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Presidential Documents

Title 3—

The President

Executive Order 13751 of December 5, 2016

Safeguarding the Nation From the Impacts of Invasive Species

By the authority vested in me as President by the Constitution and to ensure the faithful execution of the laws of the United States of America, including the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, (16 U.S.C. 4701 *et seq.*), the Plant Protection Act (7 U.S.C. 7701 *et seq.*), the Lacey Act, as amended (18 U.S.C. 42, 16 U.S.C. 3371–3378 *et seq.*), the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), the Noxious Weed Control and Eradication Act of 2004 (7 U.S.C. 7781 *et seq.*), and other pertinent statutes, to prevent the introduction of invasive species and provide for their control, and to minimize the economic, plant, animal, ecological, and human health impacts that invasive species cause, it is hereby ordered as follows:

Section 1. *Policy.* It is the policy of the United States to prevent the introduction, establishment, and spread of invasive species, as well as to eradicate and control populations of invasive species that are established. Invasive species pose threats to prosperity, security, and quality of life. They have negative impacts on the environment and natural resources, agriculture and food production systems, water resources, human, animal, and plant health, infrastructure, the economy, energy, cultural resources, and military readiness. Every year, invasive species cost the United States billions of dollars in economic losses and other damages.

Of substantial growing concern are invasive species that are or may be vectors, reservoirs, and causative agents of disease, which threaten human, animal, and plant health. The introduction, establishment, and spread of invasive species create the potential for serious public health impacts, especially when considered in the context of changing climate conditions. Climate change influences the establishment, spread, and impacts of invasive species.

Executive Order 13112 of February 3, 1999 (Invasive Species), called upon executive departments and agencies to take steps to prevent the introduction and spread of invasive species, and to support efforts to eradicate and control invasive species that are established. Executive Order 13112 also created a coordinating body—the Invasive Species Council, also referred to as the National Invasive Species Council—to oversee implementation of the order, encourage proactive planning and action, develop recommendations for international cooperation, and take other steps to improve the Federal response to invasive species. Past efforts at preventing, eradicating, and controlling invasive species demonstrated that collaboration across Federal, State, local, tribal, and territorial government; stakeholders; and the private sector is critical to minimizing the spread of invasive species and that coordinated action is necessary to protect the assets and security of the United States.

This order amends Executive Order 13112 and directs actions to continue coordinated Federal prevention and control efforts related to invasive species. This order maintains the National Invasive Species Council (Council) and the Invasive Species Advisory Committee; expands the membership of the Council; clarifies the operations of the Council; incorporates considerations

of human and environmental health, climate change, technological innovation, and other emerging priorities into Federal efforts to address invasive species; and strengthens coordinated, cost-efficient Federal action.

Sec. 2. *Definitions.* Section 1 of Executive Order 13112 is amended to read as follows:

''**Section 1.** *Definitions.* (a) 'Control' means containing, suppressing, or reducing populations of invasive species.

(b) 'Eradication' means the removal or destruction of an entire population of invasive species.

(c) 'Federal agency' means an executive department or agency, but does not include independent establishments as defined by 5 U.S.C. 104.

(d) 'Introduction' means, as a result of human activity, the intentional or unintentional escape, release, dissemination, or placement of an organism into an ecosystem to which it is not native.

(e) 'Invasive species' means, with regard to a particular ecosystem, a non-native organism whose introduction causes or is likely to cause economic or environmental harm, or harm to human, animal, or plant health.

(f) 'Non-native species' or 'alien species' means, with respect to a particular ecosystem, an organism, including its seeds, eggs, spores, or other biological material capable of propagating that species, that occurs outside of its natural range.

(g) 'Pathway' means the mechanisms and processes by which non-native species are moved, intentionally or unintentionally, into a new ecosystem.

(h) 'Prevention' means the action of stopping invasive species from being introduced or spreading into a new ecosystem.

(i) 'United States' means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of the Northern Mariana Islands, all possessions, and the territorial sea of the United States as defined by Presidential Proclamation 5928 of December 27, 1988.''

Sec. 3. *Federal Agency Duties.* Section 2 of Executive Order 13112 is amended to read as follows:

''**Sec. 2.** *Federal Agency Duties.* (a) Each Federal agency for which that agency's actions may affect the introduction, establishment, or spread of invasive species shall, to the extent practicable and permitted by law,

(1) identify such agency actions;

(2) subject to the availability of appropriations, and within administrative, budgetary, and jurisdictional limits, use relevant agency programs and authorities to:

(i) prevent the introduction, establishment, and spread of invasive species;

(ii) detect and respond rapidly to eradicate or control populations of invasive species in a manner that is cost-effective and minimizes human, animal, plant, and environmental health risks;

(iii) monitor invasive species populations accurately and reliably;

(iv) provide for the restoration of native species, ecosystems, and other assets that have been impacted by invasive species;

(v) conduct research on invasive species and develop and apply technologies to prevent their introduction, and provide for environmentally sound methods of eradication and control of invasive species;

(vi) promote public education and action on invasive species, their pathways, and ways to address them, with an emphasis on prevention, and early detection and rapid response;

(vii) assess and strengthen, as appropriate, policy and regulatory frameworks pertaining to the prevention, eradication, and control of invasive species and address regulatory gaps, inconsistencies, and conflicts;

(viii) coordinate with and complement similar efforts of States, territories, federally recognized American Indian tribes, Alaska Native Corporations, Native Hawaiians, local governments, nongovernmental organizations, and the private sector; and

(ix) in consultation with the Department of State and with other agencies as appropriate, coordinate with foreign governments to prevent the movement and minimize the impacts of invasive species; and

(3) refrain from authorizing, funding, or implementing actions that are likely to cause or promote the introduction, establishment, or spread of invasive species in the United States unless, pursuant to guidelines that it has prescribed, the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions.

(c) Federal agencies shall pursue the duties set forth in this section in coordination, to the extent practicable, with other member agencies of the Council and staff, consistent with the National Invasive Species Council Management Plan, and in cooperation with State, local, tribal, and territorial governments, and stakeholders, as appropriate, and in consultation with the Department of State when Federal agencies are working with international organizations and foreign nations.

(d) Federal agencies that are members of the Council, and Federal interagency bodies working on issues relevant to the prevention, eradication, and control of invasive species, shall provide the Council with annual information on actions taken that implement these duties and identify barriers to advancing priority actions.

(e) To the extent practicable, Federal agencies shall also expand the use of new and existing technologies and practices; develop, share, and utilize similar metrics and standards, methodologies, and databases and, where relevant, platforms for monitoring invasive species; and, facilitate the interoperability of information systems, open data, data analytics, predictive modeling, and data reporting necessary to inform timely, science-based decision making.

Sec. 4. *Emerging Priorities.* Federal agencies that are members of the Council and Federal interagency bodies working on issues relevant to the prevention, eradication, and control of invasive species shall take emerging priorities into consideration, including:

(a) Federal agencies shall consider the potential public health and safety impacts of invasive species, especially those species that are vectors, reservoirs, and causative agents of disease. The Department of Health and Human Services, in coordination and consultation with relevant agencies as appropriate, shall within 1 year of this order, and as requested by the Council thereafter, provide the Office of Science and Technology Policy and the Council a report on public health impacts associated with invasive species. That report shall describe the disease, injury, immunologic, and safety impacts associated with invasive species, including any direct and indirect impacts on low-income, minority, and tribal communities.

(b) Federal agencies shall consider the impacts of climate change when working on issues relevant to the prevention, eradication, and control of invasive species, including in research and monitoring efforts, and integrate invasive species into Federal climate change coordinating frameworks and initiatives.

(c) Federal agencies shall consider opportunities to apply innovative science and technology when addressing the duties identified in section 2 of Executive Order 13112, as amended, including, but not limited to, promoting open data and data analytics; harnessing technological advances in remote sensing technologies, molecular tools, cloud computing, and predictive analytics; and using tools such as challenge prizes, citizen science, and crowdsourcing.

Sec. 5. *National Invasive Species Council.* Section 3 of Executive Order 13112 is amended to read as follows:

''**Sec. 3.** *National Invasive Species Council.* (a) A National Invasive Species Council (Council) is hereby established. The mission of the Council is to provide the vision and leadership to coordinate, sustain, and expand Federal efforts to safeguard the interests of the United States through the prevention, eradication, and control of invasive species, and through the restoration of ecosystems and other assets impacted by invasive species.

(b) The Council's membership shall be composed of the following officials, who may designate a senior-level representative to perform the functions of the member:

(i) Secretary of State;

(ii) Secretary of the Treasury;

(iii) Secretary of Defense;

(iv) Secretary of the Interior;

(v) Secretary of Agriculture;

(vi) Secretary of Commerce;

(vii) Secretary of Health and Human Services;

(viii) Secretary of Transportation;

(ix) Secretary of Homeland Security;

(x) Administrator of the National Aeronautics and Space Administration;

(xi) Administrator of the Environmental Protection Agency;

(xii) Administrator of the United States Agency for International Development;

(xiii) United States Trade Representative;

(xiv) Director or Chair of the following components of the Executive Office of the President: the Office of Science and Technology Policy, the Council on Environmental Quality, and the Office of Management and Budget; and

(xv) Officials from such other departments, agencies, offices, or entities as the agencies set forth above, by consensus, deem appropriate.

(c) The Council shall be co-chaired by the Secretary of the Interior (Secretary), the Secretary of Agriculture, and the Secretary of Commerce, who shall meet quarterly or more frequently if needed, and who may designate a senior-level representative to perform the functions of the Co-Chair. The Council shall meet no less than once each year. The Secretary of the Interior shall, after consultation with the Co-Chairs, appoint an Executive Director of the Council to oversee a staff that supports the duties of the Council. Within 1 year of the date of this order, the Co-Chairs of the Council shall, with consensus of its members, complete a charter, which shall include any administrative policies and processes necessary to ensure the Council can satisfy the functions and responsibilities described in this order.

(d) The Secretary of the Interior shall maintain the current Invasive Species Advisory Committee established under the Federal Advisory Committee Act, 5 U.S.C. App., to provide information and advice for consideration by the Council. The Secretary shall, after consultation with other members of the Council, appoint members of the advisory committee who represent diverse stakeholders and who have expertise to advise the Council.

(e) Administration of the Council. The Department of the Interior shall provide funding and administrative support for the Council and the advisory committee consistent with existing authorities. To the extent permitted by law, including the Economy Act, and within existing appropriations, participating agencies may detail staff to the Department of the Interior to support the Council's efforts.''

Sec. 6. *Duties of the National Invasive Species Council.* Section 4 of Executive Order 13112 is amended to read as follows:

''**Sec. 4.** *Duties of the National Invasive Species Council.* The Council shall provide national leadership regarding invasive species and shall:

(a) with regard to the implementation of this order, work to ensure that the Federal agency and interagency activities concerning invasive species are coordinated, complementary, cost-efficient, and effective;

(b) undertake a National Invasive Species Assessment in coordination with the U.S. Global Change Research Program's periodic national assessment, that evaluates the impact of invasive species on major U.S. assets, including food security, water resources, infrastructure, the environment, human, animal, and plant health, natural resources, cultural identity and resources, and military readiness, from ecological, social, and economic perspectives;

(c) advance national incident response, data collection, and rapid reporting capacities that build on existing frameworks and programs and strengthen early detection of and rapid response to invasive species, including those that are vectors, reservoirs, or causative agents of disease;

(d) publish an assessment by 2020 that identifies the most pressing scientific, technical, and programmatic coordination challenges to the Federal Government's capacity to prevent the introduction of invasive species, and that incorporate recommendations and priority actions to overcome these challenges into the National Invasive Species Council Management Plan, as appropriate;

(e) support and encourage the development of new technologies and practices, and promote the use of existing technologies and practices, to prevent, eradicate, and control invasive species, including those that are vectors, reservoirs, and causative agents of disease;

(f) convene annually to discuss and coordinate interagency priorities and report annually on activities and budget requirements for programs that contribute directly to the implementation of this order; and

(g) publish a National Invasive Species Council Management Plan as set forth in section 5 of this order.''

Sec. 7. *National Invasive Species Council Management Plan.* Section 5 of Executive Order 13112 is amended to read as follows:

''**Sec. 5.** *National Invasive Species Council Management Plan.* (a) By December 31, 2019, the Council shall publish a National Invasive Species Council Management Plan (Management Plan), which shall, among other priorities identified by the Council, include actions to further the implementation of the duties of the National Invasive Species Council.

(b) The Management Plan shall recommend strategies to:

(1) provide institutional leadership and priority setting;

(2) achieve effective interagency coordination and cost-efficiency;

(3) raise awareness and motivate action, including through the promotion of appropriate transparency, community-level consultation, and stakeholder outreach concerning the benefits and risks to human, animal, or plant health when controlling or eradicating an invasive species;

(4) remove institutional and policy barriers;

(5) assess and strengthen capacities; and

(6) foster scientific, technical, and programmatic innovation.

(c) The Council shall evaluate the effectiveness of the Management Plan implementation and update the Plan every 3 years. The Council shall provide an annual report of its achievements to the public.

(d) Council members may complement the Management Plan with invasive species policies and plans specific to their respective agency's roles, responsibilities, and authorities.''

Sec. 8. *Actions of the Department of State and Department of Defense.* Section 6(d) of Executive Order 13112 is amended to read as follows:

''(d) The duties of section 3(a)(2) and section 3(a)(3) of this order shall not apply to any action of the Department of State if the Secretary of State finds that exemption from such requirements is necessary for foreign policy, readiness, or national security reasons. The duties of section 3(a)(2) and section 3(a)(3) of this order shall not apply to any action of the Department of Defense if the Secretary of Defense finds that exemption from such requirements is necessary for foreign policy, readiness, or national security reasons.''

Sec. 9. *Obligations of the Department of Health and Human Services.* A new section 6(e) of Executive Order 13112 is added to read as follows:

''(e) The requirements of this order do not affect the obligations of the Department of Health and Human Services under the Public Health Service Act or the Federal Food, Drug, and Cosmetic Act.''

Sec. 10. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(1) the authority granted by law to an executive department or agency, or the head thereof; or

(2) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
December 5, 2016.

[FR Doc. 2016–29519
Filed 12–7–16; 8:45 am]
Billing code 3295–F7–P

Rules and Regulations

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[NRC–2010–0229]

RIN 3150–AH29

Plant-Specific Applicability of Transition Break Size Specified in 10 CFR 50.46a

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft regulatory guide; discontinuation and withdrawal.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is announcing the discontinuation of further regulatory action on Draft Regulatory Guide (DG) DG–1216, ''Plant-Specific Applicability of Transition Break Size Specified in 10 CFR 50.46a,'' and its withdrawal. Draft Regulatory Guide DG–1216 was a proposed new regulatory guide written to provide implementing guidance for a proposed rule ''Risk-Informed Changes to Loss-of-Coolant Accident Technical Requirements,'' (Emergency core cooling system (ECCS) rulemaking)) that provided a voluntary, alternate approach for evaluating the performance of an ECCS. The NRC is discontinuing further regulatory action on the DG and not publishing the DG in final form because the NRC has discontinued the underlying rulemaking.

DATES: The effective date for discontinuance and withdrawal of the DG is December 8, 2016.

ADDRESSES: Please refer to Docket ID NRC–2010–0229 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2010–0229. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Robert L. Tregoning, telephone: 301–415–2324; email: *Robert.Tregoning@nrc.gov;* or Harriet Karagiannis, telephone: 301–415–2493; email: *Harriet.Karagiannis@nrc.gov.* Both are staff of the Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION: The NRC is announcing the discontinuation of further NRC action on DG–1216, ''Plant-Specific Applicability of Transition Break Size Specified in 10 CFR 50.46a,'' and its withdrawal. This draft guide describes a method that the NRC considered acceptable for demonstrating that the generic transition break size specified in the proposed 10 CFR 50.46a ECCS rule was applicable to a specific plant. The NRC provided an opportunity for public comment on DG–1216 in the **Federal Register** on June 28, 2010 (75 FR 36698). The DG package (ADAMS Accession No. ML100430352) consists of DG–1216 (ADAMS Accession No. ML100430356), a **Federal Register** notice (FRN) (ADAMS Accession No. ML100430445), and a regulatory analysis (ADAMS Accession No. ML101530472).

Draft Regulatory Guide DG–1216 was a proposed new regulatory guide written to provide implementing guidance for a proposed ECCS rulemaking which would have provided a voluntary, risk-informed alternative to the existing, deterministic requirements for evaluating ECCS performance. The proposed ECCS rule was published in the **Federal Register** on November 7, 2005 (70 FR 67597), with a supplemental proposed rule published on August 10, 2009 (74 FR 40006). In SECY–16–0009, ''Recommendations Resulting from the Integrated Prioritization and Re-Baselining of Agency Activities,'' dated January 31, 2016 (ADAMS Accession No. ML16028A189), the staff recommended that the ECCS rulemaking be discontinued. In the Staff Requirements Memorandum for SECY–16–0009, dated April 13, 2016 (ADAMS Accession No. ML16104A158), the Commission approved discontinuation of the ECCS rulemaking. The NRC published an FRN on October 6, 2016 (81 FR 69446), which provided a discussion of the discontinuation decision.

Because the NRC discontinued the ECCS rulemaking, further NRC action to develop and adopt DG–1216 as a final guidance document is not needed. Therefore, this notice announces the NRC's decision to discontinue further action on DG–1216 and documents the final NRC action on DG–1216.

Dated at Rockville, Maryland, this 2nd day of December, 2016.

For the Nuclear Regulatory Commission.

Thomas H. Boyce,

Chief, Regulatory Guide and Generic Issues Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2016–29390 Filed 12–7–16; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 29

[Docket No. FAA–2016–6939; Notice No. 29–038–SC]

Special Conditions: Bell Helicopter Textron, Inc. (BHTI), Model 525 Helicopters; Interaction of Systems and Structures.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the BHTI Model 525 helicopter. This helicopter will have a novel or unusual design feature associated with fly-by-wire flight control system (FBW FCS) functions that affect the structural integrity of the rotorcraft. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: These special conditions are effective January 9, 2017.

FOR FURTHER INFORMATION CONTACT: Martin R. Crane, Aviation Safety Engineer, Safety Management Group, Rotorcraft Directorate, FAA, 10101 Hillwood Pkwy, Fort Worth, TX 76177; telephone (817) 222–5110; email *martin.r.crane@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On December 15, 2011, BHTI applied for a type certificate for a new transport category helicopter designated as the Model 525. The aircraft is a medium twin engine rotorcraft. The design maximum takeoff weight is 20,000 pounds, with a maximum capacity of 16 passengers and a crew of 2.

The BHTI Model 525 helicopter will be equipped with a FBW FCS. The control functions of the FBW FCS and its related systems affect the structural integrity of the rotorcraft. Current regulations do not take into account loads for the rotorcraft due to the effects of systems on structural performance including normal operation and failure conditions with strength levels related to probability of occurrence. Special conditions are needed to account for these features.

Type Certification Basis

Under the provisions of 14 CFR 21.17, BHTI must show that the Model 525 helicopter meets the applicable provisions of part 29, as amended by Amendment 29–1 through 29–55 thereto. The BHTI Model 525 certification basis date is December 15, 2011, the date of application to the FAA.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 29) do not contain adequate or appropriate safety standards for the BHTI Model 525 because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same or similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the BHTI Model 525 helicopter must comply with the noise certification requirements of 14 CFR part 36, and the FAA must issue a finding of regulatory adequacy under § 611 of Public Law 92–574, the ''Noise Control Act of 1972.''

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type-certification basis under § 21.17(a)(2).

Novel or Unusual Design Features

The BHTI Model 525 helicopter will incorporate the following novel or unusual design features: FBW FCS, and its related systems (stability augmentation system, load alleviation system, flutter control system, and fuel management system), with control functions that affect the structural integrity of the rotorcraft. Current regulations are inadequate for considering the effects of these systems and their failures on structural performance. The general approach of accounting for the effect of system failures on structural performance would be extended to include any system where partial or complete failure, alone or in combination with any other system's partial or complete failure, would affect structural performance.

Discussion

Active flight control systems are capable of providing automatic responses to inputs from sources other than the pilots. Active flight control systems have been expanded in function, effectiveness, and reliability to the point that FBW FCS systems are being installed on new rotorcraft. As a result of these advancements in flight control technology, 14 CFR part 29 does not provide a basis to achieve an acceptable level of safety for rotorcraft so equipped. Certification of these systems requires issuing special conditions under the provisions of § 21.16.

In the past, traditional rotorcraft flight control system designs have incorporated power-operated systems, stability or control augmentation with limited control authority, and autopilots that were certificated partly under § 29.672 with guidance from Advisory Circular 29–2C, Section AC 29.672. These systems are integrated into the primary flight controls and are given sufficient control authority to maneuver the rotorcraft up to its structural design limits in 14 CFR part 29 subparts C and D. The FBW FCS advanced technology with its full authority necessitates additional requirements to account for the interaction of control systems and structures.

The regulations defining the loads envelope in 14 CFR part 29 do not fully account for the effects of systems on structural performance. Automatic systems may be inoperative or they may operate in a degraded mode with less than full system authority and associated built-in protection features. Therefore, it is necessary to determine the structural factors of safety and operating margins such that the probability of structural failures due to application of loads during FBW FCS malfunctions is not greater than that found in rotorcraft equipped with traditional flight control systems. To achieve this objective and to ensure an acceptable level of safety, it is necessary to define the failure conditions and their associated frequency of occurrence.

Traditional flight control systems provide two states, either fully functioning or completely inoperative. These conditions are readily apparent to the flight crew. Newer active flight control systems have failure modes that allow the system to function in a degraded mode without full authority and associated built-in protection features. As these degraded modes are not readily apparent to the flight crew, monitoring systems are required to provide an annunciation of degraded system capability.

Comments

A notice of proposed special conditions for the BHTI Model 525 helicopter FBW FCS and its related systems was published in the **Federal Register** on May 27, 2016 (81 FR 33606). We did not receive any comments.

Applicability

As discussed above, these special conditions are applicable to the BHTI Model 525 helicopter. Should BHTI apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model of rotorcraft. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 29

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Bell Helicopter Textron, Inc., Model 525 helicopters when a fly-by-wire flight control system is installed:

Interaction of Systems and Structures

For rotorcraft equipped with systems that affect structural performance, either directly or as a result of a failure or malfunction, the influence of these systems and their failure conditions must be taken into account when showing compliance with the requirements of Title 14, Code of Federal Regulations (14 CFR) part 29 subparts C and D.

The following criteria must be used for showing compliance with these special conditions for rotorcraft equipped with flight control systems, autopilots, stability augmentation systems, load alleviation systems, flutter control systems, fuel management systems, and other systems that either directly or as a result of failure or malfunction affect structural performance. If these special conditions are used for other systems, it may be necessary to adapt the criteria to the specific system.

(a) The criteria defined herein only address the direct structural consequences of the system responses and performance. They cannot be considered in isolation but should be included in the overall safety evaluation of the rotorcraft. These criteria may in some instances duplicate standards already established for this evaluation. These criteria are only applicable to structure whose failure could prevent continued safe flight and landing. Specific criteria that define acceptable limits on handling characteristics or stability requirements when operating in the system degraded or inoperative mode are not provided in these special conditions.

(b) Depending upon the specific characteristics of the rotorcraft, additional studies may be required that go beyond the criteria provided in this special condition in order to demonstrate the capability of the rotorcraft to meet other realistic conditions such as alternative gust or maneuver descriptions for a rotorcraft equipped with a load alleviation system.

(c) The following definitions are applicable to these special conditions:

(1) Structural performance: Capability of the rotorcraft to meet the structural requirements of 14 CFR part 29.

(2) Flight limitations: Limitations that can be applied to the rotorcraft flight conditions following an in-flight occurrence and that are included in the flight manual (*e.g.,* speed limitations and avoidance of severe weather conditions).

(3) Operational limitations: Limitations, including flight limitations, which can be applied to the rotorcraft operating conditions before dispatch (*e.g.,* fuel, payload, and Master Minimum Equipment List limitations).

(4) Probabilistic terms: The terms ''improbable'' and ''extremely improbable'' are the same as those used in § 29.1309.

(5) Failure condition: The term ''failure condition'' is the same as that used in § 29.1309; however, these special conditions apply only to system failure conditions that affect the structural performance of the rotorcraft (*e.g.,* system failure conditions that induce loads, change the response of the rotorcraft to inputs such as gusts or pilot actions, or lower flutter margins).

Effects of Systems on Structures

(a) *General.* The following criteria will be used in determining the influence of a system and its failure conditions on the rotorcraft structure.

(b) *System fully operative.* With the system fully operative, the following apply:

(1) Limit loads must be derived in all normal operating configurations of the system from all the limit conditions specified in subpart C (or defined by special condition or equivalent level of safety in lieu of those specified in subpart C), taking into account any special behavior of such a system or associated functions or any effect on the structural performance of the rotorcraft that may occur up to the limit loads. In particular, any significant nonlinearity (rate of displacement of control surface, thresholds or any other system nonlinearities) must be accounted for in a realistic or conservative way when deriving limit loads from limit conditions.

(2) The rotorcraft must meet the strength requirements of part 29 (static strength, residual strength), using the specified factors to derive ultimate loads from the limit loads defined above. The effect of nonlinearities must be investigated beyond limit conditions to ensure the behavior of the system presents no anomaly compared to the behavior below limit conditions. However, conditions beyond limit conditions need not be considered when it can be shown that the rotorcraft has design features that will not allow it to exceed those limit conditions.

(3) The rotorcraft must meet the flutter and divergence requirements of § 29.629.

(c) *System in the failure condition.* For all system failure conditions shown to be not extremely improbable, the following apply:

(1) At the time of occurrence. Starting from 1–g level flight conditions, a realistic scenario, including pilot corrective actions, must be established to determine the loads occurring at the time of failure and immediately after the failure.

(i) For static strength substantiation, these loads multiplied by an appropriate factor of safety that is related to the probability of occurrence of the failure are the ultimate loads that must be considered for design. The factor of safety is defined in Figure 1.

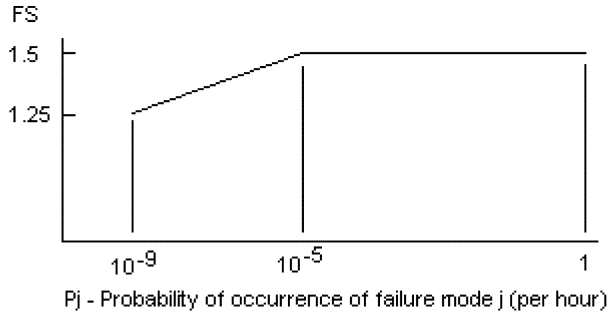

Figure 1: Factor of safety at the time of occurrence

(ii) For residual strength substantiation, the rotorcraft must be able to withstand two-thirds of the ultimate loads defined in paragraph (c)(1)(i) of these special conditions.

(iii) Freedom from flutter and divergence must be shown under all conditions of operation including:

(A) Airspeeds up to 1.11 V_{NE} (power on and power off).

(B) Main rotor speeds from 0.95 multiplied by the minimum permitted speed up to 1.05 multiplied by the maximum permitted speed (power on and power off).

(C) The critical combinations of weight, center of gravity position, load factor, and altitude.

(iv) For failure conditions that result in excursions beyond operating limitations, freedom from flutter and divergence must be shown to increased speeds, so that the margins intended by paragraph (c)(1)(iii) of these special conditions are maintained.

(v) Failures of the system that result in forced structural vibrations (oscillatory failures) must not produce loads that could result in detrimental deformation of primary structure.

(2) For the continuation of the flight. For the rotorcraft in the system failed state, and considering all appropriate reconfiguration and flight limitations, the following apply:

(i) The loads derived from the following conditions (or defined by special conditions or equivalent level of safety in lieu of the following conditions) at speeds up to V_{NE} (power on and power off) (or the speed limitation prescribed for the remainder of the flight) and at the minimum and maximum main rotor speeds, if applicable, must be determined:

(A) The limit maneuvering conditions specified in §§ 29.337 and 29.339.

(B) The limit gust conditions specified in § 29.341.

(C) The limit yaw maneuvering conditions specified in § 29.351.

(D) The limit unsymmetrical conditions specified in § 29.427.

(E) The limit ground loading conditions specified in § 29.473.

(ii) For static strength substantiation, each part of the structure must be able to withstand the loads in paragraph (c)(2)(i) of these special conditions multiplied by a factor of safety depending on the probability of being in this failure state. The factor of safety is defined in Figure 2.

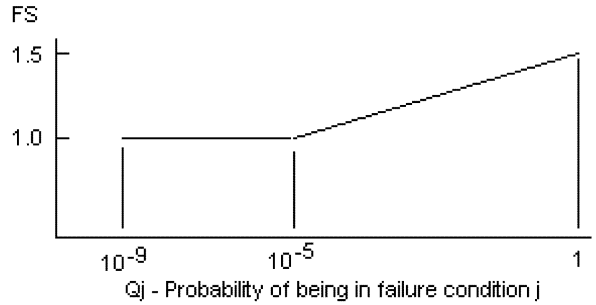

Figure 2: Factor of safety for continuation of flight:

$Q_j = (T_j)(P_j)$

Where:

T_j = Average time spent in failure condition j (in hours)

P_j = Probability of occurrence of failure mode j (per hour)

Note: If P_j is greater than 10^{-3} per flight hour, then a 1.5 factor of safety must be applied to all limit load conditions specified in Subpart C.

(iii) For residual strength substantiation, the rotorcraft must be able to withstand two-thirds of the ultimate loads defined in paragraph (c)(2)(ii) of these special conditions.

(iv) If the loads induced by the failure condition have a significant effect on fatigue or damage tolerance, then their effects must be taken into account.

(v) Freedom from flutter and divergence must be shown up to 1.11 V_{NE} (power on and power off).

(vi) Freedom from flutter and divergence must also be shown up to 1.11 V_{NE} (power on and power off) for all probable system failure conditions combined with any damage required or considered under § 29.571(g) or § 29.573(d)(3).

(3) Consideration of certain failure conditions may be required by other sections of 14 CFR part 29 regardless of calculated system reliability. Where the failure analysis shows the probability of

these failure conditions to be less than 10^{-9}, criteria other than those specified in this paragraph may be used for structural substantiation to show continued safe flight and landing.

(d) *Failure indications.* For system failure detection and indication, the following apply:

(1) The system must be checked for failure conditions, not extremely improbable, that degrade the structural capability below the level required by 14 CFR part 29 or that significantly reduce the reliability of the remaining operational portion of the system. As far as reasonably practicable, the flight crew must be made aware of these failures before flight. Certain elements of the control system, such as mechanical and hydraulic components, may use special periodic inspections, and electronic components may use daily checks, in lieu of detection and indication systems to achieve the objective of this requirement. These other means of detecting failures before flight will become part of the certification maintenance requirements (CMRs) and must be limited to components that are not readily detectable by normal detection and indication systems, and where service history shows that inspections will provide an adequate level of safety.

(2) The existence of any failure condition, shown to be not extremely improbable, during flight that could significantly affect the structural capability of the rotorcraft and for which the associated reduction in airworthiness can be minimized by suitable flight limitations, must be signaled to the flight crew. For example, failure conditions that result in a factor of safety between the rotorcraft strength and the loads of Subpart C below 1.25, or flutter and divergence margins below 1.11 V_{NE} (power on and power off), must be signaled to the crew during flight.

(e) *Dispatch with known failure conditions.* If the rotorcraft is to be dispatched in a known system failure condition that affects structural performance, or that affects the reliability of the remaining operational portion of the system to maintain structural performance, then the provisions of these special conditions must be met, including the provisions of paragraph (b) for the dispatched condition and paragraph (c) for subsequent failures. Expected operational limitations may be taken into account in establishing P_j as the probability of failure occurrence for determining the safety margin in Figure 1 of these special conditions. Flight limitations and expected operational limitations may be taken into account in establishing Q_j as the combined probability of being in the dispatched failure condition and the subsequent failure condition for the safety margins in Figure 2 of these special conditions. These limitations must be such that the probability of being in this combined failure state and then subsequently encountering limit load conditions is extremely improbable. No reduction in these safety margins is allowed if the subsequent system failure rate is greater than 10^{-3} per hour.

Issued in Fort Worth, Texas, on November 30, 2012.

Lance Gant,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2016–29431 Filed 12–7–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–7267; Directorate Identifier 2016–NM–015–AD; Amendment 39–18723; AD 2016–24–06]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Bombardier, Inc. Model DHC–8–102, –103, and –106 airplanes, Model DHC–8–200 series airplanes, and Model DHC–8–300 series airplanes. This AD was prompted by several occurrences of loss of airspeed data on both pilot and co-pilot air speed indicators due to the accumulation of ice on the pitot probes caused by inoperative pitot probe heaters. This AD requires replacing the existing circuit breakers in the pitot heater system. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 12, 2017.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 12, 2017.

ADDRESSES: For service information identified in this final rule, contact Bombardier, Inc., Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone: 416–375–4000; fax: 416–375–4539; email: *thd.qseries@aero.bombardier.com;* Internet: *http://www.bombardier.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–7267.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–7267; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Assata Dessaline, Aerospace Engineer, Avionics and Services Branch, ANE–172, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone: 516–228–7301; fax: 516–794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Bombardier, Inc. Model DHC–8–102, –103, and –106 airplanes, Model DHC–8–200 series airplanes, and Model DHC–8–300 series airplanes. The NPRM published in the **Federal Register** on June 28, 2016 (81 FR 41897) (''the NPRM'').

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian AD CF–2016–04, dated February 1, 2016 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Bombardier, Inc. Model DHC–8–102, –103, and –106 airplanes, Model DHC–8–200 series airplanes, and Model DHC–8–300 series airplanes. The MCAI states:

There have been several occurrences of loss of airspeed data on both pilot and co-pilot Airspeed Indicators (ASI) due to the accumulation of ice on the pitot probes. Subsequent investigation revealed that the build up of ice on the pitot probes was due to inoperative pitot probe heaters. When flying in heavy precipitations, the increased heat required by the pitot probe to clear ice build up may result in a current demand in excess of the trip point of the associated circuit breakers (CB). Under this condition, the CB may trip and cut power supply to the heater. If not corrected, the loss of airspeed data may result in the crew not being able to control the aeroplane's airspeed.

This [Canadian] AD is issued to mandate the replacement of the existing CBs with CBs that have higher trip points.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–7267.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the NPRM and the FAA's response to each comment. The Airline Pilots Association, International, stated that it supported the NPRM.

Request To Revise the Cost of Compliance

Bombardier, Inc. requested that we correct the cost of the pitot heaters. Bombardier, Inc. stated that we provided the cost of left-hand pitot heater ($1,194), but not the right-hand pitot heater. Bombardier Inc. stated that the cost of the right-hand pitot heater is $1,155.

We agree with the commenter's request for the reasons provided. We have revised this AD accordingly.

Request To Revise the Requirements in the NPRM

Bombardier, Inc. requested that we omit the phrase ''in production'' in the first sentence of paragraph (h) of the proposed AD. Bombardier, Inc. stated that ModSum IS8Q3000004 was incorporated in service.

We agree with the commenter for the reason stated above. We have revised this AD accordingly.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this AD with the changes described previously and minor editorial changes. We have determined that these minor changes:

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

We also determined that these changes will not increase the economic burden on any operator or increase the scope of this AD.

Related Service Information Under 1 CFR Part 51

We reviewed Bombardier Service Bulletin 8–30–39, dated November 11, 2015, and Bombardier Service Bulletin 8–30–40, dated November 11, 2015. The service information describes procedures for replacing the existing circuit breakers in both the left and right sides of the pitot heater system with circuit breakers that have higher trip points. These documents are distinct since they apply to different sides of the airplane. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

We estimate that this AD affects 83 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replacement (Left-hand pitot)	20 work-hours × $85 per hour = $1,700	$1,194	$2,894	$240,202
Replacement (Right-hand pitot)	20 work-hours × $85 per hour = $1,700	1,155	2,855	236,965

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

3. Will not affect intrastate aviation in Alaska; and

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2016–24–06 Bombardier, Inc.: Amendment 39–18723; Docket No. FAA–2016–7267; Directorate Identifier 2016–NM–015–AD.

(a) Effective Date

This AD is effective January 12, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc. Model DHC–8–102, –103, –106, –201, –202, –301, –311, and –315 airplanes, certificated in any category, serial numbers 003 through 672 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 30, Ice and rain protection.

(e) Reason

This AD was prompted by several occurrences of loss of airspeed data on both pilot and co-pilot air speed indicators due to the accumulation of ice on the pitot probes. An investigation revealed that the accumulation of ice was due to inoperative pitot probe heaters. We are issuing this AD to prevent circuit breakers from tripping and cutting power supply to the pitot probe heater, which could cause loss of airspeed data and result in the flight crew not being able to control the airspeed of the airplane.

(f) Compliance

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

(g) Replacement

Except as provided by paragraph (h) of this AD, within 5,000 flight hours or 60 months after the effective date of this AD, whichever occurs first: Replace the existing circuit breakers in both the left and right side of the pitot heater system with circuit breakers that have higher trip points, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 8–30–39, dated November 11, 2015 (for the right side), and Bombardier Service Bulletin 8–30–40, dated November 11, 2015 (for the left side).

(h) Airplanes That Meet the Requirements of Paragraph (g) of This AD

For airplanes on which Bombardier ModSum IS8Q3000004 has been incorporated, no action is required by paragraph (g) of this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the New York ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone: 516–228–7300; fax: 516–794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, New York ACO, ANE–170, FAA; or Transport Canada Civil Aviation (TCCA); or Bombardier, Inc.'s TCCA Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(j) Related Information

Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian AD CF–2016–04, dated February 1, 2016, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–7267.

(k) Material Incorporated by Reference

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

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

(i) Bombardier Service Bulletin 8–30–39, dated November 11, 2015.

(ii) Bombardier Service Bulletin 8–30–40, dated November 11, 2015.

(3) For service information identified in this AD, contact Bombardier, Inc., Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone: 416–375–4000; fax: 416–375–4539; email: *thd.qseries@aero.bombardier.com;* Internet: *http://www.bombardier.com.*

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

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

Issued in Renton, Washington, on November 16, 2016.

Phil Forde,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–28602 Filed 12–7–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9120; Directorate Identifier 2016–CE–024–AD; Amendment 39–18738; AD 2016–25–12]

RIN 2120–AA64

Airworthiness Directives; M7 Aerospace LLC

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all M7 Aerospace LLC Models SA226–AT, SA226–T, SA226–T(B), SA226–TC, SA227–AC (C–26A), SA227–AT, SA227–BC (C–26A), SA227–CC, SA227–DC (C–26B), and SA227–TT airplanes. This AD was prompted by corrosion and stress corrosion cracking of the pitch trim actuator upper attach fittings of the horizontal stabilizer front spar. This AD requires repetitive inspections with replacement of fittings as necessary. We are issuing this AD to correct the unsafe condition on these products.

DATES: This AD is effective January 12, 2017.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 12, 2017.

ADDRESSES: For service information identified in this final rule, contact M7 Aerospace LLC, 10823 NE Entrance Road, San Antonio, Texas 78216; phone: (210) 824–9421; fax: (210) 804–7766; Internet: *http://www.elbitsystems-us.com;* email: *MetroTech@M7Aerospace.com.* You may view this referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9120.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9120; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the

Docket Office (phone: 800–647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Andrew McAnaul, Aerospace Engineer, FAA, ASW–143 (c/o San Antonio MIDO), 10100 Reunion Place, Suite 650, San Antonio, Texas 78216; phone: (210) 308–3365; fax: (210) 308–3370; email: *andrew.mcanaul@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all M7 Aerospace LLC Models SA226–AT, SA226–T, SA226–T(B), SA226–TC, SA227–AC (C–26A), SA227–AT, SA227–BC (C–26A), SA227–CC, SA227–DC (C–26B), and SA227–TT airplanes. The NPRM published in the **Federal Register** on September 13, 2016 (81 FR 62845). The NPRM was prompted by reports of multiple SA226 and SA227 airplanes with corrosion and/or stress corrosion cracks in the pitch trim actuator upper attach fittings of the horizontal stabilizer front spar. The NPRM proposed to require repetitive inspections of the pitch trim actuator upper attach fittings for corrosion and/or cracking in the bolt holes and the web/flange radius with replacement of fittings as necessary. This condition, if not corrected, could cause jamming and/or loss of control of the horizontal stabilizer, which could result in partial or complete loss of airplane pitch control. We are issuing this AD to correct the unsafe condition on these products.

Comments

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

Conclusion

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

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

Related Service Information Under 1 CFR Part 51

We reviewed M7 Aerospace LLC Service Bulletin (SB) 226–27–081 R1, M7 Aerospace LLC SB 227–27–061 R1, and M7 Aerospace LLC SB CC7–27–033 R1, all revised June 27, 2016. In combination for the different applicable models, the service information describes procedures for detailed visual, liquid penetrant, ultrasound, and high frequency eddy current inspections of the pitch trim actuator upper attach fittings for corrosion and cracking in the bolt holes and the web/flange radius, and replacement if necessary for applicable airplane models. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

We estimate that this AD affects 300 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspect pitch trim actuator upper attach fittings.	16 work-hours × $85 per hour = $1,360 ...	Not applicable	$1,360	$408,000

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replace 2 fittings	8 work-hours × $85 per hour = $680	$4,900	$5,580

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities

under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2016–25–12 M7 Aerospace LLC: Amendment 39–18738; Docket No. FAA–2016–9120; Directorate Identifier 2016–CE–024–AD.

(a) Effective Date

This AD is effective January 12, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to M7 Aerospace LLC Models SA226–AT, SA226–T, SA226–T(B), SA226–TC, SA227–AC (C–26A), SA227–AT, SA227–BC (C–26A), SA227–CC, SA227–DC (C–26B), and SA227–TT airplanes, all serial numbers, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 5510, Horizontal Stabilizer Structure.

(e) Unsafe Condition

This AD was prompted by corrosion and stress corrosion cracking of the pitch trim actuator upper attach fittings of the horizontal stabilizer front spar. We are issuing this AD to prevent jamming and/or loss of control of the horizontal stabilizer, which could result in partial or complete loss of airplane pitch control.

(f) Compliance

Comply with paragraphs (g)(1) and (2) of this AD using the following service bulletins and within the compliance times specified, unless already done:

(1) *For Models SA226–AT, SA226–T, SA226–T(B), and SA226–TC:* M7 Aerospace LLC Service Bulletin (SB) 226–27–081 R1, revised June 27, 2016; or

(2) *For Models SA227–AC (C–26A), SA227–AT, SA227–BC (C–26A), and SA227–TT:* M7 Aerospace LLC SB 227–27–061 R1, revised June 27, 2016; or

(3) *For Models SA227–CC and SA227–DC (C–26B):* M7 Aerospace LLC SB CC7–27–033 R1, revised June 27, 2016.

(g) Actions

(1) Within the next 600 hours time-in-service (TIS) after January 12, 2017 (the effective date of this AD) or within the next 12 months after January 12, 2017 (the effective date of this AD), whichever occurs first, and repetitively thereafter at intervals not to exceed every 5,000 hours TIS or 5 years, whichever occurs first, perform the inspection of the pitch trim actuator upper attach fittings following section 2.A. and return to service following section 2.C. of the Accomplishment Instructions of the service bulletins identified in paragraph (f)(1), (2), or (3) of this AD, as applicable.

(2) If any corrosion or cracks are found as a result of any inspection in paragraph (g)(1) of this AD, before further flight, replace the fitting following section 2.B. and return to service following section 2.C. of the Accomplishment Instructions of the service bulletins identified in paragraph (f)(1), (2), or (3) of this AD, as applicable.

(h) Credit for Actions Accomplished in Accordance With Previous Service Information

This AD allows credit for inspection or replacement of the pitch trim actuator upper attach fittings required in paragraph (g)(1) and (2) of the AD, if done before January 12, 2017 (the effective date of this AD), following the procedures in the Accomplishment Instructions of the applicable service information listed in paragraphs (h)(1) through (3) of this AD:

(1) *For Models SA226–AT, SA226–T, SA226–T(B), and SA226–TC:* M7 Aerospace LLC Service Bulletin (SB) 226–27–081, Issued: April 13, 2016; or

(2) *For Models SA227–AC (C–26A), SA227–AT, SA227–BC (C–26A), and SA227–TT:* M7 Aerospace LLC SB 227–27–061, Issued: April 13, 2016; or

(3) *For Models SA227–CC and SA227–DC (C–26B):* M7 Aerospace LLC SB CC7–27–033, Issued: April 13, 2016.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Fort Worth Airplane Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in paragraph (i) of this AD.

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

(j) Related Information

For more information about this AD, contact Andrew McAnaul, Aerospace Engineer, FAA, ASW–143 (c/o San Antonio MIDO), 10100 Reunion Place, Suite 650, San Antonio, Texas 78216; phone: (210) 308–3365; fax: (210) 308–3370; email: *andrew.mcanaul@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) M7 Aerospace LLC Service Bulletin (SB) 226–27–081 R1, revised June 27, 2016.

(ii) M7 Aerospace LLC SB 227–27–061 R1, revised June 27, 2016.

(iii) M7 Aerospace LLC SB CC7–27–033 R1, revised June 27, 2016.

(3) For M7 Aerospace LLC service information identified in this AD, contact M7 Aerospace LLC, 10823 NE Entrance Road, San Antonio, Texas 78216; phone: (210) 824–9421; fax: (210) 804–7766; Internet: *http://www.elbitsystems-us.com;* email: *MetroTech@M7Aerospace.com.*

(4) You may view this referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

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

Issued in Kansas City, Missouri, on November 30, 2016.

Melvin Johnson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–29242 Filed 12–7–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–4224; Directorate Identifier 2015–NM–170–AD; Amendment 39–18720; AD 2016–24–03]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Bombardier, Inc. Model DHC–8–400 series airplanes. This AD was prompted by reports of cracked and corroded barrel nuts found at the mid-spar location of the horizontal-stabilizer-to-vertical-stabilizer attachment joint. This AD requires repetitive detailed

inspections of each barrel nut and cradle, a check of the bolt torque of the preload indicating (PLI) washers, and corrective action if necessary. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 12, 2017.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 12, 2017.

ADDRESSES: For service information identified in this final rule, contact Bombardier, Inc., Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone 416–375–4000; fax 416–375–4539; email *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–4224.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–4224; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Aziz Ahmed, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7329; fax 516–794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Bombardier, Inc. Model DHC–8–400 airplanes. The NPRM published in the **Federal Register** on March 14, 2016 (81 FR 13298) (''the NPRM''). The NPRM was prompted by reports of cracked and corroded barrel nuts found at the mid-spar location of the horizontal-stabilizer-to-vertical-stabilizer attachment joint. The NPRM proposed to require repetitive detailed inspections of each barrel nut and cradle, a check of the bolt torque of the PLI washers, and corrective action if necessary. We are issuing this AD to detect and correct cracked and corroded barrel nuts, which could compromise the structural integrity of the vertical-stabilizer attachment joints and lead to loss of control of the airplane.

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, issued Canadian Airworthiness Directive CF–2015–13, dated June 25, 2015 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Bombardier, Inc. Model DHC–8–400 series airplanes. The MCAI states:

> There has been one in-service report of a cracked and corroded barrel nut, part number (P/N) DSC228–12, found at the mid-spar location of the horizontal stabilizer to vertical stabilizer attachment joint. There have also been two other reports of corroded barrel nuts found at mid-spar locations.
>
> Preliminary investigation determined that the cracking is initiated by corrosion. The corrosion may have been caused by inadequate cadmium plating on the barrel nut. Failure of the barrel nuts could compromise the structural integrity of the joint and could lead to loss of control of the aeroplane.
>
> This [Canadian] AD mandates initial and repetitive inspections of the barrel nuts [and cradles for cracks and corrosion] at each horizontal stabilizer to vertical stabilizer attachment joints.

Required actions include a bolt preload check of the PLI washers and applicable corrective actions (retorque of the bolts and replacement of the barrel nut), a detailed inspection of cracked or broken barrel nuts for damaged bores of the fittings, replacement of barrel nuts, and repair of damage and corrosion.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–4224.

Comments

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

Support for the NPRM

The Air Line Pilots Association, International, and a commenter, Lara Gabrys, supported the intent of the NPRM.

Request To Specify Revised Service Information

The source of service information in the NPRM—Bombardier Alert Service Bulletin A84–55–04, Revision A, dated June 2, 2015—has been revised. Horizon Air requested that we revise the NPRM to refer to the latest version of the service information.

We agree and have revised this final rule to identify Bombardier Alert Service Bulletin A84–55–04, Revision C, dated May 3, 2016, as the appropriate source of service information. The revised service information clarifies certain conditional actions; the major actions remain essentially unchanged. We have also revised paragraph (m) of this AD to include all earlier revisions as credit for prior accomplishment of the corresponding actions specified in this AD.

Request for Terminating Action

Commenter Lara Gabrys expressed concern about the unsafe condition and the lack of a permanent solution to address it.

We acknowledge the commenter's concern, and point out that this final rule (as also specified in the NPRM) requires that operators submit their inspection findings to Bombardier. Then, based on those findings, Bombardier plans to develop a permanent solution to address the unsafe condition. If terminating action is developed, approved, and available, we might consider additional rulemaking. At this time, however, we are issuing this final rule as proposed.

Request To Limit Required Actions

Paragraphs (g)(1), (g)(2), (h)(1)(i), (h)(1)(ii), (i), and (k) of the proposed AD specified that certain actions be done in accordance with ''the Accomplishment Instructions'' of the referenced service information. Noting that ''the Accomplishment Instructions'' include paragraphs 3.A., ''Job Set-Up,'' and 3.C., ''Close Out,'' Horizon Air requested that the compliance method instead be limited to paragraph 3.B., ''Procedures''—the only section that corrects the unsafe condition. Horizon Air objected to the inclusion of the specified set-up and close-out procedures, which would restrict the operators' ability to perform other maintenance in conjunction with the incorporation of the service information.

We agree with the request, for the reasons provided by the commenter. We have revised paragraphs (g)(1), (g)(2), (h)(1)(i), (h)(1)(ii), (i), and (k) of this AD, as well as paragraph (h)(1) of this AD, to refer to paragraph 3.B., ''Procedures.''

Clarification of Applicability

This AD affects Model DHC–8–400, –401, and –402 airplanes. The **SUMMARY** of the NPRM and paragraph (c) of the proposed AD identified the affected airplanes as ''Model DHC–8–400 airplanes.'' Model DHC–8–400 series airplanes consist of Model DHC–8–400, –401, and –402 airplanes and correspond to the affected airplanes identified in the MCAI. We have therefore revised the **SUMMARY** to identify the affected airplanes as certain ''Model DHC–8–400 series airplanes.'' We also revised paragraph (c) of this AD to identify the applicability as ''Model DHC–8–400, –401, and –402 airplanes'' with serial numbers 4001 and subsequent.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this AD with the changes described previously and minor editorial changes. We have determined that these minor changes:

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

We also determined that these changes will not increase the economic burden on any operator or increase the scope of this AD.

Related Service Information Under 1 CFR Part 51

Bombardier, Inc. has issued Alert Service Bulletin A84–55–04, Revision C, dated May 3, 2016. The service information describes procedures for a detailed inspection and repair for cracks and corrosion of the barrel nuts and cradles, a bolt preload check of the PLI washers, applicable corrective actions, a detailed inspection and repair for corrosion and damage of the bores of the fittings, and replacement of the barrel nuts.

Bombardier, Inc. has also issued Bombardier Repair Drawing (RD) 8/4–55–1143, Issue 1, dated May 21, 2015. The service information describes procedures for repairing corrosion and damage of the fitting bore.

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

Costs of Compliance

We estimate that this AD affects 76 airplanes of U.S. registry.

We also estimate that it will take about 6 work-hours per product to comply with the basic requirements of this AD and 1 work-hour per product for reporting. The average labor rate is $85 per work-hour. Required parts will cost about $0 per product. Based on these figures, we estimate the cost of this AD on U.S. operators to be $45,220, or $595 per product.

In addition, we estimate that any necessary follow-on actions would take about 4 work-hours, and require parts costing $8,881, for a cost of $9,221 per product. We have no way of determining the number of aircraft that might need this action.

Paperwork Reduction Act

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

3. Will not affect intrastate aviation in Alaska; and

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2016–24–03 Bombardier, Inc.: Amendment 39–18720; Docket No. FAA–2016–4224; Directorate Identifier 2015–NM–170–AD.

(a) Effective Date

This AD is effective January 12, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc. Model DHC–8–400, –401, and –402 airplanes, certificated in any category, serial numbers 4001 and subsequent.

(d) Subject

Air Transport Association (ATA) of America Code 55, Stablizers.

(e) Reason

This AD was prompted by reports of cracked and corroded barrel nuts found at the mid-spar location of the horizontal-stabilizer-to-vertical-stabilizer attachment joint. We are issuing this AD to detect and correct cracked and corroded barrel nuts, which could compromise the structural integrity of the vertical-stabilizer attachment joints and lead to loss of control of the airplane.

(f) Compliance

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

(g) Detailed Inspection of Barrel Nuts for Cracks and Corrosion

(1) For airplanes that have accumulated 5,400 flight hours or more, or have been in service 32 months or more since the date of issuance of the original certificate of airworthiness or the date of issuance of the original export certificate of airworthiness, as of the effective date of this AD: Within 600 flight hours or 4 months, whichever occurs first after the effective date of this AD, do a detailed visual inspection for signs of cracks and corrosion of the barrel nut and cradle, in accordance with paragraph 3.B., ''Procedures,'' of the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–55–04, Revision C, dated May 3, 2016.

(2) For airplanes that have less than 5,400 flight hours, and have been in-service for less than 32 months since the date of issuance of the original certificate of airworthiness or the date of issuance of the original export certificate of airworthiness, as of the effective date of this AD: Before the accumulation of 6,000 total flight hours or 36 months since the date of issuance of the original certificate of airworthiness or the date of issuance of the original export certificate of airworthiness, whichever occurs first, do a detailed visual inspection of the barrel nut for signs of cracks and corrosion of the barrel nut and cradle, in accordance with paragraph 3.B., ''Procedures,'' of the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–55–04, Revision C, dated May 3, 2016.

(h) Corrective Actions, Detailed Inspection, and Repetitive Inspections

Depending on the findings of any inspection required by paragraphs (g) and (j) of this AD, do the applicable actions in paragraphs (h)(1), (h)(2), and (h)(3) of this AD.

(1) If any barrel nut or cradle is found cracked or broken, before further flight, replace the barrel nut and associated hardware, in accordance with paragraph 3.B., ''Procedures,'' of the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–55–04, Revision C, dated May 3, 2016.

(i) Concurrently with the replacement of any barrel nut, do a detailed inspection for corrosion and damage of the bore of the fitting, in accordance with paragraph 3.B., ''Procedures,'' of the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–55–04, Revision C, dated May 3, 2016, and, before further flight, repair all corrosion and damage, in accordance with Bombardier Repair Drawing (RD) 8/4–55–1143, Issue 1, dated May 21, 2015. If the bore of the fitting cannot be repaired in accordance with Bombardier RD 8/4–55–1143, Issue 1, dated May 21, 2015, accomplish corrective actions in accordance with the procedures specified in paragraph (n)(2) of this AD.

(ii) Within 600 flight hours or 4 months, whichever occurs first, after the replacement of a cracked barrel nut, replace the remaining barrel nuts and their associated hardware at the horizontal-stabilizer-to-vertical-stabilizer attachment joints, in accordance with paragraph 3.B., ''Procedures,'' of the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–55–04, Revision C, dated May 3, 2016.

(2) If any corrosion is found on any barrel nut on the front or rear-spar joints, before further flight, replace the barrel nut accomplish corrective actions in accordance with the procedures specified in paragraph (n)(2) of this AD.

(3) If any corrosion above level 1, as defined in Bombardier Alert Service Bulletin A84–55–04, Revision C, dated May 3, 2016, is found on a barrel nut at the mid-spar joint, before further flight, replace the barrel nut and accomplish corrective actions in accordance with the procedures specified in paragraph (n)(2) of this AD.

(4) If all corrosion found is at level 1 or below, as defined in Bombardier Alert Service Bulletin A84–55–04, Revision C, dated May 3, 2016, on a barrel nut at the mid-spar joint, repeat the inspection specified in paragraph (g) of this AD at intervals not to exceed 600 flight hours or 4 months, whichever occurs first, until completion of the actions required by paragraph (k) of this AD.

(i) Preload Indicating (PLI) Washer Check

For airplanes with PLI washers installed at the front and rear-spar joints, before further flight after accomplishing any inspection required by (g) of this AD and all applicable corrective actions required by paragraph (h) of this AD, check the bolt preload, and do all applicable corrective actions, in accordance with paragraph 3.B., ''Procedures,'' of the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–55–04, Revision C, dated May 3, 2016. Do all applicable corrective actions before further flight.

(j) Repetitive Inspection Interval

Repeat the inspection and preload check required by paragraphs (g) and (i) of this AD at intervals not to exceed 3,600 flight hours or 18 months, whichever occurs first, except as provided by paragraph (k) of this AD.

(k) Optional Barrel Nut Replacement

Inspection and replacement of all barrel nuts at the horizontal-stabilizer-to vertical-stabilizer attachment joints, in accordance with paragraph 3.B., ''Procedures,'' of the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–55–04, Revision C, dated May 3, 2016, extends the next inspection required by paragraph (j) of this AD to within 6,000 flight hours or 36 months, whichever occurs first, after accomplishing the replacement.

(l) Reporting Requirements

At the applicable time specified in paragraph (l)(1) or (l)(2) of this AD, submit a report of the findings (both positive and negative) of each inspection required by this AD to Technical Help Desk—Q-series, telephone: 416–375–4000, fax: 416–375–4539, email: *thd.qseries@aero.bombardier.com,* using the inspection form in Bombardier Alert Service Bulletin A84–55–04, Revision C, dated May 3, 2016.

(1) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(2) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(m) Credit for Previous Actions

This paragraph provides credit for the corresponding actions specified in paragraphs (g)(1), (g)(2), (h)(1), (h)(1)(i), (h)(1)(ii), (h)(3), (h)(4), (i), (k), and (l) of this AD, if those actions were performed before the effective date of this AD using the service information identified in paragraphs (m)(1), (m)(2), and (m)(3) of this AD.

(1) Bombardier Alert Service Bulletin A84–55–04, dated May 21, 2015.

(2) Bombardier Alert Service Bulletin A84–55–04, Revision A, dated June 2, 2015.

(3) Bombardier Alert Service Bulletin A84–55–04, Revision B, dated July 30, 2015.

(n) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York ACO, ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, New York ACO, ANE–170, FAA; or Transport Canada Civil Aviation (TCCA); or Bombardier, Inc.'s TCCA DAO. If approved by the DAO, the approval must include the DAO-authorized signature.

(3) *Reporting Requirements:* A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for

failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(o) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian Airworthiness Directive CF–2015–13, dated June 25, 2015, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–4224.

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (p)(4) and (p)(5) of this AD.

(p) Material Incorporated by Reference

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

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

(i) Bombardier Alert Service Bulletin A84–55–04, Revision C, dated May 3, 2016.

(ii) Bombardier Repair Drawing (RD) 8/4–55–1143, Issue 1, dated May 21, 2015.

(3) For service information identified in this AD, contact Bombardier, Inc., Q-Series Technical Help Desk, 123 Garratt Boulevard, Toronto, Ontario M3K 1Y5, Canada; telephone 416–375–4000; fax 416–375–4539; email *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.com.*

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

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

Issued in Renton, Washington, on November 15, 2016.

Paul Bernado,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–28210 Filed 12–7–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 100

[Docket No. FR 5508–C–04]

Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance; Correction

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Classification of published document; correction.

SUMMARY: On October 5, 2016, HUD published a document in response to a court remand, which was miscategorized and placed in the ''proposed rules'' section of the **Federal Register**. See 81 FR 69012 (Oct. 5, 2016). The October 5, 2016, document is neither a proposed rule, nor is it related to a proposed rule. Rather, the October 5, 2016, document responds to a court remand on a final rule by supplementing HUD's responses to certain insurance industry comments that HUD responded to in the preamble to its final rule, entitled ''Implementation of the Fair Housing Act's Discriminatory Effects Standard,'' 78 FR 11460 (Feb. 15, 2013). HUD issues this correction to clarify that the published document was related to a final rule and thus should have been categorized and published in the ''rules and regulations'' section of the **Federal Register**.

DATES: December 8, 2016.

FOR FURTHER INFORMATION CONTACT: With respect to this supplementary document, contact Ariel Pereira, Associate General Counsel for Legislation and Regulations, Department of Housing and Urban Development, 451 7th Street SW., Room 10238, Washington, DC 20410; telephone number 202–708–1793 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION: Pursuant to 1 CFR 5.9, the **Federal Register** must select one of four different categories for publishing documents: The President, Rules and regulations, Proposed rules, and Notices. Documents in the ''rules and regulations'' category include documents that ''affect other documents previously published *in the rules and regulations section,*'' whereas documents in the ''proposed rules'' category include documents that ''affect or relate to other documents previously published *in the proposed rules section.*'' 1 CFR 5.9(b), (c) (emphasis added).

On October 5, 2016, HUD published a document entitled ''Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance,'' see 81 FR 69012 (Oct. 5, 2016), which supplements responses previously published with the *final* rule, ''Implementation of the Fair Housing Act's Discriminatory Effects Standard.'' See 78 FR 11460 (Feb. 15, 2013). Because the October 5, 2016, document ''affect[ed an]other document[ ] previously published in the rules and regulations section,'' namely HUD's February 15, 2013 final rule, it falls within the ''rules and regulations'' category pursuant to 1 CFR 5.9(b). Therefore, HUD issues this correction to make clear that the document published on October 5, 2016, was not a document that affects or relates to a document previously published in the ''proposed rules'' section, but rather was a final agency action related to a final rule that should have been categorized and published in the ''rules and regulations'' category.

Dated: December 5, 2016.

Ariel Pereira,

Associate General Counsel for Legislation and Regulations.

[FR Doc. 2016–29446 Filed 12–7–16; 8:45 am]

BILLING CODE 4210–67–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2010–0496, EPA–HQ–OPP–2012–0841; FRL–9954–37]

Dicamba; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of dicamba in or on cotton, gin byproducts; cotton, undelinted seed; soybean, forage; and soybean, hay. Monsanto Company requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective December 8, 2016. Objections and requests for hearings must be received on or before February 6, 2017, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The dockets for this action, identified by docket identification (ID) number EPA–HQ–OPP–2010–0496 for soybeans and EPA–HQ–OPP–2012–0841 for cotton respectively are available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Michael Goodis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2010–0496 and EPA–HQ–OPP–2012–0841 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before February 6, 2017. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2010–0496 and EPA–HQ–OPP–2012–0841, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of August 4, 2010 (75 FR 46924) (FRL–8834–9) and December 19, 2012 (77 FR 75082) (FRL–9372–6), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of pesticide petitions (PP 0F7725 and 2F8067, respectively) by Monsanto Company, 1300 I St. NW., Suite 450 East, Washington, DC 20052. The petitions requested that 40 CFR part 180 be amended by establishing tolerances for residues of the herbicide dicamba, 3,6-dichloro-*o*-anisic acid and its metabolites 3,6-dichloro-5-hydroxy-*o*-anisic acid (5-OH dicamba) and 3,6-dichloro-2-hydroxybenzoic acid (DCSA), as follows: PP 0F7725 requested tolerances for residues in or on soybean, forage at 45 parts per million (ppm) and soybean, hay at 70 ppm and PP 2F8067 requested tolerances for residues in or on cotton, undelinted seed at 3 ppm and cotton, gin byproducts at 70 ppm. Those documents referenced summaries of the petitions prepared by Monsanto Company, the registrant, which are available in the dockets, *http://www.regulations.gov.* Comments were received, and EPA's responses to these comments are discussed in Unit IV.C.

Based upon review of the data supporting the petition, EPA is establishing tolerances for soybean, forage and soybean, hay that are higher than requested. The reason for these changes are explained in Unit IV.D.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for dicamba, including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with dicamba follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity,

completeness, and reliability, as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

For dicamba, toxicology studies for dicamba acid; its salts (isopropylamine (IPA), diglycolamine (DGA), and N, N-Bis-(3-aminopropyl) methylamine (BAPMA)); and its plant metabolites (DCSA (3, 6-dichlorosalicylic acid) and DCGA (3, 6-dichlorogentisic acid)) were all considered for risk assessment. The dicamba BAPMA salt is the BAPMA base added to the dicamba acid form. The DCSA exposure is primarily from dietary exposures (food + water) from uses on transgenic crops, and the dicamba acid exposure is relevant for the incidental oral exposure. In scenarios where co-exposure to the various forms could occur, the most protective point of departure (POD) was utilized for regulation.

Neurotoxic signs (*e.g.,* ataxia, decreased motor activity, impaired righting reflex and gait) were observed in dicamba acid studies in rats and rabbits at doses over 150 mg/kg/day. The DCSA metabolite is less neurotoxic than dicamba acid, although a rat developmental study involving the BAPMA salt indicated neurotoxic effects (*e.g.,* unsteady gait, ataxia, and convulsions) at lower doses (86 mg/kg/day).

The rat reproduction study and the developmental studies in rats and rabbits showed no evidence (qualitative or quantitative) for increased susceptibility following *in utero* or postnatal exposure of dicamba acid or its salts. In the rabbit developmental toxicity study, a single incidence of abortion (1/20 does) was seen at doses that also caused maternal toxicity, as evidenced by clinical signs of neurotoxicity. In a 2-generation reproductive toxicity study involving dicamba acid, offspring toxicity was manifested as decreases in pup weight at a dose where parental toxicity was also observed. There was however, an indication of potential increased quantitative susceptibility from exposure to the metabolite DCSA (decreased pup body weight was observed at 37 mg/kg/day, where no parental toxic effects were noted).

Dicamba is classified as ''not likely to be carcinogenic to humans''. Mutagenicity studies did not demonstrate mutagenic concern for dicamba. There was no evidence of dermal or systemic toxicity following repeated dermal application of dicamba acid or the salts at the limit dose (1,000 mg/kg/day). There is no concern for immunotoxicity following exposure to dicamba. Following oral administration, dicamba is rapidly absorbed and rapidly excreted in urine and feces without significant metabolism. Dicamba has a low acute toxicity via the oral, dermal or inhalation route (Acute Toxicity Categories III or IV). It is an eye and dermal irritant but it is not a skin sensitizer.

Specific information on the studies received and the nature of the adverse effects caused by dicamba as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document Dicamba and Dicamba BAPMA salt: Human-Health risk Assessment for Proposed Section 3 New Uses on dicamba-tolerant Cotton and Soybean in docket ID number EPA–HQ–OPP–2016–0187.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for dicamba used for human risk assessment is shown in Table 1 of this unit.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR DICAMBA ACID AND DICAMBA BAPMA SALT FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (Females 13 to 50 years of age).	Not Applicable (NA)	NA	No developmental toxicity attributed to acute exposure in the toxicity database.
Acute dietary (General population including infants and children).	NOAEL = 29 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	Acute RfD = 0.29 mg/kg/day. aPAD = 0.29 mg/kg/day.	Developmental Rat Study Dicamba BAPMA. LOAEL = 86 mg/kg/day in dams based on ataxia, unsteady gait and convulsions observed shortly after dosing.
Chronic dietary (All populations)	Offspring NOAEL= 4 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	Chronic RfD = 0.04 mg/kg/day. cPAD = 0.04 mg/kg/day.	Reproductive Rat Study with Metabolite DCSA. Offspring LOAEL = 37 mg/kg/day based on decreased pup weights in F_1 generation PND 14 and 21 (both sexes) and week 18 (females).

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR DICAMBA ACID AND DICAMBA BAPMA SALT FOR USE IN HUMAN HEALTH RISK ASSESSMENT—Continued

Exposure/scenario	Point of departure and uncertainty/ safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Incidental oral short- (1 to 30 days) and intermediate- (1 to 6 months) term.	Offspring NOAEL= 136 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	Residential LOC for MOE = 100.	Reproductive Study in Rats with Dicamba Acid Offspring. LOAEL = 450 mg/kg/day based on decreased pup weights.
No endpoints for assessing dermal risk were identified since the dermal toxicology studies for dicamba acid, IPA and DGA salts all had NOAELs of 1,000 mg/kg/day.			
Inhalation short-, intermediate-, and long-term.	Inhalation study NOAEL = 0.005 mg/L. UF_A = 3x UF_H = 10x FQPA SF = 1x	Residential LOC for MOE = 30.	Aerosol Inhalation Rat Study with Dicamba Acid. LOAEL = 0.050 mg/L based on minimal multifocal bronchiole-alveolar hyperplasia in males, multiple microscopic findings in the lung and associated lymph nodes in females.
Cancer (Oral, dermal, inhalation).	Dicamba is classified as ''not likely to be carcinogenic to humans''		

FQPA SF = Food Quality Protection Act Safety Factor. LOAEL = lowest-observed-adverse-effect-level. LOC = level of concern. mg/kg/day = milligram/kilogram/day. MOE = margin of exposure. NOAEL = no-observed-adverse-effect-level. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). UF_L = use of a LOAEL to extrapolate a NOAEL. PND = postnatal day.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to dicamba, EPA considered exposure under the petitioned-for tolerances as well as all existing dicamba tolerances in 40 CFR 180.227. EPA assessed dietary exposures from dicamba in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

Such effects were identified for dicamba. In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 2003–2008 National Health and Nutrition Examination Survey, What We Eat in America (NHANES/WWEIA). As to residue levels in food, EPA used tolerance levels and 100 percent crop treated (PCT) for the acute dietary exposure assessment.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 2003–2008 National Health and Nutrition Examination Survey, What We Eat in America (NHANES/WWEIA). As to residue levels in food, EPA used average residues based on field trial studies for crops, tolerance levels for livestock commodities and relevant PCT data for several existing uses to assess chronic dietary exposure.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that dicamba does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and percent crop treated (PCT) information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- *Condition a:* The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- *Condition b:* The exposure estimate does not underestimate exposure for any significant subpopulation group.
- *Condition c:* Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

The Agency estimated the average PCT for existing uses as follows: Asparagus: 5%; barley: 5%; corn: 10%; oats: 2.5%; sorghum: 15%; sugarcane: 20%; sweet corn: 1%; and wheat: 10%.

In most cases, EPA uses available data from United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and the National Pesticide Use Database for the chemical/crop combination for the most recent 6 to 7 years. EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than one. In those cases, 1% is used as the average PCT and 2.5% is used as the maximum PCT. EPA uses a maximum PCT for acute dietary risk analysis. The

maximum PCT figure is the highest observed maximum value reported within the recent 6 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%.

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition a, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions b and c, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant sub-populations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which dicamba may be applied in a particular area.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for dicamba in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of dicamba. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Pesticide Root Zone Model Ground Water (PRZM GW), the estimated drinking water concentrations (EDWCs) of dicamba for acute exposures are calculated to be 53.37 parts per billion (ppb) for surface water and 329 ppb parent plus 0.041 ppb DCSA for ground water. For chronic exposures for non-cancer assessments are estimated to be 44.5 ppb for surface water and 187 ppb parent plus 0.041 ppb DCSA for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. The combined estimated drinking water residues (parent + DCSA) for peak concentration used in the acute assessment and chronic were 329 and 187 ug/L (ppb), respectively.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

There are no residential uses being proposed in connection with this action for either dicamba or the dicamba BAPMA salt; however, there are existing residential turf uses of dicamba that have been reassessed to reflect updates to the Agency's 2012 Residential Standard Operating Procedures (SOPs).

There is no potential hazard *via* the dermal route for dicamba; therefore, the handler assessment includes only the inhalation route of exposure, and the post-application assessment includes only the incidental oral routes of exposure.

The quantitative exposure/risk assessment developed for residential handlers to adults is based on the following lawn/turf application scenarios:

- Mix/Load/Apply Liquid with Hand-held Equipment
- Apply Ready-To-Use with Hand-held Equipment
- Load/Apply Granule with Hand-held Equipment

The quantitative exposure/risk assessment for residential post-application exposures to children is based on the following scenarios:

- Children (1 to <2 years old) incidental oral exposure to treated turf.
- Children (1 to <2 years old) episodic granular ingestion exposure.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found dicamba to share a common mechanism of toxicity with any other substances, and dicamba does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that dicamba does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* There is no evidence of susceptibility to the young following *in utero* exposure to dicamba acid or its salts. Although quantitative offspring susceptibility was observed in the 2-generation reproduction study for the DCSA metabolite based on decreased pup weights, the degree of concern for the susceptibility is low because there is a well-established NOAEL for offspring toxicity in that study and DCSA has rapid clearance. Additionally, the current points of departure are health protective and therefore address the concern for offspring toxicity observed in this reproduction study.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for dicamba is complete for purposes of assessing the safety of existing and petitioned-for tolerances under the FFDCA.

ii. Although consistent neurotoxic signs (*e.g.,* ataxia, decreased motor activity, impaired righting reflex and gait) were observed in multiple studies in rats and rabbits, there is no need for a developmental neurotoxicity study to account for neurotoxicity for the following reasons: (1) Although clinical signs of neurotoxicity were seen in pregnant animals, no evidence of developmental anomalies of the fetal nervous system were observed in the

prenatal developmental toxicity studies, in either rats or rabbits, at maternally toxic doses up to 300 or 400 mg/kg/day, respectively; (2) there was no evidence of behavioral or neurological effects on the offspring in the two-generation reproduction study in rats; and (3) the ventricular dilation of the brain in the combined chronic toxicity and carcinogenicity study in rats was only observed in females at the high dose after two years of exposure at doses of 127 mg/kg/day. The significance of this dilation observation is questionable, since no similar histopathological finding was seen in two sub-chronic neurotoxicity studies at the limit dose or other chronic studies. Endpoints and points of departure chosen to quantify chronic risks are well below the dose level at which these effects were observed, and are therefore protective.

iii. As indicated in Unit III.D.2., the degree of concern for potential susceptibility is low; therefore, there is no need to retain the 10X FQPA safety factor to address any concern for prenatal or postnatal exposure.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on tolerance-level residues for the acute dietary, and average field trial data and percent crop treated information for the chronic dietary. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to dicamba in drinking water. EPA used similarly conservative assumptions to assess post-application exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by dicamba.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to dicamba will occupy 31% of the aPAD for all infants (<1 year old), the population sub-group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to dicamba from food and water will utilize 42% of the cPAD for children 1 to 2 years old the population sub-group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of dicamba is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential post-application exposures to children (1 to 2 years old) on turf result in an aggregate MOE of 3,600. Because EPA's level of concern for dicamba is a MOE of 100 or below, this MOE is not of concern.

EPA has determined that it is not appropriate to aggregate short-term exposures for adults, since there was no dermal hazard identified in the route-specific dermal studies and the inhalation effects were not systemic.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

An intermediate-term adverse effect was identified; however, dicamba is not registered for any use patterns that would result in intermediate-term residential exposure. Intermediate-term risk is assessed based on intermediate-term residential exposure plus chronic dietary exposure. Because there is no intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess intermediate-term risk), no further assessment of intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating intermediate-term risk for dicamba.

5. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies on dicamba acid and one on DCSA, dicamba is not expected to pose a cancer risk to humans.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to dicamba residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology liquid chromatography/mass spectrometer/mass spectrometer (LC/MS/MS) method, BASF Method D0902 is available to enforce the tolerance expression.

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established a MRL for dicamba in or on soybean, forage; soybean, hay; and cotton, gin byproducts.

The Codex has established a MRL for dicamba in or on cotton seed at 0.04 ppm. This MRL is different than the tolerance being established for dicamba in or on cotton, undelinted seed at 3.0 ppm in the United States. Since the use pattern of dicamba on dicamba-tolerant cotton has been changed to late season, the currently established international tolerances are not adequate to cover residues likely from the new use in the United States. In addition, the dicamba residues of concern for dicamba-tolerant cotton also include the DCSA metabolite, which is not found nor regulated in the other common varieties of cotton. Therefore, harmonization with respect to the tolerance expression

is not possible at this time for cotton seed.

C. Response to Comments

Several comments were received in both dockets EPA–HQ–OPP–2010–0496 and EPA–HQ–OPP–2012–0841, objecting to any approval of new dicamba uses on cotton and soybeans under the Federal Insecticide, Fungicide, and Rodenticide Act. Several comments raised concerns about a sharp increase of dicamba use due to a longer application season, the possible spread of weed resistance, off-site drift to non-targets, volatility, negative environmental effects, possible threat to endangered species, and the negative impact the new uses may have on the U.S. agricultural business as a whole. These comments do not appear to be concerned with the issuance of the tolerances under the FFDCA, but rather the approval of the uses under FIFRA. In any event, the existing legal framework provided by section 408 of the FFDCA states that tolerances may be set when persons seeking such tolerances or exemptions have demonstrated that the pesticide meets the safety standard imposed by the statute, taking into consideration human health impacts from aggregate exposure (including dietary and other non-occupational exposure) from the pesticide and other related chemicals. The scope of review under the FFDCA does not extend to other environmental considerations. Therefore, the Agency is not addressing these comments here. Where appropriate, the Agency may address them in connection with the associated pending pesticide registration action.

Comments were submitted in both docket EPA–HQ–OPP–2010–0496 and EPA–HQ–OPP–2012–0841 raising issues about the establishment of tolerances for dicamba on cotton and soybeans. Commenters raised concerns about the potential toxicity of dicamba, questioned the Agency's endpoint selection, and alleged that increased use of the pesticide would increase exposure to farmers and workers and dietary exposure. The Agency considered all the available toxicity and exposure data for dicamba and its sales and metabolites and determined that these tolerances are safe for the reasons spelled out in detail within the risk assessment Dicamba and Dicamba Salt: Human-Health Risk Assessment for Proposed Section 3 New Uses on Dicamba-tolerant Cotton and Soybean located in Docket ID number EPA–HQ–OPP–2016–0187 on Although many of the commenters' concerns are about toxicity that may occur or be associated with occupational exposure to dicamba and even though occupational exposure is outside the scope of the Agency's FFDCA safety analysis, the Agency did consider the available toxicity information and has concluded that dicamba does not pose risks of carcinogenicity or developmental toxicity. In addition, to take into account new toxicology received since the last risk assessment, the Agency has updated the chronic endpoint and is no longer relying on the endpoint about which the commenters expressed concern in their comments. The updated chronic reference dose takes into account all the available information, which has been updated since the 1987 Health Advisory that the commenters mention. The Agency also reviewed comments and requests for evaluating residue tolerances for dicamba tolerant crops and the tolerances proposed by a SOCC petition concurrently due to the potential dangers of dicamba drift and volatilization. After completing our final assessments of the new dicamba uses (which can be found in Docket ID # EPA–HQ–OPP–2016–0187) it has been determined that through proper label mitigations and restrictions, the Agency does not expect use of dicamba on cotton or soybeans to result in any inadvertent residues on neighboring crops. As a result, the Agency believes there is no need to establish tolerances for inadvertent residues on food crops as a result of the new uses for dicamba on cotton and soybean.

Finally, the commenters expressed concern that approval of new uses would increase exposure to workers and urged the Agency to take into account the likely increased dietary exposure, including any residues of dicamba that are in cattle diets and livestock commodities from treated cotton plants, from increased use of dicamba from approval of these tolerances. Because the FFDCA directs EPA to aggregate non-occupational exposure with dietary exposure, the Agency's assessment under the FFDCA does not assess the levels of occupational exposure to farmers and other workers. As to the dietary exposure, as noted in Unit III.C.1., the Agency considers exposure under the petitioned-for tolerances (including residues ingested by livestock diets that may result in residues livestock commodities) as well as all existing dicamba tolerances. Upon assessing those levels of exposure, the Agency has determined that these tolerances will be safe.

D. Revisions to Petitioned-For Tolerances

Tolerances for soybean forage and hay requested by the petitioner were estimated using the North American Free Trade Agreement (NAFTA) MRL calculator. EPA is establishing tolerances, which differ from the proposed tolerances, based on the Organization for Economic Co-operation Development (OECD) MRL calculation procedures, which is the Agency's current standard for determination of tolerances.

V. Conclusion

Therefore, tolerances are established for residues of dicamba, 3,6-dichloro-2-methoxybenzoic acid, in or on cotton, gin byproducts at 70 ppm; cotton, undelinted seed at 3.0 ppm; soybean, forage at 60 ppm; and soybean, hay at 100 ppm.

VI. Statutory and Executive Order Reviews

This action establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerances in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does

this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 9, 2016.

Michael Goodis,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.227:

■ a. Remove from the table in paragraph (a)(1), the entry ''Cotton, undelinted seed''.

■ b. Add alphabetically the following entries to the table in paragraph (a)(3) ''Cotton, gin byproducts''; ''Cotton, undelinted seed''; ''Soybean, forage''; and ''Soybean, hay''.

The additions read as follows:

§ 180.227 Dicamba; tolerances for residues.

(a) * * *

(3) * * *

Commodity	Parts per million
Cotton, gin byproducts	70
Cotton, undelinted seed	3.0
* * * * *	
Soybean, forage	60
Soybean, hay	100
* * * * *	

* * * * *

[FR Doc. 2016–29245 Filed 12–7–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Parts 3100 and 3170

[17X.LLWO310000.L13100000.PP0000]

RIN 1004–AE14

Waste Prevention, Production Subject to Royalties, and Resource Conservation; Correction

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule; correction.

SUMMARY: The Bureau of Land Management (BLM) is correcting a final rule that appeared in the **Federal Register** on November 18, 2016. The document promulgated new regulations to reduce waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities on onshore Federal and Indian (other than Osage Tribe) leases. The regulations also clarify when produced gas lost through venting, flaring, or leaks is subject to royalties, and when oil and gas production may be used royalty-free on-site. This document corrects several minor errors that were introduced by the Office of the Federal Register during formatting, as well as one erroneous cross-reference, in the text of the final rule.

DATES: Effective January 17, 2017.

FOR FURTHER INFORMATION CONTACT: Timothy Spisak at the BLM Washington Office, 20 M Street SE., Room 2134LM, Washington, DC 20003, or by telephone at 202–912–7311. For questions relating to regulatory process issues, contact Faith Bremner at 202–912–7441.

SUPPLEMENTARY INFORMATION: In FR Doc. 2016–27637 published in the **Federal Register** on November 18, 2016 (81 FR 83008), the following corrections are made:

§ 3103.3–1 [Corrected]

■ 1. On page 83077, in the third column, in § 3103.3–1(a)(2) add the word ''after'' before ''January 17, 2017:''

§ 3179.4 [Corrected]

■ 2. On page 83082, in the first column, in § 3179.4, designate the definition of ''unavoidably lost oil or gas'' as paragraph (a).

■ 3. On page 83082, in the second column, in § 3179.4, designate the definition for ''avoidably lost oil or gas'' as paragraph (b).

§ 3179.102 [Corrected]

■ 4. On page 83084, in the second column, in § 3179.102(d), remove the phrase ''paragraph (d)'' and add in its place the phrase ''paragraph (c).''

Dated: November 28, 2016.

Amanda Leiter,

Acting Assistant Secretary, Land and Minerals Management.

[FR Doc. 2016–29205 Filed 12–7–16; 8:45 am]

BILLING CODE 4310–84–P

Proposed Rules

Federal Register
Vol. 81, No. 236
Thursday, December 8, 2016

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS–2016–0075]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/United States Coast Guard-031 USCG Law Enforcement (ULE) System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security is giving concurrent notice of a newly established system of records pursuant to the Privacy Act of 1974 for the ''Department of Homeland Security/United States Coast Guard-031 USCG Law Enforcement (ULE) System of Records'' and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: Comments must be received on or before January 9, 2017.

ADDRESSES: You may submit comments, identified by docket number DHS–2016–0075, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–343–4010.
- *Mail:* Jonathan R. Cantor, Acting Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

Instructions: All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Marilyn Scott-Perez (202–475–3515), Privacy Officer, Commandant (CG–61), United States Coast Guard, Mail Stop 7710, Washington, DC 20593. For privacy issues please contact: Jonathan R. Cantor, (202–343–1717), Acting Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the Department of Homeland Security (DHS) United States Coast Guard (USCG) proposes to establish a new DHS system of records titled, ''DHS/United States Coast Guard-031 USCG Law Enforcement (ULE) System of Records.'' Concurrent with this newly issued system of records, DHS/USCG is proposing to exempt the ULE System of Records from certain provisions of the Privacy Act.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which Federal Government agencies collect, maintain, use, and disseminate personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals when systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors.

The Privacy Act allows Government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for DHS/USCG–031 USCG Law Enforcement (ULE) System of Records. Some information in DHS/USCG–031 USCG Law Enforcement (ULE) System of Records relates to official DHS national security, law enforcement, immigration, and intelligence activities. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of activity techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; and to ensure DHS's ability to obtain information from third parties and other sources; to protect the privacy of third parties; and to safeguard classified information. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

In appropriate circumstances, when compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case by case basis.

A notice of system of records for DHS/USCG–031 USCG Law Enforcement (ULE) System of Records is also published in this issue of the **Federal Register**.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend chapter I of title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

■ 1. Revise the authority citation for Part 5 to read as follows:

Authority: 6 U.S.C. 101 *et seq.;* Pub. L. 107–296, 116 Stat. 2135; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

■ 2. Add at the end of Appendix C to part 5, the following new paragraph 76:

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

76. The DHS/USCG–031 USCG Law Enforcement (ULE) System of Records consists of electronic and paper records and will be used by DHS and its components. The DHS/USCG–031 USCG Law Enforcement (ULE) System of Records is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; and national security and intelligence activities. The DHS/USCG–031 USCG Law Enforcement (ULE) System of Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other federal, state, local, tribal, foreign, or international government agencies.

The Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(j)(2), has exempted this system from the following provisions of the Privacy Act: 5 U.S.C. 552a (c)(3–4); (d); (e)(1–3), (e)(5), (e)(8); and (g). Additionally, the Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(k)(2) has exempted this system from the following provisions of the Privacy Act: 5 U.S.C. 552a (c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f).

When a record received from another system has been exempted in that source system under 5 U.S.C. 552a(j)(2), DHS will claim the same exemptions for those records that are claimed for the original primary systems of records from which they originated and claims any additional exemptions set forth here.

Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of the investigation, thereby interfering with that investigation and related law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information could impede law enforcement by compromising the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(f) From subsection (e)(5) (Collection of Information) because with the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with subsection (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS's ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal and could result in disclosure of investigative techniques, procedures, and evidence.

(j) From subsection (g) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

Dated: December 1, 2016.

Jonathan R. Cantor,

Acting Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2016–29342 Filed 12–7–16; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2016–0598; FRL–9956–30–OAR]

RIN 2060–AT16

Interstate Transport of Fine Particulate Matter: Revision of Federal Implementation Plan Requirements for Texas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of comment period.

SUMMARY: The Environmental Protection Agency (EPA) is extending the public comment period for the proposed rule titled ''Interstate Transport of Fine Particulate Matter: Revision of Federal Implementation Plan Requirements for Texas'' published in the **Federal Register** on November 10, 2016.

DATES: Comments must be received on or before January 9, 2017.

ADDRESSES: The EPA has established docket number EPA–HQ–OAR–2016–0598 for this action. Follow the instructions for submitting comments provided under **ADDRESSES** in the November 10, 2016 proposal (81 FR 78954).

FOR FURTHER INFORMATION CONTACT: For additional information on this action, contact Robert L. Miller, Clean Air Markets Division, Office of Atmospheric Programs (Mail Code 6204M), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 343–9077; email address: *Miller.RobertL@epa.gov.*

SUPPLEMENTARY INFORMATION: In the proposed rule titled ''Interstate Transport of Fine Particulate Matter: Revision of Federal Implementation Plan Requirements for Texas'' (81 FR 78954, November 10, 2016), the EPA established a public comment period ending on December 12, 2016. The EPA received multiple requests for an extension of this period. In order to ensure that the public has sufficient time to review and comment on the proposal, the EPA is extending the public comment period to end on January 9, 2017.

List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control, Electric power plants, Incorporation by reference, Intergovernmental relations, Nitrogen

oxides, Ozone, Particulate matter, Regional haze, Reporting and recordkeeping requirements, Sulfur dioxide.

Dated: December 2, 2016.

Sarah Dunham,

Director, Office of Atmospheric Programs.

[FR Doc. 2016–29442 Filed 12–7–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 5b

[Docket Number NIH–2016–0001]

RIN 0925–AA63

Privacy Act; Implementation

AGENCY: Department of Health and Human Services.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Health and Human Services (HHS or Department), through the National Institutes of Health (NIH), proposes to exempt, from certain requirements of the Privacy Act, a subset of records in a new system of records, System No. 09–25–0225, NIH Electronic Research Administration (eRA) Records (NIH eRA Records), which covers records used in managing NIH research and development applications and awards throughout the award lifecycle. Elsewhere in today's **Federal Register**, HHS has published a proposed System of Records Notice (SORN) for System No. 09–25–0225 for public notice and comment.

The subset of records proposed to be exempted is material that would inappropriately reveal the identities of referees who provide letters of recommendation and peer reviewers who provide written evaluative input and recommendations to NIH about particular funding applications under an express promise by the government that their identities in association with the written work products they authored and provided to the government will be kept confidential. Only material that would inappropriately reveal a particular referee or peer reviewer as the author of a specific work product (*e.g.,* reference or recommendation letters, reviewer critiques, preliminary or final individual overall impact/priority scores, and/or assignment of peer reviewers to an application and other evaluative materials and data compiled by NIH/OER) is proposed to be exempted. The exemptions would protect not only an author's name in association with their written work product but any content that could enable the author to be identified from context.

The Privacy Act provisions from which the material is proposed to be exempted are those that require the agency to provide an accounting of disclosures, access and amendment, and notification, which are contained in subsections (c)(3) and (d) of the Privacy Act.

DATES: Submit either electronic or written comments regarding this notice by February 6, 2017.

ADDRESSES: You may submit comments, identified by Docket Number NIH–2016–0001 via any of the following methods:

Electronic Submission

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions provided for submitting comments.

Written Submission

Submit written submissions in the following ways:

- *Fax:* 301–402–0169.
- *Mail:* Jerry Moore, NIH Regulations Officer, Office of Management Assessment, National Institutes of Health, 6011 Executive Boulevard, Suite 601, MSC 7669, Rockville, MD 20852–7669. To ensure timely processing of comments, the HHS/NIH is no longer accepting NPRM comments submitted to the agency by email. The HHS/NIH encourages you to continue to submit electronic comments by using the Federal eRulemaking Portal, as described previously, in the **ADDRESSES** portion of this document under *Electronic Submissions.*

Instructions: All submissions received must include the agency name and Docket No. for this rulemaking. All comments received may be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and follow the instructions provided for conducting a search, using the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Jerry Moore, NIH Regulations Officer, Office of Management Assessment, National Institutes of Health, 6011 Executive Boulevard, Suite 601, MSC 7669, Rockville, MD 20852–7669, telephone 301–496–4607, fax 301–402–0169, email *jm40z@nih.gov.*

SUPPLEMENTARY INFORMATION:

NIH research and development award programs provide funds through contracts, cooperative agreements, and grants to support biomedical and behavioral research and development projects and centers, training, career development, small business, and loan repayment and other research programs. The NIH is responsible to Congress and the U.S. taxpayers for carrying out its research and development award programs in a manner that facilitates research cost-effectively and in compliance with applicable statutes, rules and regulations, including 42 U.S.C. 217a, 281, 282, 41 U.S.C. 423 and 45 CFR part 75. The NIH uses an award process that relies on checks and balances, separation of responsibilities, and a two-level peer review system to ensure that funding applications submitted to NIH are evaluated in a manner that is fair, equitable, timely, and free of bias. The two-level peer review system is authorized by 42 U.S.C. 216; 42 U.S.C. 282(b)(6); 42 U.S.C. 284(c)(3); and 42 U.S.C. 289a and governed by regulations at 42 CFR part 52h, ''Scientific Peer Review of Research Grant Applications and Research and Development Contract Projects.'' The two-level system separates the scientific assessment of proposed projects from policy decisions about scientific areas to be supported and the level of resources to be allocated, which permits a more objective and complete evaluation than would result from a single level of review. The two-level review system is designed to provide NIH officials with the best available advice about scientific and technical merit as well as program priorities and policy considerations. The initial or first level review involves panels of experts established according to scientific disciplines, generally referred to as Scientific Review Groups (SRGs), whose primary function is to evaluate the scientific merit of grant applications. The second level of review of grant applications is performed by National Advisory Boards or Councils composed of both scientific and lay representatives. The recommendations made by these Boards or Councils are based not only on considerations of scientific merit as judged by the SRG but also on the relevance of a proposed project to the programs and priorities of NIH. Referees are those individuals who supply reference or other letters of recommendations for a grant or cooperative agreement applicant. Confidential referee and peer reviewer identifying material is contained in records such as reference or

recommendation letters, reviewer critiques, preliminary or final individual overall impact/priority score records, and/or assignment of peer reviewers to an application and other evaluative materials and data, which referees and peer reviewers provide to the NIH Office of Extramural Research (OER) under express promises that they will not be identified as the sources of the information, and which NIH/OER compiles solely for the purpose of determining applicants' suitability, eligibility, or qualifications for federal contracts, grants, or cooperative agreements. To the extent that records in System No. 09–25–0225 are retrieved by personal identifiers for individuals other than the referees and reviewers (for example, individual applicants), the exemptions proposed for the new system will enable the agency to prevent, when appropriate, those individual record subjects from having access to, and other rights under the Privacy Act with respect to, confidential source-identifying material in the records.

Under the Privacy Act (5 U.S.C. 552a), individuals have a right of access to records about them in federal agency systems of records, and other rights with respect to those records (such as notification, amendment, and an accounting of disclosures), but the Act permits certain types of systems of records (identified in § 552a (j) and (k)) to be exempted from certain requirements of the Act. Subsection (k)(5) permits the head of an agency to promulgate rules to exempt from the requirements in subsections (c)(3) and (d) of the Act investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal contracts, to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence.

Confidential referee and peer reviewer-identifying material in NIH award program records covered by System No. 09–25–0225 qualifies for exemption under subsection (k)(5) because it is investigatory material that NIH/OER compiles solely for the purpose of determining applicants' suitability, eligibility, or qualifications for federal research and development contracts, grants, and cooperative agreements.

The exemptions are necessary to maintain the integrity of the NIH extramural peer review and award processes, which depend on receiving accurate, objective, and unbiased recommendations and evaluations from referees and peer reviewers about funding applications. Protecting their identities as the sources of the information they provide protects them from harassment, intimidation, and other attempts to improperly influence award outcomes, and ensures that they are not reluctant to provide sensitive information or frank assessments. Case law has held that exemptions promulgated under subsection (k)(5) may protect source-identifying material even where the identity of the source is known.

The specific rationales that support the exemptions, as to each affected Privacy Act provision, are as follows:

- *Subsection (c)(3).* An exemption from the requirement to provide an accounting of disclosures to record subjects is needed to protect the identity of any referee or peer reviewer source who is expressly promised confidentiality. Release of an accounting of disclosures to an individual who is related to the application under assessment or evaluation could identify particular referees and peer reviewers as sources of recommendations or evaluative input received, or to be received, on the application. Inappropriately revealing their identities in association with the nature and scope of their assessments or evaluations and could lead them to alter or destroy their assessments or evaluations or subject them to harassment, intimidation, or other improper influences, which would impede or compromise the fairness and objectivity of the grant or contract review process.
- *Subsection (d)(1).* An exemption from the access requirement is needed both during and after a grant or contract review proceeding, to avoid inappropriately revealing the identity of any referee or peer reviewer source who was expressly promised confidentiality. Protecting confidential referee and peer reviewer identifying material from inappropriate access by record subjects is necessary for the integrity of the peer review process to ensure such sources provide candid assessments or evaluations to the government without fear that their identities as linked to a specific work product will be inappropriately revealed. Allowing an individual applicant or other individual who is the subject of an assessment or evaluation to access material that would inappropriately reveal a confidential referee or peer reviewer source could interfere with or compromise the objectivity and fairness of grant and contract review proceedings, constitute an unwarranted invasion of the personal privacy of the source and violate the express promise of confidentiality made to the source.
- *Subsections (d)(2) through (d)(4).* An exemption from the amendment provisions is necessary while one or more related grant and/or contract review proceedings are pending to avoid inappropriately revealing the identity of any referee or peer reviewer source who was expressly promised confidentiality. Allowing an individual applicant or other individual who is the subject of an evaluation or assessment an opportunity to amend extramural assistance program records in a pending proceeding could interfere with that proceeding, could constitute an unwarranted invasion of the personal privacy of a source, and would violate the express promise of confidentiality made to the source, if the information sought to be amended was provided by the source under an express promise of confidentiality and if acknowledging the existence of the record and discussing its contents as required to process the amendment request would inappropriately reveal the source's identity.

Accordingly, pursuant to 5 U.S.C. 552a(k)(5), the agency proposes to exempt the following source-identifying material in system of records-–25–0225 NIH eRA Records from the accounting, access, amendment and notification provisions of the Privacy Act (paragraphs (c)(3), and (d)), based on the specific rationales indicated above: Material that would inappropriately reveal the identities of referees who provide letters of recommendation and peer reviewers who provide written evaluative input and recommendations to NIH about particular funding applications under an express promise by the government that their identities in association with the written work products they authored and provided to the government will be kept confidential; this includes only material that would reveal a particular referee or peer reviewer as the author of a specific work product (*e.g.,* reference or recommendation letters, reviewer critiques, preliminary or final individual overall impact/priority scores, and/or assignment of peer reviewers to an application and other evaluative materials and data compiled by NIH/OER); it includes not only an author's name but any content that could enable the author to be identified from context.

Notwithstanding the exemptions, consideration will be given to any requests for notification, access, and amendment that are addressed to the System Manager, as provided in the

SORN for system of records 09–25–0225.

Analysis of Impacts

The HHS/NIH has examined the impacts of this rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this rule is not a significant regulatory action under the Executive Order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the rule imposes no duties or obligations on small entities, the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $144 million, using the most current (2015) Implicit Price Deflator for the Gross Domestic Product. The NIH does not expect that a final rule consistent with this NPRM would result in any 1-year expenditure that would meet or exceed this amount.

List of Subjects in 45 CFR Part 5b

Privacy.

For the reasons set out in the preamble, the Department proposes to amend its part 5b of title 45 of the Code of Federal Regulations, as follows:

PART 5b—PRIVACY ACT REGULATIONS

■ 1. The authority citation for Part 5b continues to read as follows:

Authority: 5 U.S.C. 301, 5 U.S.C. 552a.

■ 2. Amend § 5b.11 by adding paragraph (b)(2)(vii)(E) as follows:

§ 5b.11 Exempt systems.

* * * * *

(b) * * *

(2) * * *

(vii) * * *

(E) NIH Electronic Research Administration (eRA) Records, HHS/NIH/OD/OER, 09–25–0225 (*e.g.,* reference or recommendation letters, reviewer critiques, preliminary or final individual overall impact/priority scores, and/or assignment of peer reviewers to an application and other evaluative materials and data compiled by the NIH Office of Extramural Research).

Dated: October 14, 2016.

Francis S. Collins,

Director, National Institutes of Health.

Approved: October 18, 2016.

Sylvia Matthews Burwell,

Secretary, Department of Health and Human Services.

[FR Doc. 2016–29058 Filed 12–7–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[Docket No. 141216999–6999–02]

RIN 0648–XD669

Endangered and Threatened Wildlife and Plants: Notice of 12-Month Finding on a Petition To List the Gulf of Mexico Bryde's Whale as Endangered Under the Endangered Species Act (ESA)

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

ACTION: Proposed rule, request for comments.

SUMMARY: We, NMFS, announce a 12-month finding and listing determination on a petition to list the Gulf of Mexico Bryde's whale (*Balaenoptera edeni*) as threatened or endangered under the Endangered Species Act (ESA). We have completed a Status Review report of the Gulf of Mexico Bryde's whale in response to a petition submitted by the Natural Resources Defense Council. After reviewing the best scientific and commercial data available, including the Status Review report, and consulting with the Society for Marine Mammology's Committee on Taxonomy, we have determined that the Gulf of Mexico Bryde's whale is taxonomically a subspecies of the Bryde's whale thus meeting the ESA's definition of a species. Based on the Gulf of Mexico Bryde's whale's small population (likely fewer than 100 individuals), its life history characteristics, its extremely limited distribution, and its vulnerability to existing threats, we believe that the species faces a high risk of extinction. Based on these considerations, described in more detail within this action, we conclude that the Gulf of Mexico Bryde's whale is in danger of extinction throughout all of its range and meets the definition of an endangered species. We are soliciting information that may be relevant to inform both our final listing determination and designation of critical habitat.

DATES: Information and comments on the subject action must be received by January 30, 2017. For the specific date of the public hearing, see Public Hearing section.

ADDRESSES: You may submit comments, information, or data on this document, identified by the code NOAA–NMFS–2014–0101 by any of the following methods:

- *Electronic submissions:* Submit all electronic comments via the Federal eRulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2014-0101,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments;
- *Mail:* NMFS, Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701;
- *Hand delivery:* You may hand deliver written information to our office during normal business hours at the street address given above.

The Status Review of Bryde's Whales in the Gulf of Mexico (Rosel *et al.,* 2016) and reference list are available by submitting a request to the Species Conservation Branch Chief, Protected Resources Division, NMFS Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701–5505, Attn: Bryde's Whale 12-month Finding. The Status Review report and references are also available electronically at: *http://sero.nmfs.noaa.gov/protected_resources/listing_petitions/index.html.*

FOR FURTHER INFORMATION CONTACT: Laura Engleby or Calusa Horn, NMFS, Southeast Regional Office (727) 824–5312 or Marta Nammack, NMFS, Office of Protected Resources (301) 427–8469.

SUPPLEMENTARY INFORMATION:

Background

On September 18, 2014, we received a petition from the Natural Resources Defense Council to list the Gulf of

Mexico population of Bryde's whale (*Balaenoptera edeni*) as an endangered species. The petition asserted that the Bryde's whale in the Gulf of Mexico is endangered by at least three of the five ESA section 4(a)(1) factors: present or threatened destruction, modification, or curtailment of habitat or range; inadequacy of existing regulatory mechanisms; and other natural or manmade factors affecting its continued existence. The petitioner also requested that critical habitat be designated concurrent with listing under the ESA.

On April 6, 2015, we published a 90-day finding that the petition presented substantial scientific and commercial information indicating that the petitioned action may be warranted (80 FR 18343). At that time, we announced the initiation of a formal status review and requested scientific and commercial information from the public, government agencies, scientific community, industry, and any other interested parties on the delineation of, threats to, and the status of the Bryde's whale in the Gulf of Mexico including: (1) Historical and current distribution, abundance, and population trends; (2) life history and biological information including adaptations to ecological settings, genetic analyses to assess paternal contribution and population connectivity, and movement patterns to determine population mixing; (3) management measures and regulatory mechanisms designed to protect the species; (4) any current or planned activities that may adversely impact the species; and (5) ongoing or planned efforts to protect and restore the species and habitat. We received eight public comments in response to the 90-day finding, with the majority of comments in support of the petition. The public provided relevant scientific literature to be considered in the Status Review report as well as a recently developed density model and abundance estimate. Relevant information was incorporated in the Status Review report and in this proposed rule.

Listing Determinations Under the ESA

We are responsible for determining whether the Bryde's whale in the Gulf of Mexico is threatened or endangered under the ESA (16 U.S.C. 1531 *et seq.*). Section 4(b)(1)(A) of the ESA requires us to make listing determinations based solely on the best scientific and commercial data available after conducting a review of the status of the species and after taking into account efforts being made by any state or foreign nation to protect the species. To be considered for listing under the ESA, a group of organisms must constitute a ''species,'' which is defined in Section 3 of the ESA to include taxonomic species and ''any subspecies of fish, or wildlife, or plants, and any distinct population segment (DPS) of any species of vertebrate fish or wildlife which interbreeds when mature.'' Under NMFS regulations, we must rely not only on standard taxonomic distinctions, but also on the biological expertise of the agency and the scientific community, to determine if the relevant taxonomic group is a ''species'' for purposes of the ESA (see 50 CFR 424.11). Under Section 4(a)(1) of the ESA, we must next determine whether any species is endangered or threatened due to any of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence (sections 4(a)(1)(A) through (E)).

To determine whether the Bryde's whale population in the Gulf of Mexico warrants listing under the ESA, we first formed a Status Review Team (SRT) of seven biologists, including six NOAA Fisheries Science Center (Southeast, Southwest, and Northeast) and Southeast Regional Office personnel and one member from the Bureau of Safety and Environmental Enforcement—Gulf of Mexico Region, to compile and review the best available scientific information on Bryde's whales in the Gulf of Mexico and assess their extinction risk. The Status Review report prepared by the SRT summarizes the taxonomy, distribution, abundance, life history, and biology of the species, identifies threats or stressors affecting the status of the species, and provides a description of existing regulatory mechanisms and conservation efforts (Rosel *et al.,* 2016). The Status Review report incorporates information received in response to our request for information (80 FR 18343; April 6, 2015) and comments from three independent peer reviewers. Information from the Status Review report about the biology of the Gulf of Mexico Bryde's whale is summarized below under ''Biological Review.'' The Status Review report also includes a threats evaluation and an Extinction Risk Analysis (ERA), conducted by the SRT. The results of the threats evaluation are discussed below under ''Threats Evaluation'' and the results of the ERA are discussed below under ''Extinction Risk Analysis.''

Section 3 of the ESA defines an endangered species as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a threatened species as one ''which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Thus, we interpret an ''endangered species'' to be one that is presently in danger of extinction. A ''threatened species,'' on the other hand, is not currently at risk of extinction but is likely to become so in the foreseeable future. In other words, a key statutory difference between a threatened and endangered species is the timing of when a species may be in danger of extinction, either presently (endangered) or in the foreseeable future (threatened).

In determining whether the Gulf of Mexico population of Bryde's whale meets the standard of endangered or threatened, we first determined that, based on the best scientific and commercial data available, the Gulf of Mexico Bryde's whale is a genetically distinct subspecies of the globally distributed Bryde's whale. We next considered the specific life history and ecology of the species, the nature of threats, the species' response to those threats, and population numbers and trends. We considered both the data and information summarized in the Status Review report, as well as the results of the ERA. We considered impacts of each identified threat both individually and cumulatively. For purposes of our analysis, the mere identification of factors that could impact a species negatively is not sufficient to compel a finding that ESA listing is appropriate. In considering those factors that might constitute threats, we look beyond mere exposure of the species to the factor to determine whether the species responds, either to a single threat or multiple threats, in a way that causes actual impacts at the species level. In making this finding, we have considered and evaluated the best available scientific and commercial information, including information received in response to our 90-day finding.

Biological Review

This section provides a summary of key biological information presented in the Status Review report (Rosel *et al.,* 2016), which provides the baseline context and foundation for our listing determination. The petition specifically requested that we consider the Gulf of Mexico population of Bryde's whale as a DPS and list that population as an

endangered species. Therefore, the SRT first considered whether the Bryde's whale in the Gulf of Mexico constituted a DPS, a subspecies, a species, or part of the globally distributed Bryde's whale population. This section also includes our conclusions based on the biological information presented in the Status Review report.

Species Description

Bryde's whale (*B. edeni*) is a large baleen whale found in tropical and subtropical waters worldwide. Currently two subspecies of Bryde's whale are recognized: A smaller form, Eden's whale (*B. e. edeni*), found in the Indian and western Pacific oceans primarily in coastal waters, and a larger, more pelagic form, Bryde's whale (*B. e. brydei*), found worldwide. Like Bryde's whales found worldwide, the Bryde's whale in the Gulf of Mexico has a streamlined and sleek body shape, a somewhat pointed, flat rostrum with three prominent ridges (*i.e.,* a large center ridge, and smaller left and right lateral ridges), a large falcate dorsal fin, and a counter-shaded color that is fairly uniformly-dark dorsally and light to pinkish ventrally (Jefferson *et al.,* 2015). There is no apparent morphological difference between the Bryde's whale in the Gulf of Mexico and those worldwide. Baleen from these whales has not been thoroughly characterized, but the baleen plates from one individual from the Gulf of Mexico were dark gray to black with white bristles (Rosel *et al.,* 2016). This is consistent with the description by Mead (1977), who indicated that the bristles of both Bryde's whale subspecies are coarser than those in the closely-related sei whale. Limited data (n=14) indicate the length of Bryde's whales in the Gulf of Mexico is intermediate with the currently recognized subspecies. The largest Bryde's whale observed in the Gulf of Mexico was a lactating female at 12.7 meters (m) in length and the next four largest animals were 11.2–11.6 m in length (Rosel and Wilcox 2014). Rice (1998) reported adult Eden's whales rarely exceed 11.5 m total length and adult Bryde's whales from the Atlantic, Pacific and the Indian Ocean reach 14.0–15.0 m in length.

Genetics

In a recent genetic analysis of mitochondrial DNA (mtDNA) samples taken from Bryde's whales in the Gulf of Mexico, Rosel and Wilcox (2014) found that the Gulf of Mexico population was genetically distinct from all other Bryde's whales worldwide. Maternally inherited mtDNA is an indicator of population-level differentiation, as it evolves relatively rapidly. Rosel and Wilcox (2014) identified 25–26 fixed nucleotide differences in the mtDNA control region between the Bryde's whale in the Gulf of Mexico and the two currently recognized subspecies (*i.e.,* Eden's whale and Bryde's whale) and the sei whale (*B. borealis*). They found that the level and pattern of mtDNA differentiation discovered indicates that Gulf of Mexico Bryde's whales are as genetically differentiated from other Bryde's whales worldwide, as those Bryde's whales are differentiated from their most closely-related species, the sei whale. In addition, genetic analysis of the mtDNA data and data from 42 nuclear microsatellite loci (repeating base pairs in the DNA) revealed that the genetic diversity within the Gulf of Mexico Bryde's whale population is exceedingly low. Rosel and Wilcox (2014) concluded that this level of genetic divergence suggests a unique evolutionary trajectory for the Gulf of Mexico population of Bryde's whale, worthy of its own taxonomic standing.

The SRT considered this level of genetic divergence to be significant, indicating that the Bryde's whale in the Gulf of Mexico is a separate subspecies. To confirm its determination, the SRT asked the Society for Marine Mammalogy Committee on Taxonomy (Committee) for its expert scientific opinion on the level of taxonomic distinctiveness of the Bryde's whale in the Gulf of Mexico. The Committee maintains the official list of marine mammal species and subspecies for the Society for Marine Mammalogy. It updates the list as new descriptions of species, subspecies, or taxonomic actions appear in the technical literature, adhering to principle and procedures, opinions, and directions set forth by the International Commission on Zoological Nomenclature. The Committee also reviews, as requested, formal descriptions of new taxa and other taxonomic actions, and provides expert advice on taxonomic descriptions and other aspects of marine mammal taxonomy. In response to the request made by the SRT, all of the Committee members who responded (nine out of nine) voted it was ''highly likely'' that Bryde's whales in the Gulf of Mexico comprise at least an undescribed subspecies of what is currently recognized as *B. edeni.* This result constituted the opinion of the Committee, which makes decisions by majority vote (W. F. Perrin, Committee Chairman 2015). Based on the expert opinion from the Committee and the best available scientific information, the SRT concluded Bryde's whales in the Gulf of Mexico are taxonomically distinct from the other two Bryde's whale subspecies. The SRT identified the Bryde's whale occurring in the Gulf of Mexico as a separate subspecies called ''GOMx Bryde's whale,'' and conducted the Status Review accordingly.

Our regulations state that, ''In determining whether a particular taxon or population is a species for the purpose of the Act, the Secretary shall rely on standard taxonomic distinctions and biological expertise of the Department and scientific community concerning the relevant taxonomic group'' (50 CFR 424.11(a)). Under this provision, we must consider the biological expertise of the SRT and the scientific community, and apply the best available science when it indicates that a taxonomic classification is outdated or incorrect. The GOMx Bryde's whale has a high level of genetic divergence from the two recognized Bryde's whale subspecies (Eden's whale and Bryde's whale) elsewhere in the world. Given this information, we relied on the biological expertise of the SRT and the Committee concerning the taxonomic status of the Bryde's whale in the Gulf of Mexico. We agree with the SRT and the Committee's determination that the Bryde's whale in the Gulf of Mexico is taxonomically at least a subspecies of *B. edeni.* Based on the best available scientific and commercial information described above and in the Status Review report, we have determined that the Bryde's whale in the Gulf of Mexico is a taxonomically distinct subspecies and, therefore, eligible for listing under the ESA. Accordingly, we did not further consider whether the Gulf of Mexico Bryde's whale population is a DPS under the ESA.

Distribution

The Status Review report (Rosel *et al.,* 2016) found that the historical distribution of Bryde's whale in the Gulf of Mexico included the northeastern, north-central and southern Gulf of Mexico. This was based on work by Reeves *et al.* (2011), which reviewed whaling logbooks of ''Yankee whalers'' and plotted daily locations of ships during the period 1788–1877 as a proxy for whaling effort, with locations of species takes and sightings in the Gulf of Mexico. These sightings by the whalers were generally offshore in deeper (*e.g.,* >1000 m) waters, given their primary target of sperm whales (*Physeter microcephalus*). Reeves *et al.* (2011) concluded whales reported as ''finback'' by ''Yankee whalers'' in the

Gulf of Mexico were most likely Bryde's whales, because Bryde's whales are the only baleen whales that occur in the Gulf of Mexico year-round. The SRT found that these data indicate that the historical distribution of Bryde's whales in the Gulf of Mexico was much broader and also included the north-central and southern Gulf of Mexico.

Stranding records from the Southeast U.S. stranding network, the Smithsonian Institution, and the literature (Mead 1977, Schmidly 1981, Jefferson 1995) include 22 Bryde's whales strandings in the Gulf of Mexico from 1954–2012, although three have uncertain species identification. Most strandings were recorded east of the Mississippi River through west central Florida, but two were recorded west of Louisiana. There are no documented Bryde's whale strandings in Texas, although strandings of fin (*B. physalus*), sei (*B. borealis*), and minke (*B. acutorostrata*) whales have been documented.

We began conducting oceanic (ship) and continental shelf (ship and aerial) surveys for cetaceans in 1991 that continue today. The location of shipboard and aerial survey effort in the Gulf of Mexico and Atlantic Ocean was plotted by Roberts *et al.* (2016). Details of Bryde's whale sightings from these surveys are summarized in Waring *et al.* (2015). During surveys in 1991, Bryde's whales were sighted in the northeastern Gulf of Mexico along the continental shelf break, in an area known as the De Soto Canyon. In subsequent surveys, Bryde's whales or whales identified as Bryde's/sei whales (*i.e..,* where it was not possible to distinguish between a Bryde's whale or a sei whale), were sighted in this same region of the northeastern Gulf of Mexico. When observers were able to clearly see the dorsal surface of the rostrum of at least one whale, three ridges were present, a diagnostic characteristic of Bryde's whales (Maze-Foley & Mullin 2006). As a result, our Gulf of Mexico surveys from 1991–2015 use sightings of Bryde's whale, Bryde's/sei whale, and baleen whale species collectively as the basis for estimates of Bryde's whales abundance and distribution. Sightings of Bryde's whales in the Gulf of Mexico have been consistently located in the De Soto Canyon area, along the continental shelf break between 100 m and 300 m depth. Bryde's whales have been sighted in all seasons within the De Soto Canyon area (Mullin and Hoggard 2000, Maze-Foley and Mullin 2006, Mullin 2007, DWH MMIQT 2015). Consequently, LaBrecque *et al.* (2015) designated this area, home to the small resident population of Bryde's whale in the northeastern Gulf of Mexico, as a Biologically Important Area (BIA). BIA's are reproductive areas, feeding areas, migratory corridors, and areas in which small and resident populations are concentrated. They do not have direct or immediate regulatory consequences. Rather, they are intended to provide the best available science to help inform regulatory and management decisions, in order to minimize impacts from anthropogenic activities on marine mammals (LaBrecque *et al.,* 2015).

Despite the lack of sightings of Bryde's whales in the Gulf of Mexico outside the BIA, questions remain about their current distribution in U.S. waters. NMFS surveys recorded three baleen whales sighted outside the BIA (*i.e.,* fin whale identified in 1992 off Texas and two sightings of Bryde's/sei whale in 1992 and 1994 along the shelf break in the western Gulf of Mexico). In addition, five records of 'baleen whales' have been recorded from 2010 to 2014 west of the BIA, at the longitude of western Louisiana in depths similar to those in the BIA (Bureau of Safety and Environmental Enforcement, unpublished). The two sightings southwest of Louisiana included photographs showing they were clearly baleen whales. However, the information collected was not sufficient to identify to the species level. In 2015 a citizen sighted and photographed what most experts believe was a Bryde's whale in the western Gulf of Mexico south of the Louisiana-Texas border (Rosel *et al.,* 2016). Given these observations, the SRT determined that while it is possible that a small number of baleen whales occur in U.S. waters outside the BIA, these observations in the north-central and western Gulf of Mexico were difficult to interpret (Rosel *et al.,* 2016).

Few systematic surveys have been conducted in the southern Gulf of Mexico (*i.e.,* Mexico and Cuba). Six marine mammal surveys were conducted from 1997 to 1999 in the southern Gulf of Mexico and Yucatán Channel. These surveys focused specifically in the extreme southern Bay of Campeche, an area where Reeves *et al.* (2011) reported numerous sightings of baleen whales from the whaling logbooks. A more recent survey reported a single baleen whale in an area of nearly 4,000 square kilometers (km^2) (Ortega-Ortiz 2002, LaBrecque *et al.* 2015). This whale was identified as a fin whale; however, subsequent discussion between the author and the SRT suggested it should have been recorded as an unidentified baleen whale (Rosel *et al.,* 2016). A compilation of all available records of marine mammal sightings, strandings, and captures in the southern Gulf of Mexico identified no Bryde's whales (Ortega-Ortiz 2002) as summarized in the Status Review report (Rosel *et al.,* 2016).

We agree with the SRT's findings that what is now recognized as the GOMx Bryde's whale has been consistently located over the past 25 years along a very narrow depth corridor in the northeastern Gulf of Mexico, recognized as the GOMx Bryde's whale BIA. Sightings outside this particular area are few, despite a large amount of dedicated marine mammal survey effort that included both continental shelf and oceanic waters of the Atlantic Ocean off the southeastern United States and the northern Gulf of Mexico. Historical whaling records indicate that the historical distribution of the GOMx Bryde's whale in the Gulf of Mexico was much broader than it is currently and included the north-central and southern Gulf of Mexico. We agree with the SRT that the BIA, located in the De Soto Canyon area of the northeastern Gulf of Mexico, encompasses the current areal distribution of GOMx Bryde's whale.

Abundance Estimates

All of the abundance estimates for Bryde's whale in the northern Gulf of Mexico are based on aerial- or ship-based line-transect surveys (Buckland *et al.,* 2005). Various surveys conducted from 1991 to 2012 are discussed in the Status Review report (Rosel *et al.,* 2016). As previously stated, nearly all GOMx Bryde's whale sightings occurred in the BIA during surveys that uniformly sampled the entire northern Gulf of Mexico. The Marine Mammal Protection Act abundance estimate used for management of the ''Northern Gulf of Mexico Bryde's Whale Stock'' is 33 whales (coefficient of variation = 1.07; Waring *et al.,* 2013). Recently, Duke University researchers estimated abundance to be 44 individuals (coefficient of variation = .27) based on the averages of 23 years of survey data (Roberts *et al.,* 2015a, Roberts *et al.,* 2016). No analysis has been conducted to evaluate abundance trends for GOMx Bryde's whale. Given the paucity of data that influences the range in the abundance estimates, the SRT agreed by consensus that, given the best available science and allowing for the uncertainty of Bryde's whale occurrence in non-U.S. waters of the Gulf of Mexico, most likely less than 100 individuals exist. For the reasons stated above, we concur that likely less than 100 GOMx Bryde's whales exist.

Behavior

Little information exists on the behavior of GOMx Bryde's whale. Maze-Foley and Mullin (2006) found GOMx Bryde's whales to have a mean group size of 2 (range 1 −5, n = 14), similar to group sizes of the Eden's and Bryde's whales (Wade and Gerrodette 1993). The GOMx Bryde's whale is known to be periodically ''curious'' around ships and has been documented approaching them in the Gulf of Mexico (Rosel *et al.,* 2016), as observed in Bryde's whales worldwide (Leatherwood *et al.* 1976, Cummings 1985). In September 2015, a female GOMx Bryde's whale was tagged with an acoustic and kinematic data-logging tag in the De Soto Canyon (Rosel *et al.,* 2016). Over the nearly 3-day tagging period, the whale spent 47 percent of its time within 15 m of the surface during the day and 88 percent of its time within 15 m of the surface during the night (NMFS, unpublished data).

Foraging Ecology

Little information is available on foraging ecology available for GOMx Bryde's whales. Based on behavior observed during assessment surveys, these whales do not appear to forage at or near the surface (NMFS, unpublished). In general, Bryde's whales are thought to feed primarily in the water column on schooling fish such as anchovy, sardine, mackerel and herring, and small crustaceans (Kato 2002). These prey occur throughout the Gulf of Mexico and the BIA (Grace *et al.* 2010). Tracking data from the single whale with an acoustic tag (described above) indicated diurnal diving to depths of up to 271 m, with foraging lunges apparent at the deepest depths. That whale was likely foraging at or just above the sea floor (NMFS, unpublished data) where diel-vertical-migrating schooling fish form tight aggregations.

Reproduction and Growth

Little information exists on reproduction and growth of GOMx Bryde's whale; however, similar to Eden's whales and Bryde's whales elsewhere in the world, the GOMx Bryde's whale is considered to have k-selected life history parameters (large body size, long life expectancy, slow growth rate, late maturity, with few offspring). Taylor *et al.* (2007) estimated that Bryde's whales worldwide may reproduce every two to three years and reach sexual maturity at age nine. Given the basic biology of baleen whales, it is likely that under normal conditions, the female GOMx Bryde's whales produce a calf every 2 to 3 years. The largest known GOMx Bryde's whale was a lactating female 12.6 m in length (Rosel and Wilcox 2014). Currently, skewed sex ratio does not appear to be an issue for this population, as recent biopsies have shown equal number of males and females (Rosel and Wilcox, 2014; Rosel *et al.,* 2016). No GOMx Bryde's whale calves have been reported during surveys. However, two stranded calves have been recorded in the Gulf of Mexico: A 4.7 m calf stranded in the Florida Panhandle in 2006 (SEUS Historical Stranding Database) and a 6.9 m juvenile stranded north of Tampa, Florida, in 1988 (Edds *et al.* 1993).

Acoustics

Baleen whale species produce a variety of highly stereotyped, low-frequency tonal and broadband calls for communication purposes (Richardson *et al.* 1995). These calls are thought to function in a reproductive or territorial context, provide individual identification, and communicate the presence of danger or food (Richardson *et al.,* 1995). Bryde's whales worldwide produce a variety of calls that are distinctive among geographic regions that may be useful for delineating subspecies or populations (Oleson *et al.* 2003, Širović *et al.* 2014). In the Gulf of Mexico, Širović *et al.* (2014) reported Bryde's whale call types composed of downsweeps and downsweep sequences and localized these calls. Rice *et al.* (2014) detected these sequences, as well as two stereotyped tonal call types that originated from Bryde's whales in the Gulf of Mexico. One call type has been definitively identified to free-ranging GOMx Bryde's whales (Širović *et al.,* 2014), four additional call types have been proposed as likely candidates (Rice *et al.,* 2014a, Širović *et al.,* 2014), and two call types have been described from a captive juvenile during rehabilitation (Edds *et al.,* 1993). Based on these data, the calls by the Gulf of Mexico Bryde's whale are consistent with, but different from those previously reported for Bryde's whales worldwide (Rice *et al.,* 2014). These unique acoustic signatures support the genetic analyses identifying the GOMx Bryde's whale as an evolutionary distinct unit (Rosel and Wilcox 2014).

Threats Evaluation

The threats evaluation is the second step in making an ESA listing determination for the GOMx Bryde's whale, as described above in ''Listing Determinations Under the ESA.'' The SRT identified a total of 27 specific threats, organized and described them according to the five ESA factors listed in section 4(a)(1), and then evaluated the severity of each threat with a level of certainty (see Appendix 3 in Rosel *et al.,* 2016). Because direct evidence from studies on GOMx Bryde's whales was lacking, the SRT agreed that published scientific evidence from other similar marine mammals was relevant and necessary to estimate impacts to GOMx Bryde's whale and extinction risk.

To promote consistency when ranking each threat, the SRT used definitions for 'severity of threat' and 'level of certainty' similar to other status reviews, including the Hawaiian insular false killer whales (Oleson *et al.* 2010) and the northeastern Pacific population of white shark (Dewar *et al.* 2013). The SRT categorically defined specific rankings for both severity and certainty for each specific threat (identified below) as ''low,'' ''moderate,'' or ''high.'' The categorical definitions for the severity of each threat were identified by the SRT as 1 = ''low,'' meaning that the threat is likely to only slightly impair the population; 2 = ''moderate,'' meaning that the threat is likely to moderately degrade the population; or 3 = ''high,'' meaning that the threat is likely to eliminate or seriously degrade the population. The SRT also scored the certainty of the threat severity based on the following categorical definitions: 1 = ''low,'' meaning little published and/or unpublished data exist to support the conclusion that the threat did affect, is affecting, or is likely to affect the GOMx Bryde's whale with the severity ascribed; 2 = ''moderate,'' meaning some published and/or unpublished data exist to support the conclusion that the threat did affect, is affecting, or is likely to affect the population with the severity ascribed; and 3 = ''high,'' meaning there are definitive published and/or unpublished data to support the conclusion that this threat did affect, is affecting, or is likely to affect the GOMx Bryde's whale with the severity ascribed. Then, to determine the overall impact of an ESA factor, the SRT looked at the collective impact of threats considered for each ESA factor to provide an ''overall threat ranking'' for each ESA factor, defined as follows: 1= ''low,'' meaning the ESA factor included ''a low number'' of threats likely to contribute to the decline of the GOMx Bryde's whale; 2 = ''moderate,'' meaning the ESA Factor included an intermediate number of threats likely to contribute to the decline of the GOMx Bryde's whale, or contained some individual threats identified as moderately likely to contribute to the decline; and 3 = ''high,'' meaning the ESA factor included a high number of threats that are moderately or very likely

to contribute to the decline of the GOMx Bryde's whale, or contains some individual threats identified as very likely to contribute to the decline of the GOMx Bryde's whale.

The SRT then calculated the numerical mean of the team members' scores for each threat or category of threats. However, we do not believe that relying on the numerical mean of the SRT's scores is appropriate, because the specific rankings for the severity, certainty, and overall threat were categorically defined by the SRT and not numerically defined. Therefore, we assessed the majority vote of the team members' scores (*i.e.,* 1, 2, or 3, as described above) and assigned each threat a specific ranking defined by the SRT's categorical definitions (*i.e.,* low, moderate or high) based on the majority vote of the SRT. When there was no clear majority (*i.e.,* no rank received four votes), the categorical ranking we assigned was a combination of the two ranks receiving three votes each (*e.g.,* three votes for high and three votes for moderate we characterized as ''moderate-high'').

Each of the 27 threats identified by the SRT is summarized below, by ESA factor, with severity and certainty rankings based on the SRT's categorical scoring, as described above. We also summarize the overall threat ranking for each ESA factor, based on the SRT's scores, and provide NMFS' determination with regard to each factor. A detailed table of the SRT's threats and rankings can be found in Appendix 3 of the Status Review report (Rosel *et al.,* 2016).

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Habitat or Range

The SRT considered the following threats to the GOMx Bryde's whale under ESA Factor A: Energy exploration and development, oil spills and spill response, harmful algal blooms, persistent organic pollutants, and heavy metals. Based on the SRT's numerical threat rankings, the overall threat ranking assigned to Factor A was ''high.''

Energy Exploration and Development

The SRT assigned the threat of energy exploration and development (drilling rigs, platforms, cables, pipelines) a score of ''high'' severity threat with ''moderate'' certainty, as it relates to destruction, modification, or curtailments of the range of the GOMx Bryde's whale. (Note: Other aspects or elements of energy exploration and development can act directly on the whales (*e.g.,* noise, vessel collision, marine debris). The SRT evaluated those threats under Factor E, other natural or human factors affecting a species continued existence. Accordingly, we discuss and evaluate those threats under Factor E below.)

The Gulf of Mexico is a major oil and gas producing area and has proven a steady and reliable source of crude oil and natural gas for more than 50 years. Approximately 2,300 platforms operate in Federal outer continental shelf (OCS) waters (Rosel *et al.,* 2016) and in 2001 approximately 27,569 miles (44,368 km) of pipeline lay on the Gulf of Mexico seafloor (Cranswick 2001). For planning and administrative purposes, the Bureau of Ocean Energy Management (BOEM) has divided the Gulf of Mexico into three planning areas: Western, Central, and Eastern. The majority of active lease sales are located in the Western and Central Planning Areas. Habitat in the north-central and western Gulf of Mexico, which includes the GOMx Bryde's whale's historical range, has been significantly modified with the presence of thousands of oil and gas platforms. The Eastern Planning Area (EPA), which overlaps with the GOMx Bryde's whale BIA, currently has no production activity, with most of the area falling under a moratorium of lease sales until 2022. However, this moratorium expires in 2022, and GOMx Bryde's whale could then be exposed to increased threats associated with energy exploration and development activities (*e.g.,* marine debris, operational discharge, vessel collision, noise, seismic surveys, oil spills, etc.) as they are almost exclusively located within this geographic region. In addition to expressing concern regarding the current curtailment of the GOMx Bryde's whale range due to energy exploration and development in the north-central and western Gulf of Mexico, the SRT raised significant concern about the moratorium expiring and the potential expansion of impacts that opening these waters to development would have on the Bryde's whale BIA in the future, especially in light of the apparent limited use by Bryde's whales of the north-central and western Gulf of Mexico.

Oil Spills and Spill Response

Oil spills are a common occurrence in the Gulf of Mexico. In 2010, the Deepwater Horizon (DWH) oil spill was the largest spill affecting U.S. waters in U.S. history, spilling nearly 134 million gallons (507 million liters) of oil into the Gulf of Mexico. In addition, 46 smaller-scale spills associated with oil and gas related activities (*e.g.,* platforms, rigs, vessels, pipelines) occurred in the Gulf of Mexico between 2011 and 2013 (OCS EIS EA BOEM 2015–001).

Exposure to oil spills may cause marine mammals acute or chronic impacts with lethal or sub-lethal effects depending on the size and duration of the spill. For large baleen whales, like the GOMx Bryde's whale, oil can foul the baleen they use to filter-feed, decreasing their ability to eat, and resulting in the ingestion of oil (Geraci *et al.,* 1989). Impacts from exposure may also include: Reproductive failure, lung and respiratory impairments, decreased body condition and overall health, and increased susceptibility to other diseases (Harvey and Dahlheim 1994). Oil and other chemicals on the body of marine mammals may result in irritation, burns to mucous membranes of eyes and mouth, and increased susceptibility to infection (DWH Trustees 2016). Dispersants used during oil spill response activities may also be toxic to marine mammals (Wise *et al.,* 2014a). After oil spills cease, marine mammals may experience continued effects through persistent exposure to oil and dispersants in the environment, reduction or contamination of prey, direct ingestion of contaminated prey, or displacement from preferred habitat (Schwacke *et al.,* 2014, BOEM and Gulf of Mexico OCS Region 2015, DWH Trustees 2016). The DWH oil spill is an example of the significant impacts a spill can have on the status of the GOMx Bryde's whale. Although the DWH platform was not located within the BIA, the oil footprint included 48 percent of GOMx Bryde's whale habitat and an estimated 17 percent of the species was killed, 22 percent of reproductive females experienced reproductive failure, and 18 percent of the population likely suffered adverse health effects due to the spill (DWH Trustees 2016). Based on the SRT's scoring, the threat of exposure to oil spills and spill response is a ''high'' severity threat with a ''high'' level of certainty to the GOMx Bryde's whale.

Harmful Algal Blooms

Harmful Algal Blooms (HAB) occur throughout the Gulf of Mexico, with most blooms occurring off the coast of Florida. One of the most common HAB species, *Karenia brevis* (also known as the red tide organism), is common along coastal zones, but can also develop offshore. *Karenia brevis* produces neurotoxins that affect the nervous system by blocking the entry of sodium ions to nerve and muscle cells (Geraci *et al.,* 1989). The neurotoxins can accumulate in primary consumers through direct exposure to toxins in the water, ingestion, or inhalation. Once

neurotoxins have entered the food web, bioaccumulation can occur in predators higher up on the food web, like GOMx Bryde's whales.

HABs are also known to negatively affect marine mammal populations through acute and chronic detrimental health effects, including reproductive failure (reviewed in Fire *et al.,* 2009). Although no documented cases of GOMx Bryde's whale deaths resulting from HABs exist, cases involving humpback whales (*Megaptera novaeangliae;* Geraci *et al.*, 1989) and potentially fin (*B. physalus*) and minke whales (Gulland and Hall 2007) have been reported. Impacts from HABs have also been associated with large-scale mortality events for common bottlenose dolphins and manatees in the offshore and coastal waters of the northeastern Gulf of Mexico. Given the small population size of the GOMx Bryde's whale, the SRT noted that a HAB-induced mortality of a single breeding female would significantly degrade the status of the population. Largely due to human activities, HABs are increasing in frequency, duration, and intensity throughout the world (Van Dolah 2000). Based on the SRT's scoring, the threat of harmful algal blooms (HABs) is a ''moderate'' severity threat with a ''low'' level certainty.

Persistent Organic Pollutants and Heavy Metals

Concentrations of persistent organic pollutants (POP) are typically lower in baleen whales compared to toothed whales due to differences in feeding levels in the trophic system (Waugh *et al.,* 2014, Wise *et al.,* 2014b). In general, thresholds for adverse impacts to baleen whales resulting from POPs are unknown (Steiger and Calambokidis 2000).

Little is known about the effects of heavy metals on offshore marine mammal populations. Heavy metals can accumulate in whale tissue and cause toxicity (Sanpera *et al.,* 1996, Hernández *et al.,* 2000, Wise *et al.,* 2009). Similarly heavy metals accumulate in prey at the trophic levels where marine mammals feed. However, concentrations of heavy metals in tissue vary based on physiological and ecological factors such as geographic location, diet, age, sex, tissue, and metabolic rate (Das *et al.,* 2003). Although heavy metals are pervasive in the marine environment and documented in various marine mammal species, their impact on Bryde's whale health and survivorship is unknown. Based on the SRT's scoring, the threat of POPs and heavy metals are ''low'' severity threat, with a ''moderate'' level of certainty for POPs and a ''low'' level of certainty for heavy metals.

Summary of Factor A

We interpret the overall risk assigned by the SRT for ESA Factor A as ''high,'' indicating that there are a high number of threats that are moderately or very likely to contribute to the decline of the GOMx Bryde's whale, or some individual threats identified as very likely to contribute to the decline of the population. Specifically, the SRT found that energy exploration and development, and oil spills and spill response, were significant threats currently seriously degrading the GOMx Bryde's whale population. In addition, the SRT found that HABs, POPs, and heavy metals are not currently significantly contributing to the risk of extinction for the Gulf of Mexico Bryde's whale.

Based on the comprehensive status review and after considering the SRT's threats assessment, we conclude that energy exploration and development, and oil spills and spill response, are currently increasing the GOMx Bryde's whales risk of extinction.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The SRT considered two threats under ESA Factor B; historical whaling and scientific biopsy sampling. The overall rank assigned for Factor B, based on the SRT's scoring, is ''low.''

Historical Whaling

The SRT scored the impacts from historical whaling as a ''low'' severity threat with a ''moderate-high'' degree of certainty. Whaling that occurred in the 18th and 19th centuries in the Gulf of Mexico may have removed Bryde's whales. The primary target species were sperm whales, but other species were taken. Reeves *et al.,* (2011) indicated that, during the 18th and 19th centuries, whalers hunting ''finback whales'' in the Gulf of Mexico were most likely taking Bryde's whales, based on the known distribution and recent records of baleen whale species in the Gulf of Mexico. However, the total number of whales killed during that time cannot be quantified. The SRT determined that it is unlikely the current low abundance of GOMx Bryde's whales is related to historical whaling, as the population would have recovered to some extent, given the estimated population recovery rate (Wade 1998) and considering that whaling stopped over a century ago (Rosel *et al.,* 2016). Whaling is not a current threat in the Gulf of Mexico and is regulated by the International Whaling Commission (see Factor D). The SRT ranked the impacts from historical whaling as ''low'' severity threat with a ''moderate-high'' degree of certainty.

Scientific Biopsy Sampling

Scientific research that may have the potential to disturb and/or injure marine mammals such as the Bryde's whale requires a letter of authorization under the Marine Mammal Protection Act (MMPA). As of March 7, 2016 (the reference date used by the SRT), there was one active scientific permit authorizing non-lethal take of GOMx Bryde's whale and four scientific research permits authorizing non-lethal take of Bryde's whales worldwide, including the Gulf of Mexico. The permits authorize activities such as vessel or aerial surveys, photo-identification, behavioral observation, collection of sloughed skin, and passive acoustics. Four of the permits also authorize activities such as dart biopsies and/or tagging. Biopsy sampling, where a small piece of tissue is removed for analysis, is a common research activity used to support stock differentiation, evaluate genetic variation, and investigate health, reproduction and pollutant loads (Brown *et al.,* 1994). Research on wound healing from biopsies has indicated little long-term impact (Brown *et al.,* 1994, Best *et al.,* 2005). In addition, research activities are closely monitored and evaluated in the United States in an attempt to minimize impacts (see Factor D). The SRT scored the threat of scientific biopsy sampling as a ''low'' severity threat with a ''high'' level of certainty.

Summary of Factor B

The overall threat rank assigned for Factor B by the SRT was ''low,'' indicating there are a low number of threats that are likely to contribute to the decline of the GOMx Bryde's whale. We conclude, based on our review of the information presented in the Status Review report and SRTs threats assessment, that the threats posed by whaling and scientific biopsy sampling are not increasing the risk of extinction for the Gulf of Mexico Bryde's whale. Upon reviewing the information in the Status Review report and the SRT's threats assessment, we concluded that whaling and scientific biopsy sampling are low potential threats to the GOMx Bryde's whale and are not currently contributing to the risk of extinction.

Factor C. Disease, Parasites, and Predation

The SRT considered the following threats under ESA Factor C: Disease and

parasites, and predation. The overall rank assigned for Factor C based on the SRT's scoring was ''low.''

Disease and Parasites

There is little information on disease or parasitism of any Bryde's whale in the literature. Reviews of conservation issues for baleen whales have tended to see disease as a relatively inconsequential threat (Claphan *et al.,* 1999). The SRT noted that cetacean morbillivirus, which causes epizootics resulting in serious population declines in dolphin species (Van Bressem *et al.,* 2014), has also been detected in fin whales in the eastern Atlantic Ocean (Jauniaux *et al.,* 2000) and in fin whales and minke whales in the Mediterranean Sea (Mazzariol *et al.,* 2012; Di Guardo *et al.,* 1995). In the Gulf of Mexico the morbillivirus outbreaks that occurred in 1990, 1992, and 1994, caused marine mammal mortalities, with most the mortalities being common bottlenose dolphins (Rosel *et al.,* 2016). These outbreaks were thought to have originated in the Atlantic Ocean (Litz *et al.* 2014). An unusual mortality event involving hundreds of common bottlenose dolphins in the Atlantic Ocean from 2013–2015 was caused by morbillivirus (Rosel *et al.,* 2016). During this outbreak, a few individuals of multiple species of baleen whales in the Atlantic tested positive for the disease, indicating that it could potentially spread to Bryde's whales (Rosel *et al.,* 2016). However, there have been no confirmed morbillivirus-related deaths of Bryde's whales in the Gulf of Mexico (Rosel *et al.,* 2016).

The SRT identified only two cases of other diseases and parasites known to occur in Bryde's whale detected in Australia (Patterson 1984) and Brazil (Pinto *et al.,* 2004). Based on the SRT's scoring, the threat of disease and parasites is a ''low'' severity threat with ''low'' certainty.

Predation

Killer whales (*Orcinus orca)* are the only known predator to Bryde's whales and they occur in areas further offshore from the BIA (Silber & Newcomer 1990, Alava *et al.* 2013). There are no published records of killer whale predation of GOMx Bryde's whale (Rosel *et al.,* 2016). Killer whales have been observed harassing sperm whales and attacking pantropical spotted dolphins (*Stenella attenuate)* and a dwarf/pygmy sperm whale (*Kogia* sp.) (Pitman *et al.* 2001, Whitt *et al.* 2015, NMFS SEFSC, unpublished) in the Gulf of Mexico. While large sharks (*e.g.,* white sharks *Carcharodon carcharias,* and tiger sharks *Galaecerdo cuvier*) are known to scavenge on carcasses of Bryde's whales elsewhere in the world (Dudley *et al.* 2000), the SRT found no published reports of large shark predation on healthy, living individuals (Rosel *et al.,* 2016). Based on this information, the SRT's scoring of this threat was ''low'' severity with ''low'' certainty.

Summary of Factor C

The overall threat rank assigned for Factor C, based on the SRT's scoring was ''low,'' indicating that this category includes a low number of threats that are likely to contribute to the decline of the GOMx Bryde's whale. Based on the limited observance of disease, parasites, or predation, we concur that these are low potential threats to the GOMx Bryde's whale and are not currently contributing to their extinction risk.

Factor D. Inadequacy of Existing Regulatory Mechanisms

The relevance of existing regulatory mechanisms to extinction risk for an individual species depends on the vulnerability of that species to each of the threats identified under the other factors of ESA section 4, and the extent to which regulatory mechanisms could or do control the threats that are contributing to the species' extinction risk. If a species is not vulnerable to a particular threat, it is not necessary to evaluate the adequacy of existing regulatory mechanisms for addressing that threat. Conversely, if a species is vulnerable to a particular threat, we do evaluate the adequacy of existing measures, if any, in controlling or mitigating that threat. In the following paragraphs, we summarize existing regulatory mechanisms relevant to threats to GOMx Bryde's whale generally, and assess their adequacy for controlling those threats.

Marine Mammal Protection Act

In U.S. waters, Bryde's whales are protected by the MMPA (16 U.S.C. 1361 *et seq.*). The MMPA sets forth a national policy to prevent marine mammal species or population stocks from diminishing to the point where they are no longer a significant functioning element of their ecosystem. The Secretaries of Commerce and the Interior have primary responsibility for implementing the MMPA. The Secretary of Commerce has jurisdiction over the orders Cetacean and Pinnipedia with the exception of walruses, and the Secretary of Interior has jurisdiction over all other marine mammals. Both agencies are responsible for promulgating regulations, issuing permits, conducting scientific research, and enforcing regulations, as necessary, to carry out the purposes of the MMPA. The MMPA includes a general moratorium on the 'taking' and importing of marine mammals, which is subject to a number of exceptions. Some of these exceptions include 'take' for scientific purposes, public display, and unintentional incidental take coincident with conducting lawful activities. Any U.S. citizen, agency, or company who engages in a specified activity other than commercial fishing (which is specifically and separately addressed under the MMPA) within a specified geographic region may submit an application to the Secretary to authorize the incidental, but not intentional, taking of small numbers of marine mammals within that region for a period of not more than five consecutive years (16 U.S.C. 1371(a)(5)(A)). U.S. citizens can also apply under the MMPA for authorization to incidentally take marine mammals by harassment for up to 1 year (16 U.S.C. 1371(a)(5)(D)). For both types of authorizations, it must be determined that the take is of small numbers, has no more than a negligible impact on those marine mammal species or stocks, and does not have an unmitigable adverse impact on the availability of the species or stock for subsistence use. The MMPA also provides mechanisms for directed ''take'' of marine mammals for the purposes of scientific research. Non-lethal research takes of Bryde's whale for scientific research (*e.g.,* biopsy sampling) are currently authorized on a global scale and typically do not specify a geographic area. Hence the potential for multiple biopsies of an individual Bryde's whale does exist. However, any risk to GOMx Bryde's whale from multiple sampling is low, and we do not expect any mortalities to result. In these situations, we take a proactive role and coordinate with researchers to minimize any potential negative effects to a small population.

The MMPA currently identifies the Northern Gulf of Mexico stock of Bryde's whales as a ''strategic'' stock, because the level of direct human-caused mortality and serious injury exceeds the potential biological removal (PBR) level determined for the species, which could have management implications. The MMPA also provides additional protections to stocks designated as ''depleted'' and requires that conservation plans be developed to conserve and restore the stock to its optimum sustainable population (OSP). In order for a stock to be considered ''depleted'' the Secretary, after consultation with the Marine Mammal

Commission and the Committee of Scientific Advisors on Marine Mammals, must determine it is below its OSP or if the species or stock is listed under the ESA. In 2015, the Marine Mammal Stock Assessment Report determined that the status of the Northern Gulf of Mexico Population of Bryde's whales, relative to OSP was unknown, as there was insufficient information to determine population trends (SARS 2015). Due to this lack of information on OSP, the GOMx Bryde's whale is not designated as a ''depleted'' stock and there is no conservation plan. Based on the above, we conclude that, outside of the general protections provided to marine mammals by the MMPA, there are no specific regulatory mechanisms specific to the GOMx Bryde's whale under the MMPA.

Outer Continental Shelf Lands Act and the Oil Pollution Act

The SRT also identified existing regulatory mechanisms relating to oil and gas development and oil spills and spill response (see Factors A and E for a discussion of those threats). The Outer Continental Shelf Lands Act (OCSLA) establishes Federal jurisdiction over submerged lands on the OCS seaward of coastal state boundaries in order to explore and develop oil and gas resources. Implementation, regulation, and granting of leases for exploration and development on the OCS are delegated to the BOEM, and BOEM is responsible for managing development of the nation's offshore resources. The functions of BOEM include leasing, exploration and development, plan administration, environmental studies, National Environmental Policy Act (NEPA) analysis, resource evaluation, economic analysis, and the renewable energy program BSEE is responsible for enforcing safety and environmental regulations. OCSLA mandates that orderly development of OCS energy resources be balanced with protection of human, marine and coastal environments. It is the stated objective of the OCSLA ''to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages . . . or other occurrences which may cause damage to the environment or to property, or endanger life or health'' (43 U.S.C. 1332(6)). OCSLA further requires the study of the environmental impacts of oil and gas leases on the continental shelf, including an assessment of effects on marine biota (43 U.S.C. 1346). OCSLA, as amended, requires the Secretary of the Interior, through BOEM and BSEE, to manage the exploration and development of OCS oil, gas, and marine minerals (*e.g.,* sand and gravel) and the siting of renewable energy facilities. The Energy Policy Act of 2005, Public Law (Pub. L.) 109–58, added Section 8(p)(1)(C) to the OCSLA, which grants the Secretary of Interior the authority to issue leases, easements, or rights-of-way on the OCS for the purpose of renewable energy development (43 U.S.C. 1337(p)(1)(C)). This authority has been delegated to BOEM (30 CFR 585), who now regulates activities within Federal waters. Since 2006, there has been a moratorium on leasing new areas for oil and gas development and production in the Gulf of Mexico EPA that includes the waters offshore of Florida, including the BIA. The moratorium is set to expire in 2022 and, if it is not renewed, the GOMx Bryde's whale within the BIA could be exposed to increased energy exploration.

The Oil Pollution Act (OPA) of 1990 (33 U.S.C. 2701–2761) is the principal statute governing oil spills in the nation's waterways. OPA was passed following the March 1989 Exxon Valdez oil spill to address a lack of adequate resources, particularly Federal funds, to respond to oil spills (National Pollution Funds Center 2016). The OPA created requirements for preventing, responding to, and funding restoration for oil pollution incidents in navigable waters, adjoining shorelines, and Federal waters. The OPA authorizes Trustees (representatives of Federal, state, and local government entities, and Tribes with jurisdiction over the natural resources in question) to determine the type and amount of restoration needed to compensate the public for the environmental impacts of the spill. These assessments are typically described in damage assessment and restoration plans. The Final Programmatic Damage Assessment and Restoration Plan (PDARP) developed for the 2010 DWH oil spill found the GOMx Bryde's whale to be the most impacted oceanic and shelf marine mammal; 48 percent of the population was affected, resulting in an estimated 22 percent maximum decline in population size (DWH Trustees 2016). The DWH PDARP allocates fifty-five million dollars over the next 15 years for restoration of oceanic and shelf marine mammals, including Bryde's whales. The PDARP does not identify specific projects, but lays out a framework for planning future restoration projects, that may contribute to the restoration of GOMx Bryde's whale.

The ongoing impacts to the GOMx Bryde's whale from oil and gas development and oil spills in the Gulf of Mexico identified by the SRT indicate that existing regulatory mechanisms are not adequate to control these threats. While the current moratorium on leasing for new oil and gas development in the EPA appears to provide some protection to the GOMx Bryde's whale, the SRT found that development in the Gulf of Mexico continues to have broad impacts, through curtailment of range and anthropogenic noise from seismic surveys and vessels associated with oil and gas development. Additionally, the existing moratorium on new leases in the EPA expires in 2022 and, if not renewed, energy exploration would be allowed in the GOMx Bryde's whale BIA, resulting in potentially severe impacts to this small population. We acknowledge that activities under the DWH PDARP may be beneficial to GOMx Bryde's whales, but we also conclude that oil spills and spill response remain a serious current threat to the GOMx Bryde's whale population, as discussed above in Factor A.

International Convention for the Regulation of Whaling

The International Whaling Commission (IWC) was set up under the International Convention for the Regulation of Whaling (ICRW), signed in 1946. The IWC established an international moratorium on commercial whaling for all large whale species in 1982, effective in 1986; this affected all member (signatory) nations (paragraph 10e, IWC 2009a). Since 1985, IWC catch limits for commercial whaling have been set at zero. However, under the IWC's regulations, commercial whaling has been permitted in both Norway and Iceland based on their objection to specific provisions. In addition, harvest of whales by Japan for scientific purposes has been permitted by the ICRW, including the Bryde's whale in the North Pacific. However, distribution of the GOMx Bryde's whale does not overlap with any permitted commercial whaling. The SRT concluded the current commercial whaling moratorium provides significant protection for the GOMx Bryde's whale, and we concur.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is aimed at protecting species at risk from unregulated international trade and regulates international trade in animals and plants by listing species in one of its three appendices. The level of monitoring and control to which an animal or plant species is subject depends on the appendix in which the

species is listed. All Bryde's whales (*B. edeni*) are currently listed in Appendix I under CITES. Appendix I includes species that are threatened with extinction and may be affected by trade; trade of Appendix I species is only allowed in exceptional circumstances. Due to the IWC commercial whaling moratorium in place since 1985, commercial trade of Bryde's whale in the Gulf of Mexico has not been permitted. However, if the moratorium should be lifted in the future, the Bryde's whale's CITES Appendix I listing would restrict trade, so that trade would not contribute to the extinction risk of the species.

International Maritime Organization

The International Maritime Organization (IMO), a branch of the United Nations, is the international authority on shipping, pollution, and safety at sea and has adopted guidelines to reduce shipping noise and pollution from maritime vessels. Additionally, the IMO's Marine Environment Protection Committee occasionally identifies special areas and routing schemes for various ecological, economic, or scientific reasons. Some of these actions help benefit endangered right whales and humpback whales. However the SRT found no protected areas or routing schemes that would protect the GOMx Bryde's whale.

Mexico Energy Sector: Opening to Private Investment

The SRT expressed concern regarding potential oil and gas development in the southern Gulf of Mexico. Mexico recently instituted reforms related to its oil and gas sector that officially opened Mexico's oil, natural gas, and energy sectors to private investment. As a result, Mexico's state-owned petroleum company, Petroleos Mexicanos (Pemex) may now partner with international companies for the purposes of exploring the southern Gulf of Mexico's deep water and shale resources. The SRT found that more than 9 companies have shallow water lease permits either pending or approved, and 2D and 3D seismic data collection has begun. In 2013, the U.S. Congress approved the U.S.-Mexico Transboundary Hydrocarbons Agreement, which aims to facilitate joint development of oil and natural gas in part of the Gulf of Mexico. This agreement, coupled with recent reforms in Mexico, could lead to development within the Gulf of Mexico offshore Mexico oil and gas, including infrastructure for cross-border pipelines. The SRT found that recent developments indicate a high potential for oil and gas development in these waters. However, we believe that anticipating any future threats to the GOMx Bryde's whale at this point in time is overly speculative, because the best available science indicates that the GOMx Bryde's whale distribution does not currently include the southern Gulf of Mexico.

Summary of Factor D

The SRT unanimously agreed that the inadequacy of existing regulatory mechanisms factor is a ''high'' threat to the GOMx Bryde's whale (Rosel *et al.,* 2016). Specifically the SRT found that, given the current status and limited distribution of the Bryde's whale population in the Gulf of Mexico, it is clear that existing regulations have been inadequate to protect them. The SRT expressed particular concern regarding current oil and gas development and impacts from oil spills in the Gulf of Mexico, as well as vessel strikes due to shipping traffic. We agree that currently there are no regulatory mechanisms in the Gulf of Mexico to address ship strikes on GOMx Bryde's whales, which the SRT identified as one of the primary threats faced by the species (see Factor E below). Additionally, the Status Review report suggests that oil and gas development in the Gulf of Mexico have been a contributing factor to limiting the GOMx Bryde's whale's current range to the De Soto Canyon. Thus, while we acknowledge that existing protective regulations are in place, we agree with the SRT's overall conclusion that the existing regulatory mechanisms have not prevented the current status of the GOMx Bryde's whale, for the reasons stated above.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

The SRT categorized threats under ESA Factor E by three groups: A general category for ''other natural or human factors;'' anthropogenic noise; and small population concerns. Within the general sub-category for other natural or human factors, the SRT included: Vessel collision; military activities; fishing gear entanglements; trophic impacts due to commercial harvest of prey; climate change; plastics and marine debris; and aquaculture. Within the anthropogenic noise sub-category of Factor E, the SRT included: Aircraft and vessel noise associated with oil and gas activities; drilling and production noise associated with oil and gas activities; seismic survey noise associated with oil and gas activities; noise associated with military training and exercises; noise associated with commercial fisheries and scientific acoustics; and noise associated with vessels and shipping traffic. Within the small population concerns sub-category of Factor E, the SRT included: Allee effects; demographic stochasticity; genetics; k-selected life-history parameters; and stochastic and catastrophic events. An explanation of these threats and the SRT's ranking for each of these sub-categories follows.

Other Natural or Human Factors

Vessel Collision—Vessel collisions are a significant source of mortality for a variety of coastal large whale species (Laist *et al.,* 2001). The northern Gulf of Mexico is an area of considerably high amount of ship traffic, which increases the risk of vessel-whale collisions (Rosel *et al.,* 2016). Several important commercial shipping lanes travel through the primary GOMx Bryde's whale habitat in the northeastern Gulf of Mexico, particularly vessel traffic from ports in Mobile, Pensacola, Panama City, and Tampa (see Figure 17; Rosel *et al.,* 2016). In 2009, a GOMx Bryde's whale was found floating dead in the Port of Tampa, Tampa Bay, Florida. The documented cause of death was blunt impact trauma due to ship strike (Waring *et al.,* 2016). The necropsy report found that the whale was a lactating female indicating that the whale was nursing a calf. It is likely that the calf died, as it was still dependent on the mother.

Bryde's whales are the third most commonly reported species struck by ships in the southern hemisphere (Van Waerebeek *et al.,* 2007). As previously described, tracking information from a single GOMx Bryde's whale indicated a consistent diel dive pattern over 3 days, with 88 percent of nighttime hours spent within 15 m of the surface. This suggested to the SRT that, if other individuals exhibit a similar diving pattern, they would be at greater risk of ship strike, because they spend most of the time at the surface at night when there is minimal visibility. Marine mammals that spend the majority of their nighttime hours near the surface and animals that spend more time at or near the surface are at greater risk than species that spend less time at the surface (Rosel *et al.,* 2016). Additionally, the threat of vessel collision may increase in the future given the expansion of the Panama Canal, which is anticipated to increase vessel traffic in the Gulf of Mexico (Institute for Water Resources 2012). Given the location of commercial shipping lanes, the difficulty of sighting a whale at the surface at night, and the low ability of large ships to change course quickly enough to avoid a whale, the SRT's scoring indicates that ship

strikes pose a ''high'' severity threat to the GOMx Bryde's whale with ''high'' certainty.

Military Activities—Significant portions of the Gulf of Mexico are used for military activities. NMFS conducted a 2013 Biological Opinion to assess the impact of the Navy training exercises and coordinated via a Letter of Authorization under the MMPA to govern unintentional takes incidental to training and testing activities (Rosel *et al.,* 2016). Although Level B harassment (*i.e.,* activities that have the potential to disturb or harass) is authorized, the Navy determined that very few training or testing activities are likely to occur within the BIA (see Figures 18 and 19 in Rosel *et al.,* 2016). Moreover, the Navy agreed to expand their Planning Awareness Area to encompass the Bryde's whale BIA and as a result they will avoid planning major training activities there, when feasible. In addition, Eglin Air Force Base (AFB) also conducts training exercises in the Gulf of Mexico. Eglin AFB also has an incidental harassment authorization for common bottlenose dolphin and Atlantic spotted dolphin, for their Maritime Weapon Systems Evaluation Program. However, their training activities take place in relatively shallow water (*i.e.,* 35 to 50 m depth). Eglin AFB does not anticipate that its activities would take GOMx Bryde's whales, because the GOMx Bryde's whales are rare in the areas involved (*e.g.,* shallow waters); therefore, Eglin AFB did not request a take authorization (Rosel *et al.,* 2016; 81 FR 7307, February 11, 2016). The SRT concluded that, although there are military activities in the Gulf of Mexico, including the northern Gulf of Mexico, most activities appeared to occur outside the BIA. In addition, they found that military activities are not constant, and due to the current scope of existing activities, the threat was considered less likely to have negative impacts on the population (Rosel *et al.,* 2016). However, the SRT believed that this threat would need to be re-evaluated if the intensity, timing, or location of military training exercises encroached closer to the BIA. Based on the SRT rankings, the threat of military activities (*i.e.,* explosive pressure waves, target training, and vessel activities) is a ''moderate'' threat with ''low'' certainty. The threat of noise from military activities is considered under the *Anthropogenic Noise* section, below.

Fishing Gear Entanglement—Marine mammals are known to become hooked, trapped, or entangled in fishing gear, leading to injury or mortality (Read 2008, Reeves *et al.,* 2013). While gear interactions are documented more frequently for toothed whales, they remain a threat to small populations of baleen whales like the GOMx Bryde's whale (Reeves *et al.,* 2013). The SRT evaluated the special distribution and fishing effort for 12 fisheries that occur in the Gulf of Mexico. Based on their evaluation, the SRT concluded that five commercial fisheries (Table 7; Rosel *et al.,* 2016) overlap or possibly overlap with the Bryde's whale BIA and use gear types (*i.e.,* pelagic longlines, bottom longlines, and trawls) that pose entanglement threats to whales.

Pelagic longlines are a known entanglement threat to baleen whales, as the majority of mainline gear is in the water column and animals swimming in the area may interact with the gear (Andersen *et al.,* 2008). The Atlantic Ocean, Caribbean, Gulf of Mexico commercial pelagic longline fishery for large pelagic species is active within the GOMx Bryde's whale BIA. Approximately two thirds of the BIA has been closed to commercial pelagic longline fishing year-round since 2000, when the Highly Migratory Species Atlantic Tunas, Swordfish, and Sharks Fishery Management Plan was amended to close the De Soto Canyon Marine Protected Area (65 FR 47214, August 1, 2000). While longline fishing still occurs in the remaining one third of the BIA (Figure 20B; Rosel *et al.,* 2016), the fishery typically operates in waters greater than 300m, where sightings of Bryde's whales are infrequent. To date, no interactions between GOMx Bryde's whale and pelagic longline gear have been recorded.

Gulf reef fish and shark bottom longline gear consists of a monofilament mainline up to a mile in length anchored on the seafloor, with up to 1,000 baited hooks along the mainline and marked with buoys. Generally bottom longline gear poses less of a threat of entanglement threat to cetaceans compared to pelagic longline gear, except when cetaceans forage along the seafloor. Such foraging appears to be the case with the GOMx Bryde's whale, exposing them to risk of entanglement in mainlines. These fisheries overlap spatially with the GOMx Bryde's whale BIA. While bottom longlining typically occurs in waters less than 100m, fishing for yellowedge grouper, golden tilefish, blueline tilefish, and sharks occurs in deeper waters between 100 and 300m within the BIA. The available information indicates the GOMx Bryde's whale forages on or near the seafloor bottom, such that, potential for interactions exists, although no interactions have been recorded (Rosel *et al.,* 2016).

Both the Gulf of Mexico shrimp trawl fishery and the butterfish trawl fishery occur within the GOMx Bryde's whale BIA (Rosel *et al.,* 2016). However, the shrimp trawl fishery has limited spatial overlap with the BIA and the areas that do overlap represent only a small portion of total fishing effort. The butterfish trawl fishery is small, with only two participants currently permitted, and limited available information. Based on the SRT's scoring, the threat of entanglement in commercial fishing gear is ''moderate'' in severity with ''moderate'' certainty.

Trophic Impacts Due to Commercial Harvest of Prey Items—While GOMx Bryde's whales' prey in the Gulf of Mexico are currently unknown (Rosel *et al.,* 2016), they likely feed on anchovy, sardine, mackerel and herring, and small crustaceans, similar to Bryde's whales worldwide (Kato 2000). The two main Gulf of Mexico commercial fisheries for small schooling fish are the Gulf of Mexico menhaden purse-seine fishery and the Florida west coast sardine purse-seine fishery; the main invertebrate fishery is the Gulf of Mexico shrimp trawl fishery. The SRT concluded that direct competition between GOMx Bryde's whale and commercial fisheries did not appear to be likely, based on the current distribution of the GOMx Bryde's whale, the distribution of fishery effort, and presumed fish and invertebrate habitat (Rosel *et al.,* 2016). The SRT also evaluated the threat of total biomass removal by the menhaden purse-seine fishery and the shrimp trawl fishery in the Gulf of Mexico and the resulting impact on ecosystem functioning, species composition, and potential trophic pathway alterations, and concluded that the ecosystem and trophic effects of these removals are unknown. Based on the SRT's scoring, the threat from trophic impacts due to commercial harvest of prey is a ''low'' severity threat with ''low'' certainty.

Climate Change—The impacts of climate change on cetaceans are not easily quantified; however direct and indirect impacts are expected (Evans and Bjørge 2013). Potential impacts of climate change on marine mammals include range shifts, habitat degradation or loss, changes to the food web, susceptibility to disease and contaminants, and thermal intolerance (MacLeod 2009, Evans and Bjørge 2013). The restricted distribution of the GOMx Bryde's whale is a concern, as climate change may disproportionately affect species with specialized or restricted habitat requirements. As water temperatures rise, many marine species will have to shift their distributions

northward or in a direction that maintains a near-constant environment (*e.g.,* temperature and prey availability) (Evans *et al.,* 2010). Within the Gulf of Mexico, GOMx Bryde's whales have little room to shift their distribution northward into cooler waters. Furthermore, the predicted changes in freshwater inflow and the associated effects on productivity may affect the health of the Gulf of Mexico. While recognizing the potential threat that climate change poses to the GOMx Bryde's whale, the SRT considered that there are more significant and immediate pressures on the GOMx Bryde's whale (Rosel *et al.,* 2016). The SRT assigned the threat of climate change as a ''low'' severity threat to GOMx Bryde's whale with ''low'' certainty.

Plastics and Marine Debris—Plastics comprise 60–80 percent of all marine debris (Baulch and Perry 2014), and derelict fishing gear is the second most common form of marine debris (National Oceanic Service 2015). The interactions of marine mammals with marine debris in the Gulf of Mexico are not frequently documented and the SRT did not find any documented cases specific to Bryde's whale (NOAA Fisheries Marine Mammal Health and Stranding Response Database). Less than one percent of marine mammal strandings in the Gulf of Mexico from 2000–2014 showed evidence of entanglement or ingestion of marine debris (NOAA Fisheries Marine Mammal Health and Stranding Response Database, March 21, 2016). While noting that the records of reported marine mammal strandings may not be comprehensive, the SRT's scoring ranked this threat as ''low'' severity with ''low'' certainty (Rosel *et al.,* 2016).

Aquaculture—There are currently no aquaculture facilities in the U.S. waters of the Gulf of Mexico. However, a final rule was published on January 13, 2016 (81 FR 1761) regulating offshore marine aquaculture in the Gulf of Mexico and establishing a regional permitting process. We note that this final rule is currently under challenge in a pending court proceeding, *Gulf Fishermen's Association, et al.* v. *NMFS,* 16–cv–01271 (E.D. La.). The associated Fishery Management Plan for Regulating Offshore Aquaculture in the Gulf of Mexico (FMP) specifies that each facility must satisfy a list of siting requirements and conditions and specifies that an application may be denied for potential risks to essential fish habitat, endangered and threatened species, marine mammals, wild fish and invertebrate stocks, public health, or safety (Gulf of Mexico Fishery Management Council and National Marine Fisheries Service 2009). Marine mammals are known to interact with aquaculture facilities through physical interaction with nets, ropes, twine and anchor lines (Price and Marris 2013). Because each application, including the proposed location, will be considered on a case-by-case basis, taking into account potential impacts to marine mammals, and no aquaculture facilities are currently sited in the Gulf of Mexico, the SRT scoring indicates that the SRT found aquaculture to be a ''low'' severity threat with ''low'' certainty.

Anthropogenic Noise—A variety of anthropogenic noise sources, such as energy exploration and development and shipping have considerable energy at low frequencies (<100 Hz) (Sodal 1999; Nieukirk *et al.,* 2004; Hildebrand 2009; Nieukirk *et al.,* 2012) and are pervasive in the Gulf of Mexico (Rosel *et al.,* 2016). Baleen whales produce calls that span a similar low frequency range (20 Hz–30 kHz), and therefore, presumably these species' best hearing abilities fall within this range, and are most impacted by low-frequency sounds (Richardson *et al.,* 1995, Ketten 1997, Ketten *et al.,* 2013, Cranford and Krysl 2015). Marine mammals rely heavily on their hearing to detect and interpret communication and environmental cues to select mates, find food, maintain group structure and relationships, avoid predators, navigate, and perform other critical life functions (Rosel *et al.,* 2016). As noise levels rise in the marine environment, there are a variety of direct and indirect adverse physical and behavioral effects to marine mammals such as death, hearing loss or impairment, stress, behavioral changes, physiological effects, reduced foraging success, reduced reproductive success, masking of communication and environmental cues, and habitat displacement (Richardson *et al.,* 1995, Southall *et al.,* 2007, Francis and Barber 2013). The SRT evaluated anthropogenic noise and separately assessed, as detailed below, noise from aircraft and vessels associated with oil and gas activities, seismic surveys associated with oil and gas activities, noise associated with military training and exercises, noise associated with commercial fisheries and scientific acoustics, and noise associated with vessels and shipping traffic.

Noise Generated from Aircraft and Vessels and Oil Drilling and Production Associated with Oil and Gas Activities—Aircraft and vessel operations (service vessels, etc.) support outer continental shelf oil and gas activities in the Gulf of Mexico. Routine aircraft overflights may interrupt and elicit a startle response from marine mammals nearby (Richardson *et al.,* 1995). However, if marine mammals are nearby, the disturbance caused by helicopters approaching or departing OCS oil and gas facilities will be short in duration and transient in nature. The SRT reasoned that aircraft and vessel operations may ensonify large areas, but due to the lack of oil and gas activities currently in the eastern Gulf of Mexico, the threat from service aircraft and vessel noise to GOMx Bryde's whale should be minimal.

Oil drilling and production activities produce low-frequency underwater sounds that are in the frequency range detectable by the GOMx Bryde's whale and, given the amount of drilling activity and platforms in the central and western Gulf of Mexico, noise levels are already high. While there are currently no wells being drilled in the eastern Gulf of Mexico, and no production platforms in place, the potential opening of the EPA that overlaps the GOMx Bryde's whale BIA for oil and gas exploration is of considerable concern (Rosel *et al.,* 2016). Based on the SRT's scoring, the threat of noise generated from aircraft and vessels associated with oil and gas activities and noise from drilling and oil production is a ''moderate'' threat, with a ''moderate'' level of certainty for noise associated with aircraft and vessels, and the SRT assigned a ''low'' level of certainty for noise generated from drilling and oil production.

Seismic Survey Noise Associated with Oil and Gas Activities—The northern Gulf of Mexico is an area of high seismic survey activity; seismic surveys are typically conducted 24 hours a day, 365-days a year, using airguns that are a source of primarily low-frequency sound (Sodal 1999), and that overlap with ranges baleen whales use for communication and hearing (Rosel *et al.,* 2016). These low-frequency sounds can travel substantial distances and airgun sounds have been recorded many hundreds of miles away from the survey locations (Nieukirk *et al.,* 2004). Seismic surveys have the potential to cause serious injury to animals within 100m–1km of airguns with source levels of 230 dB re 1 µPa (peak) or higher (Southall *et al.,* 2007). Behavioral changes following seismic surveys, specifically changes in vocal behavior and habitat avoidance, have been documented for baleen whales (Malme *et al.,* 1984, McCauley *et al.,* 1998, Gordon *et al.,* 2001, Blackwell *et al.,* 2015). While reactions of Bryde's whales to seismic surveys have not been studied, the

auditory abilities of all baleen whale species are considered to be broadly similar based upon vocalization frequencies and ear anatomy (Ketten 1998). There are currently few seismic surveys occurring in the eastern Gulf of Mexico, due in part to the moratorium on energy exploration in the EPA; however, the SRT noted that, given the ability of low-frequency sounds to travel substantial distances, sounds from nearby surveys may be impacting the GOMx Bryde's whales in the BIA. The SRT scorned anthropogenic noise associated with seismic surveys as a ''high'' severity threat with ''moderate'' certainty.

Noise Associated with Military Training and Exercises—Military training and exercises use active sonar sources and explosives as part of their operations and each of these sources have the potential to impact marine mammals (Rosel *et al.,* 2016). However, as discussed above, most military activities that occur in the Gulf of Mexico take place outside of the GOMx Bryde's whale BIA and the Navy expanded their Planning Awareness Area to encompass the BIA (see *Military Activities* above). The SRT found this threat to be less likely to have a negative impact on the GOMx Bryde's whale compared to other threats associated with the anthropogenic noise considered in this sub-category. Therefore, the SRT assigned the threat of noise associated with military training and exercises as ''low'' in severity with a ''moderate'' level of certainty.

Noise Associated with Commercial Fisheries and Scientific Acoustics—Commercial and scientific vessels employ active sonar for the detection, localization, and classification of underwater targets, including the seafloor, plankton, fish, and human divers (Hildebrand 2009). Source frequencies of many of these sonars are likely above the frequency range for Bryde's whale hearing (Watkins 1986, Au et al. 2006, Tubelli et al. 2012). Recent technological advancements, such as Ocean Acoustic Waveguide Remote Sensing (OAWRS) system, use low-frequency acoustics that have the potential to impact baleen whale behavior (Risch *et al.,* 2012). However, the SRT concluded these low-frequency systems are not likely to be used in U.S. waters in the future (Rosel *et al.,* 2016). Because the acoustic frequencies associated with the sonar systems employed by commercial fisheries and scientific vessels are not within the range of GOMx Bryde's whale hearing and are not likely to be used in the Gulf of Mexico, the SRT assigned the threat of noise associated with commercial fisheries and scientific acoustics a ranking of ''low'' in severity with ''low'' certainty.

Noise Associated with Shipping Traffic and Vessels—Noise from shipping traffic is an unintended byproduct of shipping and depends on factors such as ship type, load, speed, ship hull and propeller design; noise levels increase with increasing speed and vessel size (Allen *et al.,* 2012, McKella et al 2012b, Rudd *et al.,* 2015). Shipping noise is characterized by mainly low frequencies (Hermannsen *et al.,* 2014) and contributes significantly to low-frequency noise in the marine environment (National Research Council 2003, Hildebrand 2009). Approximately 50 percent of U.S. merchant vessel traffic (as measured by port calls or tonnage for merchant vessels over 1000 gross tons) occurs at U.S. Gulf of Mexico ports, indicating shipping activity is a significant source of noise in this region. Noise is likely to increase as shipping trends indicate that faster, larger ships will traverse the Gulf of Mexico following expansion of the Panama Canal (Rosel *et al.,* 2016).

Shipping noise in the northeast United States was predicted to reduce the communication space of humpback whales, right whales, and fin whales by 8 percent, 77 percent, and 20 percent, respectively, by masking their calls (Clark et al. 2009). Because Bryde's whale call source levels are most similar to those of right whales, the SRT found they may be similarly impacted (Rosel *et al.,* 2016). Documented impacts of vessel and shipping noise on marine mammals, like the GOMx Bryde's whale, include: habitat displacement; changes in diving and foraging behavior; changes in vocalization behavior; and altered stress hormone levels (Rosel *et al.,* 2016).

The SRT found that there is a high level of low frequency noise caused by shipping activity in the Gulf of Mexico, and that it is likely the GOMx Bryde's whale is experiencing significant biological impacts as a result. The impacts to the GOMx Bryde's whale are assumed to be similar to those observed in other low frequency hearing baleen whale species, and include increased stress hormone levels, changes in dive and foraging behavior and communication, and habitat displacement. The SRT assigned the threat of noise associated with shipping traffic and vessels a score of ''moderate'' severity threat with ''moderate'' certainty.

Small Population Concerns

The final sub-category considered by the SRT under ESA Factor E was small population concerns. The SRT considered Allee effects, demographic stochasticity, genetics, k-selected life-history parameters, and stochastic and catastrophic events under this sub-category.

Allee Effects—If a population is critically small in size, individuals may have difficulty finding a mate. The probability of finding a mate depends largely on density (*i.e.,* abundance per area) rather than absolute abundance alone (Rosel *et al.,* 2016). As previously discussed, noise from ships and industrial oil activities, including seismic exploration, could mask mating calls and contribute to reduced fecundity of the GOMx Bryde's whale (Rosel *et al.,* 2016). The small population size (*i.e.,* likely less than 100 individuals) may mean that Allee effects are occurring, making it difficult for individual whales to find one another for breeding, thereby reducing the population growth rate. The SRT's scored the impacts from Allee effects as a ''moderate'' threat in both severity and certainty.

Demographic Stochasticity—Demographic stochasticity refers to the variability of annual population change arising from random birth and death events at the individual level. Populations that are small in number are more vulnerable to adverse effects from demographic stochasticity. Demographic stochasticity is also more problematic for slowly reproducing species, such as GOMx Bryde's whales, which under normal conditions are likely to produce a calf every two to three years, similar to Bryde's whales worldwide and Eden's whale. Mean population growth rates can be reduced by variances in inter-annual growth rates, and this variance steadily increases as the population size decreases (Goodman 1987). The SRT also noted that, while skewed sex ratios do not currently appear to be a problem for GOMx Bryde's whales, their low calving rate and small population size create a higher probability of developing skewed sex ratios through chance alone. The SRT's scored the threat from impacts from demographic stochasticity as ''high'' in both severity and certainty.

Genetics—Genetic stochasticity results from three separate factors: Inbreeding depression, loss of potentially adaptive genetic diversity and mutation accumulation (Frankham 2005, Reed 2005). The SRT concluded that the very small population size and documented low level of genetic

diversity (Rosel and Wilcox 2014) indicates that the GOMx Bryde's whale is likely already experiencing inbreeding (mating with related individuals) that could lead to a loss of potentially adaptive genetic diversity and accumulation of deleterious mutations (Frankham 2005, Reed 2005). Applying the estimate from Taylor *et al.,* (2007) of 0.51 for the proportion of a Bryde's whale population that is mature, and assuming a stable age distribution, the SRT concluded there would be at most 50 mature individuals for the GOMx Bryde's whale population, putting the whales at immediate recognized risk for genetic factors. Even with a 50–50 sex ratio, the SRT concluded that current abundance estimates are so low that current Bryde's whale population levels would meet any genetic risk threshold for decreased population growth due to inbreeding depression and potential loss of adaptive genetic diversity (Rosel *et al.,* 2016). The SRT scored the threat of genetic stochasticity as ''high'' in both severity and certainty.

K-Selected Life History Parameters—In general all whales are considered as k-selected species due to their life history characteristics of large-size, late-maturity, and iteroparous reproduction that is energetically expensive, resulting in few offspring. K-selected life history characteristics in and of themselves are not a problem for baleen whales, but a small population size coupled with a low productivity rate further hinders population growth and increases the time frame for recovery when, as with the GOMx Bryde's whale, the population size is small and overly vulnerable to threats (Rosel *et al.,* 2016). The SRT assigned the threat from k-selective life history parameters a score of ''high'' in severity and certainty.

Stochastic and Catastrophic Events—The small number of GOMx Bryde's whales and their restricted range (*i.e.,* De Soto Canyon area of the northeastern Gulf of Mexico) exacerbates the species' vulnerability to stochastic and catastrophic events. Further, the GOMx Bryde's whales are in close proximity to oil extraction developments, extreme weather events, and HABs. For example, an analysis of the impacts of Deepwater Horizon oil spill on cetacean stocks in the Gulf of Mexico estimated that 17 percent of the GOMx Bryde's whale population was killed (DWH Trustees 2016). The SRT scored the threat from stochastic and catastrophic events on the GOMx Bryde's whale as ''high'' in severity with ''high'' certainty.

Summary of Factor E

The overall threat rank for ESA Factor E by the SRT was influenced by the suite of threats assessed by the SRT. Based on the SRT's scoring, vessel collision, followed by fishing gear entanglements, presents the most serious individual threats of those considered in the generic ''other natural and human factors,'' category. The threat of vessel collision is a significant source of mortality for a variety of coastal whale species and several important commercial shipping lanes travel through the GOMx Bryde's whale BIA (Rosel *et al.,* 2016). Fishing gear entanglement from the pelagic longline and bottom longline fisheries is a threat due to the spatial overlap between these fisheries and the Bryde's whale BIA, and the potential for interactions given the whale's foraging behavior (Rosel *et al.,* 2016). The SRT's overall threat ranking for the generic ''other natural or human factors category'' was moderate-high. The SRT's overall threat ranking for the sub-category of ''anthropogenic noise'' was ''high'', which was driven strongly by the impacts of seismic noise, shipping noise, and oil and gas activities. The greatest threat identified by the SRT under ESA Factor E was ''small population concerns, which the SRT's scoring unanimously assigned a ''high'' overall threat rank.

In summary, the SRT found the level of anthropogenic noise in the Gulf of Mexico, the cumulative threat posed by energy exploration, development and production, and the risk of vessel collisions, in combination with the small population size, are threats that are likely to eliminate or seriously degrade the population. The overall rank the SRT assigned for Factor E was ''high'' (*i.e.,* two high overall ranks and one moderate-high overall rank), indicating that there are a high number of threats that are moderately or very likely to contribute to the decline of the GOMx Bryde's whale. Considering the assessment completed by the SRT, we determine that the threats considered under Factor E are currently increasing the risk of extinction for the GOMx Bryde's whale.

NMFS' Conclusions From Threats Evaluation

The most serious threats to the GOMx Bryde's whale are: Energy exploration and development, oil spills and oil spill response, vessel collision, anthropogenic noise, and the effects of small population size. We consider these threats, under ESA section 4(a)(1) factors A and E, as overall ''high'' threats. We agree with the SRT's assessment that these threats are currently affecting the status of the GOMx Bryde's whale, and find that they are putting it at a heightened risk of extinction. We also agree with the SRT's characterization of factors B and C, overutilization for commercial, recreational, scientific, or educational purposes and disease, parasites, or predation, and their low overall ranking. We find that these are not factors that are likely contributing to the extinction risk for the GOMx Bryde's whale. Finally, we agree with the SRT's overall conclusion for Factor D, that existing regulatory measures have not adequately prevented the GOMx Bryde's whale from reaching its current status, given the presence of current threats to the GOMx Bryde's whale identified under Factors A and E.

Demographic Risk Analysis

The SRT also evaluated four demographic factors to assess the degree of extinction risk: Abundance, spatial distribution, growth/productivity, and genetic diversity. These demographic criteria have been used in previous NMFS status reviews to summarize and assess a population's extinction risk due to demographic processes. The SRT used the following definitions to rank these factors: 1 = ''No or low risk: it is unlikely that this factor contributes significantly to risk of extinction, either by itself or in combination with other factors;'' 2 = ''Low risk: it is unlikely that this factor contributes significantly to risk of extinction by itself, but some concern that it may contribute, in combination with other factors;'' 3 = ''Moderate risk: it is likely that this factor in combination with others contributes significantly to risk of extinction;'' 4 = ''High risk: it is likely that this factor, by itself, contributes significantly to risk of extinction''; and 5 = ''Very high risk: it is highly likely that this factor, by itself, contributes significantly to risk of extinction.'' As described in detail below, the SRT concluded that each of these four demographic factors are likely to contribute significantly to the risk of extinction for the GOMx Bryde's whale.

The SRT determined that both abundance and spatial distribution were ''very high risk'' factors, meaning that it is highly likely that each factor, by itself, contributes significantly to the risk of extinction. The SRT concluded the best available science indicated: (1) The number of GOMx Bryde's whales is likely less than 100 mature individuals, and (2) their current distribution restricted to a small region along the continental shelf break (100–300 m) in the De Soto Canyon makes them

vulnerable to catastrophe. The SRT concluded that the GOMx Bryde's whale constitutes a dangerously small population, at or below the near-extinction population level, and the species' restricted range makes it vulnerable to a single catastrophic event (Rosel *et al.,* 2016).

The SRT ranked both growth/productivity and genetic diversity as ''high'' risk factors, meaning that it is likely that each factor, by itself, contributes significantly to the risk of extinction. The SRT noted that the life-history characteristics of the GOMx Bryde's whale (*i.e.,* late-maturing, long gestation, single offspring) result in a slower recovery ability from their small population size and leads to a longer time during which a risk factor like a catastrophe could occur (Rosel *et al.,* 2016). Allee effects were also identified by the SRT as increasing extinction risk because the small number of individuals reduces population growth rate through mate limitation (Rosel *et al.,* 2016). Similarly, the low level of genetic diversity, documented in both mtDNA and nuclear DNA by Rosel and Wilcox (2014), combined with the small population size, means that individuals are likely breeding with related individuals and inbreeding depression may be occurring, resulting in a loss of genetic diversity (Rosel *et al.,* 2016).

Extinction Risk Analysis

The SRT considered the information provided in the Status Review report and demographic risk factors to conduct an Extinction Risk Analysis (ERA). The SRT summarized its ERA for the GOMx Bryde's whale, placing it in the context of our agency guidelines on how to synthesize extinction risk (NMFS 2015). Those agency guidelines define the high extinction risk category as:

> A species or DPS with a high risk of extinction is at or near a level of abundance, productivity, spatial structure, and/or diversity that places its continued persistence in question. The demographics of a species or DPS at such a high level of risk may be highly uncertain and strongly influenced by stochastic or depensatory processes. Similarly, a species or DPS may be at high risk of extinction if it faces clear and present threats (*e.g.,* confinement to a small geographic area; imminent destruction, modification, or curtailment of its habitat; or disease epidemic) that are likely to create present and substantial demographic risks.

Applying this standard, the SRT unanimously agreed that the GOMx Bryde's whale has a high risk of extinction.

The SRT provided the following summary of the concerns leading to its overall extinction risk assessment:

> The GOMx Bryde's whale population is very small and is restricted to a small habitat area in the De Soto Canyon region of the northeastern [Gulf of Mexico]. Their level of genetic divergence from other Bryde's whales worldwide indicates they are reproductively isolated and on a unique evolutionary trajectory. The Society for Marine Mammalogy's Committee on Taxonomy concluded they represent at least an unnamed subspecies of Bryde's whales. Although the historic population size is unknown, whaling data indicate their distribution in the [Gulf of Mexico] was once much broader. The Team concluded, therefore, based on the best available scientific data, that there has been a range contraction such that their primary range is restricted to the northeastern [Gulf of Mexico] although there are limited data from outside U.S. waters. The north-central and western [Gulf of Mexico] contains some of the most industrialized marine waters in the U.S. due to expansive energy exploration and production, and also experiences significant commercial shipping traffic and commercial fishing activity. The area in the northeastern [Gulf of Mexico], where all verified sightings of Bryde's whales have been recorded during cetacean surveys, has experienced the least amount of energy exploration, due in part to a moratorium put in place in 2006. However, this moratorium expires in 2022 and the eastern [Gulf of Mexico] could be exposed to increased energy activities. Commercial fishing and vessel traffic also could affect the whales in the eastern [Gulf of Mexico].
>
> The Team concluded that the small population size alone put the GOMx Bryde's whale at high risk of extinction. The small size of this population makes it vulnerable to inbreeding depression, demographic stochasticity, and stochastic and catastrophic events. The combination of small size plus risk factors that may have affected the population in the past and may affect it in the future, further increase the extinction risk. These factors include, in particular, impacts due to energy exploration (*e.g.,* habitat modification, noise from seismic surveys, and shipping) and energy production (*e.g.,* oil spills), and vessel collisions. The Team's concern for this group of whales is further increased by uncertainty regarding the cause(s) of its small population size, its limited distribution, current and future threats, and the long-term viability of the population (Rosel *et al.,* 2016).

We consider the SRT's approach to assessing the extinction risk for GOMx Bryde's whale appropriate, consistent with our agency guidance, and based on the best scientific and commercial information available. Based on the key conclusions from the Status Review report, including the ERA (Rosel *et al.,* 2016), we find that the GOMx Bryde's whale is a species, as defined by the ESA, which is in danger of extinction throughout all of its range, as a result of ESA Factors A (the present or threatened destruction, modification or curtailment of a species' habitat or range), D (inadequacy of existing regulatory mechanisms), and E (other natural or manmade factors affecting its continued existence). Accordingly, we find that the species meets the definition of an endangered species.

Protective Efforts

Section 4(b)(1)(A) of the ESA requires the Secretary, when making a listing determination for a species, to take into consideration those efforts, if any, being made by any State or foreign nation to protect the species. To evaluate the efficacy of domestic efforts that have not yet been implemented or that have been implemented, but have not yet demonstrated to be effective, the Services developed a joint ''Policy for Evaluation of Conservation Efforts When Making Listing Decisions'' (PECE) (68 FR 15100; March 28, 2003). The PECE is designed to ensure consistent and adequate evaluation on whether domestic conservation efforts that have been recently adopted or implemented, but not yet proven to be successful, will result in recovering the species to the point at which listing is not warranted or contribute to forming the basis for listing a species as threatened rather than endangered. The PECE is expected to facilitate the development of conservation efforts by states and other entities that sufficiently improve a species' status so as to make listing the species as threatened or endangered unnecessary.

The PECE establishes two overarching criteria to use in evaluating efforts identified in conservations plans, conservation agreements, management plans or similar documents: (1) The certainty that the conservation efforts will be implemented; and (2) the certainty that the efforts will be effective. We have considered the actions identified by the SRT (*i.e.,* potential future DWH PDARP restoration activities and Gulf of Mexico Marine Assessment Program for Protected Species (GoMMAPPS) as conservation efforts and we have concluded that they do not meet the PECE policy criteria (see analysis below).

The Status Review report (Rosel *et al.,* 2016) summarized two known conservation efforts, both of which are planned and have yet to be implemented, which we further assess here: The DWH PDARP and the GoMMAPPS. The restoration plan in the PDARP is a framework for planning future restoration projects. For marine mammals, the PDARP focuses on restoration activities that support population resilience, reduce further harm or impacts, and complement existing management priorities, with the

goal of compensating for the population injuries suffered by each marine mammal stock. GOMx Bryde's whales were the most impacted offshore cetacean by the DWH oil spill, suffering an estimated 22 percent maximum decline in population size (DWH Trustees 2016). Although specific projects are not yet identified to implement Bryde's whale restoration, we anticipate that they should benefit the population, but, considering the species' life history, population recovery to pre-spill levels will take decades. More importantly, the population estimates considered by the SRT were pre-spill and were still found to represent a high extinction risk. Therefore, the conservation benefits that may be expected through implementation of the PDARP would not be expected to reduce the extinction risk for Bryde's whale to a degree where this population qualifies only as threatened or where that listing is not warranted.

We also considered the proposed results from GoMMAPPS and its potential to protect and restore the population of GOMx Bryde's whale. The purpose of this program is to improve information about abundance, distribution, habitat use, and behavior of living marine resources (*e.g.,* marine mammals, sea turtles, sea birds) in the Gulf of Mexico, as well as to mitigate and monitor potential impacts of human activities. GoMMAPPS promotes collaborations via data sharing with other research efforts in the Gulf of Mexico, including potentially with Mexico. Given the scope of the program, studies are likely to increase scientific understanding of the GOMx Bryde's whale and its habitat, support management decisions, and monitor potential impacts of human activities. GoMMAPPS is likely to provide significantly improved information on the status of protected species in the Gulf of Mexico, possibly including GOMx Bryde's whales, and we anticipate that this information can be used to protect Bryde's whales more effectively in the future. However, these conservation benefits will require secondary actions that are not currently known. Therefore, we conclude that the conservation benefits from GOMAPPS to Bryde's whales are too diffuse and uncertain to be considered effective measures under our PECE policy. After taking into account these conservation efforts and the current status of GOMx Bryde's whale, our evaluation of the section 4(a)(1) factors is that the conservation efforts identified cannot be considered effective measures in reducing the current extinction risk.

Proposed Listing Determination

Section 4(b)(1) of the ESA requires that we make listing determinations based solely on the best scientific and commercial data available after conducting a review of the status of the species and taking into account those efforts, if any, being made by any state or foreign nation, or political subdivisions thereof, to protect and conserve the species. We have reviewed the best available scientific and commercial information contained in the Status Review report, the Threats Evaluation, Demographic Evaluation, and the ERA (Rosel *et al.,* 2016). We found that the GOMx Bryde's whale is a species, as defined by the ESA, which is in danger of extinction throughout all of its range as a result of ESA section 4(a)(1) Factors A, D, and E. After considering efforts being made to protect the species, we could not conclude that existing or proposed conservation efforts would alter its extinction risk. Accordingly, we propose to list the GOMx Bryde's whale as an endangered species.

Effects of Listing

Conservation measures provided for species listed as endangered or threatened under the ESA include recovery plans (16 U.S.C. 1533(f)), critical habitat designations (16 U.S.C. 1533(a)(3)(A)), Federal agency consultation requirements (16 U.S.C. 1536), and protective regulations (16 U.S.C. 1533(d)). Recognition of the species' status through listing promotes conservation actions by Federal and state agencies, private groups, and individuals, as well as the international community. Both a recovery program and designation of critical habitat could result from this final listing. Given its narrow range in the De Soto Canyon region of the northeastern Gulf of Mexico, and existing threats, a regional cooperative effort to protect and restore the population is necessary. Federal, state, and the private sectors will need to cooperate to conserve listed GOMx Bryde's whales and the ecosystem upon which they depend.

Marine Mammal Protection Act

The MMPA provides protections to all marine mammals, such as Bryde's whales, whether they are listed under the ESA or not. In addition, the MMPA provides heightened protections to marine mammals designated as ''depleted.'' Section 3(1) of the MMPA defines ''depleted'' as ''any case in which'': (1) The Secretary ''determines that a species or population stock is below its optimum sustainable population''; (2) a state to which authority has been delegated makes the same determination; or (3) a species or stock ''is listed as an endangered species or a threatened species under the [ESA]'' (16 U.S.C. 1362(1)). Section 115(a)(1) of the MMPA establishes that ''[i]n any action by the Secretary to determine if a species or stock should be designated as depleted, or should no longer be designated as depleted,'' such determination must be made by rule, after public notice and an opportunity for comment (16 U.S.C. 1383b(a)(1)). It is our position that a marine mammal species or stock automatically gains ''depleted'' status under the MMPA when it is listed under the ESA.

Identifying ESA Section 7 Consultation Requirements

Section 7(a)(2) of the ESA and joint NMFS/U.S. Fish and Wildlife Service regulations require Federal agencies to consult with us on any actions they authorize, fund, or carry out if those actions may affect the listed species or designated critical habitat. Based on currently available information, we can conclude that examples of Federal actions that may affect GOMx Bryde's whale include, but are not limited to: Authorizations for energy exploration (*e.g.,* habitat modification, noise from seismic surveys, and shipping), energy production (*e.g.,* oil drilling and production), actions that directly or indirectly introduce vessel traffic that could result in collisions, and military activities and fisheries regulations that may impact the species.

Take Prohibitions

Because we are proposing to list this species as endangered, all of the take prohibitions of section 9(a)(1) of the ESA would apply. These include prohibitions against the import, export, use in foreign commerce, or ''take'' of the species. ''Take'' is defined under the ESA as ''to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.'' These prohibitions apply to all persons subject to the jurisdiction of the United States, including in the United States or on the high seas.

Critical Habitat

Critical habitat is defined in section 3 of the ESA (16 U.S.C. 1532(5)) as: (1) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the ESA, on which are found those physical or biological features (a) essential to the conservation of the

species and (b) that may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by a species at the time it is listed upon a determination that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures needed to bring the species to the point at which listing under the ESA is no longer necessary. Critical habitat may also include areas unoccupied by GOMx Bryde's whale if those areas are essential to the conservation of the species.

Section 4(a)(3)(A) of the ESA (16 U.S.C. 1533(a)(3)(A)) requires that, to the maximum extent prudent and determinable, critical habitat be designated concurrently with the listing of a species. Pursuant to 50 CFR 424.12(a), designation of critical habitat is not determinable when one or both of the following situations exist: (i) Data sufficient to perform required analyses are lacking; or (ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of ''critical habitat.'' Although we have gathered information through the Status Review report and public comment periods on the habitat occupied by this species, we currently do not have enough information to determine what physical and biological feature(s) within that habitat facilitate the species' life history strategy and are thus essential to the conservation of GOMx Bryde's whale, and may require special management considerations or protection. To the maximum extent prudent and determinable, we will publish a proposed designation of critical habitat for GOMx Bryde's whale in a separate rule. Designations of critical habitat must be based on the best scientific data available and must take into consideration the economic, national security, and other relevant impacts of specifying any particular area as critical habitat. Once critical habitat is designated, section 7 of the ESA requires Federal agencies to ensure that they do not fund, authorize, or carry out any actions that are likely to destroy or adversely modify that habitat. This requirement is in addition to the section 7 requirement that Federal agencies ensure that their actions do not jeopardize the continued existence of listed species.

Policies on Peer Review

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The OMB Bulletin, implemented under the Information Quality Act (Pub. L. 106–554) is intended to enhance the quality and credibility of the Federal government's scientific information, and applies to influential or highly influential scientific information disseminated on or after June 16, 2005. To satisfy our requirements under the OMB Bulletin, we received peer reviews from three independent peer reviewers on the Status Review report (Rosel *et al.,* 2016). All peer reviewer comments were addressed prior to dissemination of the final Status Review report and publication of this final rule. We conclude that these experts' reviews satisfy the requirements for ''adequate [prior] peer review'' contained in the Bulletin (sec. II.2.).

Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate as possible and informed by the best available scientific and commercial information. Therefore, we request comments or information from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. In particular we seeks comments containing: (1) Information, including genetic analyses, regarding the classification of the GOMx Bryde's whale as a subspecies; (2) life history information including abundance, distribution, diving, and foraging patterns; (3) information concerning threats to the species; (4) efforts being made to protect the species throughout its current range; and (5) other pertinent information regarding the species.

We are also soliciting information on physical or biological features and areas that may support designation of critical habitat for the GOMx Bryde's whale. Information provided should identify the physical and biological features essential to the conservation of the species and areas that contain these features. Areas outside the occupied geographical area should also be identified if such areas themselves are essential to the conservation of the species. Essential features may include, but are not limited to, features specific to the species' range, habitat, and life history characteristics within the following general categories of habitat features: (1) Space for individual growth and normal behaviour; (2) food, or other nutritional or physiological requirements; (3) protection from predation; (4) sites for reproduction and development of offspring; and (5) habitats that are protected from natural or human disturbance or are representative of the historical, geographical, and ecological distributions of the species (50 CFR 424.12(b)). ESA implementing regulations at 50 CFR 424.12(h) specify that critical habitat shall not be designated within foreign countries or in other areas outside of U.S. jurisdiction. Therefore, we request information only on potential areas of critical habitat within U.S. jurisdiction. For features and areas potentially qualifying as critical habitat, we also request information describing: (1) Activities or other threats to the essential features or activities that could be affected by designating them as critical habitat, and (2) the positive and negative economic, national security and other relevant impacts, including benefits to the recovery of the species, likely to result if these areas are designated as critical habitat.

Public Hearing

During the public hearing, a brief opening presentation on the proposed rule will be provided before accepting public testimony. Written comments may be submitted at the hearing or via the Federal e-Rulemaking Portal (see **ADDRESSES**) until the scheduled close of the comment period on (January 30, 2017). In the event that attendance at the public hearing is large, the time allotted for oral statements may be limited. There are no limits on the length of written comments submitted to us. Oral and written statements receive equal consideration.

Public Hearing Schedule

The date and location for the public hearing is as follows: St. Petersburg, Florida: January 19, 2017, from 6:00 p.m. to 8:00 p.m. at NOAA Fisheries, Southeast Regional Office, Dolphin Conference Room, 236 13th Avenue, South, St. Petersburg, Florida 33701.

Special Accommodations

This hearing is physically accessible to people with disabilities. Requests for sign language interpretation or other accommodations should be directed to Calusa Horn (see **ADDRESSES**) as soon as possible, but no later than 7 business days prior to the hearing date.

References

A complete list of the references used in this proposed rule is available upon request, and also available at: *http://sero.nmfs.noaa.gov/protected_resources/listing_petitions/species_esa_consideration/index.html.*

Classifications

National Environmental Policy Act

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and the opinion in *Pacific Legal Foundation* v. *Andrus,* 675 F. 2d 825 (6th Cir. 1981), NMFS has concluded that ESA listing actions are not subject to the environmental assessment requirements of the NEPA (See NOAA Administrative Order 216–6A).

Executive Order 12866, Regulatory Flexibility Act and Paperwork Reduction Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process. In addition, this final rule is exempt from review under Executive Order 12866. This final rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

Executive Order 13132, Federalism

In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, the proposed rule will be provided to the relevant agencies in each state in which the subject species occurs, and these agencies are invited to comment.

List of Subjects in 50 CFR Part 224

Administrative practice and procedure, Endangered and threatened species, Exports, Imports, Reporting and record keeping requirements, Transportation.

Dated: December 2, 2016.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, we propose to amend 50 CFR part 224 as follows:

PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 224 continues to read as follows:

Authority: 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq.*

■ 2. In § 224.101, in the table in paragraph (h), add an entry for ''Whale, Bryde's (Gulf of Mexico subspecies)'' under MARINE MAMMALS in alphabetical order by common name to read as follows:

§ 224.101 Enumeration of endangered marine and anadromous species.

* * * * *

(h) * * *

Species [1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
*	*	*	*	*	*
Marine mammals					
*	*	*	*	*	*
Whale, Bryde's (Gulf of Mexico subspecies).	*Balaenoptera edeni (unnamed subspecies).*	Bryde's whales that breed and feed in the Gulf of Mexico.	*[**Federal Register** citation and date when published as a final rule].*	NA	NA
*	*	*	*	*	*

[1] Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement, see 61 FR 4722, February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement, see 56 FR 58612, November 20, 1991).

[FR Doc. 2016–29412 Filed 12–7–16; 8:45 am]

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Notices

Federal Register
Vol. 81, No. 236
Thursday, December 8, 2016

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Office of Advocacy and Outreach

Beginning Farmers and Ranchers Advisory Committee

AGENCY: Office of Advocacy and Outreach, USDA

ACTION: Notice of Public Meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act (FACA), the Office of Advocacy and Outreach (OAO) is announcing a meeting of the Beginning Farmers and Ranchers Advisory Committee (BFRAC). The committee is being convened to consider issues involving barriers for beginning farmers and ranchers, including lending and access to U.S. Department of Agriculture (USDA) programs, resources, and land. The members will continue deliberations on recommendations to be prepared for USDA Secretarial consideration as discussed during the recent in-person meeting held in Cleveland, Ohio, September 29–30, 2016.

DATES: The committee meeting is scheduled for Monday, December 19, 2016, 2:30–4:30 p.m., EST, via teleconference. The meeting will be open to the public. All persons wishing to make comments during this meeting will be allowed a maximum of three minutes. If the number of registrants requesting to speak is greater than what can be reasonably accommodated during the scheduled open public teleconference meeting timeframe, speakers will be scheduled on a first-come basis. Public written comments for the committee's consideration may be submitted by close of business on December 16, 2016, to Mrs. Kenya Nicholas, Designated Federal Official, USDA OAO, 1400 Independence Avenue SW., Room 520–A, Washington, DC 20250–0170, Phone (202) 720–6350, Fax (202) 720–7704, Email: *acbfr@osec.usda.gov.* Written submissions are encouraged to either be less than one page in length, or be accompanied by an executive summary and a summary of policy initiatives.

A listen-only line will be available during the entire meeting for all who wish to listen in on the meeting or make public comments through the following telephone number: 1 (888) 455–1685 and enter passcode 1047915#. Members of the public may also submit written comments for consideration to the committee via email at: *acbfr@osec.usda.gov* or fax to: (202) 720–7136.

FOR FURTHER INFORMATION CONTACT: Questions should be directed to Phyllis Morgan, Executive Assistant, OAO, 1400 Independence Avenue SW., Whitten Building, Room 520–A, Washington, DC 20250, Phone: (202) 720–6350; Fax: (202) 720–7704; email: *Phyllis.Morgan@osec.usda.gov.*

SUPPLEMENTARY INFORMATION: The BFRAC last met in Cleveland, Ohio, on September 29–30, 2016. The Secretary tasked the BFRAC with providing recommendations on access to land, farm business transition, and land tenure. They also considered issues around lending and credit in parsing statistics generated by USDA. Please visit our Web site at: *http://www.outreach.usda.gov/smallbeginning/index.htm* for additional information on the BFRAC.

Members of the public who wish to make comments during the committee meeting are asked to pre-register for the meeting by midnight on December 16, 2016. You may pre-register for the public meeting by submitting an email to *acbfr@osec.usda.gov* with your name, organization or affiliation, or any comments for the committee's consideration. You may also fax this information to (202) 720–7704. The agenda is as follows: Committee discussions and public comments and continued, and continued committee deliberations. Please visit the BFRAC Web site for the full agenda. All agenda topics and documents will be made available to the public by December 16, 2016, at: *http://www.outreach.usda.gov/smallbeginning/index.htm.*

Meeting Accommodations: USDA is committed to ensuring that everyone is accommodated in our work environment, programs, and events. If you are a person with a disability and request reasonable accommodations to participate in this meeting, please contact Mrs. Kenya Nicholas in advance of the meeting by or before noon on December 16, 2016, by phone at (202) 720–6350, fax (202) 720–7704, or email: *kenya.nicholas@osec.usda.gov.*

Issued in Washington, DC, this 30 day of November 2016.

Christian Obineme,

Associate Director, Office of Advocacy and Outreach.

[FR Doc. 2016–29374 Filed 12–7–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Tongass National Forest Land and Resource Management Plan Amendment

AGENCY: Forest Service, USDA.

ACTION: Notice of Forest Plan Amendment approval.

SUMMARY: M. Earl Stewart, the Forest Supervisor for the Tongass National Forest, Alaska Region, signed the final Record of Decision (ROD) for the Tongass National Forest Land and Resource Management Plan Amendment (Forest Plan Amendment). The Final ROD documents the rationale for approving the Forest Plan Amendment and is consistent with the Reviewing Officer's response to objections and instructions.

DATES: The effective date of the Forest Plan Amendment is 30 days after publication of notice of Forest Plan Amendment approval in the newspaper of record, the *Ketchikan Daily News.* A supplemental notice will also be published in the *Juneau Empire.* To view the final ROD, final environmental impact statement (FEIS), FEIS errata, amended Forest Plan, and other related documents please visit the Tongass National Forest Plan Amendment Web site at *http://www.fs.usda.gov/goto/R10/Tongass/PlanAmend.*

FOR FURTHER INFORMATION CONTACT: Further information about the Tongass National Forest Plan can be obtained from Earl Stewart during normal office hours (weekdays, 8:00 a.m. to 4:30 p.m. Alaska Time) at the Tongass National Forest Supervisor's Office (Address: Tongass National Forest, 648 Mission Street, Ketchikan, AK 99901–6591); Phone/voicemail: (907) 228–6200.

Individuals who use telecommunication devices for the deaf

(TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The Forest Plan Amendment lays the foundation to address and balance the need for more stable contributions to the economic and social sustainability of Southeast Alaska. It supports both transitioning to a more economically, socially and ecologically sustainable timber program on the Tongass and promoting more sustainable and diverse local economies by encouraging renewable energy production.

The Forest Plan Amendment amends the 2008 Tongass Land and Resource Management Plan (2008 Forest Plan) and describes resource management practices, levels of resource production and management, and the availability and suitability of lands for different kinds of resource management. The Forest Plan Amendment guides all natural resource management projects and activities and establishes management direction for the Tongass National Forest. The Forest Plan Amendment was developed using the current Planning Rule, issued in 2012 and embodies the provisions of the National Forest Management Act, the implementing regulations, and other guiding documents.

The Forest Plan Amendment was shaped by best available science, current laws, and public participation including participation of a cooperating agency (U.S. Fish and Wildlife Service); consultation with Alaska Native tribes and Alaska Native Corporations; advice and recommendations from the Tongass Advisory Committee, a Federal Advisory Committee established by the U.S. Department of Agriculture; and significant public contributions from nine open house meetings, nine subsistence hearings, and the receipt of over 165,000 public comments.

Dated: November 30, 2016.

M. Earl Stewart,

Forest Supervisor, Tongass National Forest.

[FR Doc. 2016–29188 Filed 12–7–16; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

National Institute of Food and Agriculture

Solicitation of Veterinary Shortage Situation Nominations for the Veterinary Medicine Loan Repayment Program (VMLRP)

AGENCY: National Institute of Food and Agriculture, USDA.

ACTION: Notice and solicitation for nominations.

SUMMARY: The National Institute of Food and Agriculture (NIFA) is soliciting nominations of veterinary service shortage situations for the Veterinary Medicine Loan Repayment Program (VMLRP) for fiscal year (FY) 2017, as authorized under the National Veterinary Medical Services Act (NVMSA), 7 U.S.C. 3151a. This notice initiates the nomination period and prescribes the procedures and criteria to be used by States, Insular Areas, DC and Federal Lands to nominate veterinary shortage situations. Each year all eligible nominating entities may submit nominations, up to the maximum indicated for each entity in this notice. NIFA is conducting this solicitation of veterinary shortage situation nominations under a previously approved information collection (OMB Control Number 0524–0046).

DATES: Shortage situation nominations must be submitted on or before February 8, 2017.

ADDRESSES: Submissions must be made by clicking the submit button on the Veterinarian Shortage Situation nomination form provided in the VMLRP Shortage Situations section at *www.nifa.usda.gov/vmlrp*.

This form is sent as a data file directly to the Veterinary Medicine Loan Repayment Program; National Institute of Food and Agriculture; U.S. Department of Agriculture.

FOR FURTHER INFORMATION CONTACT: Danielle Tack; Program Coordinator, Veterinary Science; National Institute of Food and Agriculture; U.S. Department of Agriculture; STOP 2220; 1400 Independence Avenue SW.,Washington, DC 20250–2220; Voice: 202–401–6802; Fax: 202–401–6156; Email: *vmlrp@nifa.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background and Purpose

Food supply veterinary medicine embraces a broad array of veterinary professional activities, specialties and responsibilities, and is defined as the full range of veterinary medical practices contributing to the production of a safe and wholesome food supply and to animal, human, and environmental health. A series of studies and reports [1–6] have drawn attention to maldistributions in the veterinary workforce leaving some communities, especially rural areas, with insufficient access to food supply veterinary services.

Two programs, born out of this concern, aim to mitigate the maldistribution of the veterinary workforce: The Veterinary Medicine Loan Repayment Program (VMLRP) and Veterinary Services Grant Program (VSGP), both administered by USDA—NIFA. VMLRP addresses increasing veterinary school debt by offering veterinary school debt payments in exchange for service in shortage situations, while VSGP addresses other factors contributing to the maldistribution of veterinarians serving the agricultural sector. Specifically, the VSGP promotes availability and access to (1) specialized education and training which will enable veterinarians and veterinary technicians to provide services in designated veterinarian shortage situations, and (2) practice-enhancing equipment and personnel resources to enable veterinary practices to expand or improve access to veterinary services.

Paperwork Reduction Act

In accordance with the Office of Management and Budget (OMB) regulations (5 CFR part 1320) that implement the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements imposed by the implementation of these guidelines have been approved by OMB Control Number 0524–0046.

[1] Government Accountability Office, Veterinary Workforce: Actions Are Needed to Ensure Sufficient Capacity for Protecting Public and Animal Health, GAO–09–178: Feb 18, 2009).

[2] National Academies of Science, Workforce Needs in Veterinary Medicine, 2013.

[3] Andrus DM, Gwinner KP, Prince, JB. Food Supply Veterinary Medicine Coalition Report: Estimating FSM Demand and Maintaining the Availability of Veterinarians in Food Supply Related Disciplines in the United States and Canada, 2016. *https://www.avma.org/KB/Resources/Reference/Pages/Food-Supply-Veterinary-Medicine-Coalition-Report.aspx.*

[4] Andrus DM, Gwinner KP, Prince, JB. Future demand, probable shortages and strategies for creating a better future in food supply veterinary medicine. 2006, JAVMA 229(1):57–69.

[5] Andrus DM, Gwinner KP, Prince, JB. Attracting students to careers in food supply veterinary medicine. 2006, JAVMA 228(1):16931704.

[6] Andrus DM, Gwinner KP, Prince, JB. Job satisfaction, changes in occupational area and commitment to a career in food supply veterinary medicine. 2006, JAVMA 228(12):1884–1893.

List of Subjects in Guidelines for Veterinary Shortage Situation Nominations

I. Preface and Authority

In January 2003, the National Veterinary Medical Service Act (NVMSA) was passed into law adding section 1415A to the National Agricultural Research, Extension, and Teaching Policy Act of 1997 (NARETPA). This law established a new Veterinary Medicine Loan Repayment Program (7 U.S.C. 3151a) authorizing the Secretary of Agriculture to carry out a program of entering into agreements with veterinarians under which they agree to provide veterinary services in veterinarian shortage situations. In FY 2010, NIFA announced the first funding opportunity for the VMLRP.

Section 7104 of the 2014 Farm Bill (Pub. L. 113–79) added section 1415B to NARETPA, as amended, (7 U.S.C. 3151b) to establish the Veterinary Services Grant Program (VSGP). This amendment authorizes the Secretary of Agriculture to make competitive grants to qualified entities and individual veterinarians that carry out programs in veterinarian shortage situations and for the purpose of developing, implementing, and sustaining veterinary services. Funding for the VSGP was first appropriated in 2016 through the Consolidated Appropriations Act, 2016 (Pub. L. 114–113).

Pursuant to the requirements enacted in the NVMSA of 2004 (as revised), and the implementing regulation for this Act, part 3431 subpart A of the VMLRP Final Rule [75 FR 20239–20248], NIFA hereby implements guidelines for authorized State Animal Health Officials (SAHO) to nominate veterinary shortage situations for the FY 2017 program cycle.

II. Nomination of Veterinary Shortage Situations

A. General

1. Eligible Shortage Situations

Section 1415A of NARETPA, as amended and revised by Section 7105 of the Food, Conservation and Energy Act, directs determination of veterinarian shortage situations for the VMLRP to consider (1) geographical areas that the Secretary determines have a shortage of veterinarians; and (2) areas of veterinary practice that the Secretary determines have a shortage of veterinarians, such as food animal medicine, public health, epidemiology, and food safety. This section also added that priority should be given to agreements with veterinarians for the practice of food animal medicine in veterinarian shortage situations.

While the NVMSA (as amended) specifies priority be given to food animal medicine shortage situations, and that consideration also be given to specialty areas such as public health, epidemiology and food safety, the Act does not identify any areas of veterinary practice as ineligible. Accordingly, all nominated veterinary shortage situations will be considered eligible for submission. However, assessment of submitted nominations by the external review panel convened by NIFA will reflect that priority be given to certain types of veterinary service shortage situations. NIFA therefore anticipates that the more competitive nominations will be those directly addressing food supply veterinary medicine shortage situations.

A subset of the shortages designated for VMLRP applicants are also available to satisfy requirements, as applicable, for VSGP applicants. In addition, a shortage situation under the VSGP Rural Practice Enhancement program area must also be designated rural as defined in section 343(a) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1991(a)).

NIFA adopted definitions for the practice of veterinary medicine and the practice of food supply medicine that are broadly inclusive of the critical roles veterinarians serve in both public practice and private practice situations. Nominations describing either public or private practice veterinary shortage situations are eligible for submission.

2. State Respondents and Use of Consultation

The only authorized respondent on behalf of each State is the chief SAHO, as duly authorized by the Governor or the Governor's designee in each State. The chief SAHO must submit nominations using the Veterinarian Shortage Situation Nomination Form (OMB Control Number 0524–0046), which is available in the VMLRP Shortage Situations section on the VMLRP Web site at *www.nifa.usda.gov/vmlrp*. One form must be submitted for each nominated shortage situation. When ''SUBMIT'' is selected on the form a data file will be sent directly to NIFA. NIFA strongly encourages the SAHO to involve leading health animal experts in the State in the identification and prioritization of shortage situation nominations.

3. State Allocation of Nominations

NIFA will accept the number of nominations equivalent to the maximum number of designated shortage areas for each state. For historical background and more information on the rationale for capping nominations and state allocation method, please visit *www.nifa.usda.gov/vmlrp*.

The maximum number of nominations (and potential designations) is based on data from the 2012 Agricultural Census conducted by the USDA National Agricultural Statistics Service (NASS). Awards from previous years have no bearing on a state's maximum number of allowable shortage nomination submissions or designations in any given year, or number of nominations or designations allowed for subsequent years. NIFA reserves the right in the future to proportionally adjust the maximum number of designated shortage situations per state to ensure a balance between available funds and the requirement to ensure that priority is given to mitigating veterinary shortages corresponding to situations of greatest need. Nomination Allocation tables for FY 2017 are available under the VMLRP Shortage Situations section of the VMLRP Web site at *www.nifa.usda.gov/vmlrp*.

Table I lists the maximum nomination allocations by state. Table II lists ''Special Consideration Areas'' which include any State or Insular Area not reporting data to NASS, reporting less than $1,000,000 in annual Livestock and Livestock Products Total Sales ($), and/or possessing less than 500,000 acres. One nomination is allocated to any State or Insular Area classified as a Special Consideration Area.

Table III shows the values and quartile ranks of States for two variables broadly correlated with demand for food supply veterinary services: ''Livestock and Livestock Products Total Sales ($)'' (LPTS) and ''Land Area (acres)'' (LA).

The maximum number of NIFA-designated shortage situations per state is based on the sum of quartile rankings for LPTS and LA for each state and can be found in Table IV.

While Federal Lands are widely dispersed within States and Insular Areas across the country, they constitute a composite total land area over twice the size of Alaska. If the 200-mile limit U.S. coastal waters and associated fishery areas are included, Federal Land total acreage would exceed 1 billion. Both State and Federal Animal Health officials have responsibilities for matters relating to terrestrial and aquatic food animal health on Federal Lands. Interaction between wildlife and domestic livestock, such as sheep and cattle, is particularly common in the plains states where significant portions of Federal lands are leased for grazing. Therefore, both SAHOs and the Chief Federal Animal Health Officer (Deputy Administrator of the Animal and Plant Health Inspection Service or designee) may submit nominations to address shortage situations on or related to Federal Lands.

NIFA emphasizes that the shortage nomination allocation is set to broadly balance the number of designated shortage situations across states prior to the nomination and award phases of the VMLRP and VSGP. Awards will be made based strictly on the peer review panels' assessment according to each program's review criteria; thus no state will be given a preference for placement of awardees. Additionally, each designated shortage situation will be limited to one award per program.

4. FY 2017 Shortage Situation Nomination Process

For the FY 2017 program cycle, all eligible submitting entities may: (1) Request to retain designated status for any shortage situation successfully designated in 2016 and/or (2) submit new nominations. Any shortage from FY 2016 not retained or submitted as a new nomination will not be considered a shortage situation in 2017. The total number of new nominations plus designated nominations retained (carried over) may not exceed the maximum number of nominations each entity is permitted. *ALL* nominations, new and retained, will be evaluated by the 2017 review panel.

The following process is the mechanism for retaining a designated nomination: Each SAHO should review the map of VMLRP designated shortage situations for FY 2016 (*http://go.usa.gov/xkFD3*) and download a PDF copy of the nomination form for each designated area that remains open (not awarded) in FY 2016. If the SAHO wishes to retain (carry over) one or more designated nomination(s), the SAHO shall copy and paste the prior year information into the current year's nomination form and select ''SUBMIT.''

Both new and retained nominations must be submitted on the Veterinary Shortage Situation Nomination form provided in the VMLRP Shortage Situations section at *www.nifa.usda.gov/vmlrp.*

5. Submission and Due Date

Submissions must be made by clicking the submit button on the Veterinarian Shortage Situation nomination form provided in the VMLRP Shortage Situations section at *www.nifa.usda.gov/vmlrp.*

This form is sent as a data file directly to the Veterinary Medicine Loan Repayment Program; National Institute of Food and Agriculture; U.S. Department of Agriculture; Shortage situation nominations. Both new and retained (carry-over) nominations must be submitted on or before February 8, 2017.

7. Period Covered

Each shortage situation is approved for one program year cycle only. However, any previously approved shortage situation not filled in a given program year may be resubmitted as a retained (carry-over) nomination. Retained (carry-over) shortage nominations will be required to undergo panel merit review for 2017. Starting in 2018 retained shortages (without any revisions) will be automatically approved for up to three years before requiring another merit review. By resubmitting a carry-over nomination, the SAHO is affirming that in his or her professional judgment the original case made for shortage status, and the original description of needs, remain current and accurate.

8. Definitions

For the purpose of implementing the solicitation for veterinary shortage situations, the definitions provided in 7 CFR part 3431 are applicable.

B. Nomination Form

The VMLRP Shortage Nomination Form must be used to nominate Veterinarian Shortage Situations. Once designated as a shortage situation, VMLRP applicants will use the information to select shortage situations they are willing and qualified to fill, and to guide the preparation of their applications. NIFA will use the information to assess contractual compliance of awardees. The form is available in the VMLRP Shortage Situations section at *www.nifa.usda.gov/vmlrp.* The completed form must be sent to NIFA by selecting ''SUBMIT'' on the nomination form.

Detailed directions for each field can be found at *http://go.usa.gov/xkFDY.*

C. NIFA Review of Shortage Situation Nominations

1. Review Panel Composition and Process

NIFA will convene a panel of food supply veterinary medicine experts from Federal and State agencies, as well as institutions receiving Animal Health and Disease Research Program funds under section 1433 of NARETPA, to review the nominations and make recommendations to the NIFA Program Manager. NIFA will review the panel's recommendations and designate the VMLRP shortage situations. The list of approved shortage situations will be made available on the VMLRP Web site at *www.nifa.usda.gov/vmlrp.*

2. Review Criteria

Criteria used by the shortage situation nomination review panel and NIFA for certifying a veterinary shortage situation will be consistent with the information requested in the shortage situations nomination form. NIFA understands the process for defining the risk landscape associated veterinary service shortages within a state may require consideration of many qualitative and quantitative factors. In addition, each shortage situation will be characterized by a different array of subjective and objective supportive information that must be developed into a cogent case identifying, characterizing, and justifying a given geographic or disciplinary area as deficient in certain types of veterinary capacity or service. To accommodate the uniqueness of each shortage situation, the nomination form provides opportunities to present a case using both supportive metrics and narrative explanations to define and explain the proposed need.

While NIFA anticipates some arguments made in support of a given shortage situation will be qualitative, respondents are encouraged to present verifiable quantitative and qualitative evidentiary information wherever possible. Absence of quantitative data such as animal and veterinarian census data for the proposed shortage area(s) may lead the panel to recommend disapproval of the shortage nomination.

The maximum point value that panelists may award for each element is as follows:

20 points: Describe the objectives of a veterinarian to meet the needs of the shortage situation in the community, area, state/insular area, or position requested above.

20 points: Describe the activities required of a veterinarian to meet the needs of the shortage situation located in the community, area, state/insular area, or position requested above.

5 points: Describe any past efforts to recruit and retain a veterinarian to achieve the objectives and activities in the shortage situation identified above.

35 points: Describe the risk of this veterinarian position not being filled or retained. Include the risk(s) to the production of a safe and wholesome food supply and/or to animal, human, and environmental health not only in the community but in the region, state/insular area, nation, and/or international community.

An additional 20 points will be used to evaluate overall merit/quality of the case made for each nomination.

Done in Washington, DC, this 30th day of November, 2016.

Sonny Ramaswamy,

Director, National Institute of Food and Agriculture.

[FR Doc. 2016–29424 Filed 12–7–16; 8:45 am]

BILLING CODE 3410–22–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

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

Agency: U.S. Census Bureau.

Title: Business Research and Development and Innovation Survey.

OMB Control Number: 0607–0912.

Form Number(s): BRDI–1, BRDI–1S, and BRDI–M.

Type of Request: Revision of a currently approved collection.

Number of Respondents: 245,000.

Average Hours Per Response: 43 minutes.

Burden Hours: 176,500.

Needs and Uses: The Census Bureau requests a revision to the currently cleared Business R&D and Innovation Survey (BRDIS) information collection. This revision adds a form type [BRDI–M] to collect data on research and development (R&D) and innovation activities from small businesses with fewer than 10 employees.

In 2004, the National Academy of Sciences' Committee on National Statistics (CNSTAT) reviewed the National Center for Science and Engineering Statistics' (NCSES) portfolio of R&D surveys and recommended that NCSES explore ways to measure firm innovation and investigate the incidence of R&D activities in growing sectors, such as small business enterprises not currently covered by BRDIS. As a result, Census plans to expand BRDIS to include very small businesses or microbusinesses through the use of the BRDI–M questionnaire.

The National Science Foundation Act of 1950 as amended authorizes and directs the National Science Foundation (NSF) through the National Center for Science and Engineering Statistics (NCSES) ''. . . to provide a central clearinghouse for the collection, interpretation, and analysis of data on scientific and engineering resources and to provide a source of information for policy formulation by other agencies of the Federal government.'' One of the methods used by NCSES to fulfill this mandate is the Business R&D and Innovation Survey (BRDIS)—the primary federal source of information on R&D in the business sector.

BRDIS will continue to collect the following types of information:

- R&D expense based on accounting standards.
- Worldwide R&D of domestic companies.
- Business segment detail.
- R&D related capital expenditures.
- Detailed data about the R&D workforce.
- R&D strategy and data on the potential impact of R&D on the market.
- R&D directed to application areas of particular national interest.
- Data measuring innovation and intellectual property protection activities.

In addition to adding the BRDI–M form, the following changes will be made to the 2016–2017 BRDIS compared to the 2015 BRDIS:

- Add item in type-of-cost questions to collect Royalty and licensing payments.
- Add questions collecting Basic-Applied-Development split of Total R&D paid for by the company and Total R&D paid for by others.
- Delete question on intellectual property protection.
- Add two Yes/No questions to help separately identify intellectual property transfer transactions with U.S. persons and foreign persons.
- Discontinue the pre-survey letter. This letter was planned to collect contact and company status information (merger, acquisition, etc.) from approximately 500 of the largest R&D companies.

The forms used in the BRDIS are:

Form BRDI–M. This form will be mailed to approximately 200,000 small businesses with less than 10 employees. In addition to general business information—primary business activity (NAICS code), year business was formed, and number of employees—this form would collect data on R&D, innovation, employment, related activities (such as sales of significantly improved goods and services; operating agreements and licensing activities; technology transfer; patents and intellectual property; and sources of technical knowledge), measures of entrepreneurial strategies, and demographic characteristics of the entrepreneur.

Form BRDI–1. This form will be mailed to approximately 7,000 companies with a history of significant R&D and contains the full complement of BRDIS data items.

Form BRDI–1(S). This form will be mailed to approximately 38,000 companies and contains only the most high-level BRDIS data items.

Information from BRDIS will continue to support the America COMPETES Reauthorization Act of 2010 as well as other R&D-related initiatives introduced during the clearance period. Other initiatives that have used BRDIS statistics include: The Innovation Measurement-Tracking the State of Innovation in the American Economy (U.S. Department of Commerce); Science of Science and Innovation Policy (NSF); and Rising Above the Gathering Storm (National Research Council).

Policy officials from many Federal agencies rely on BRDIS statistics for essential information. For example, the Bureau of Economic Analysis (BEA) now incorporates R&D as fixed investment in the National Income and Product Accounts (NIPAs). Businesses and trade organizations also rely on BRDIS data to benchmark their industries' performance against others. Each BRDIS data item is intended to address specific data user needs identified by NCSES through research, workshops, and regular interaction with data users.

In previous years, BRDIS statistics were limited to companies with five or more U.S. employees. With the addition of BRDI–M, all companies with U.S. employees will be eligible for inclusion in providing statistics on R&D and innovation regardless of company size. Expanding the coverage of the BRDIS

will provide data users a more complete picture of R&D and innovation in the business sector and will allow policy makers and researchers to investigate questions about R&D, innovation, and competiveness in small businesses.

Affected Public: Business or other for-profit.

Frequency: Annually.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13, United States Code, Sections 8(b), 131, and 182, and Title 42, United States Code, Sections 1861–76 (National Science Foundation Act of 1950, as amended).

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

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

Sheleen Dumas,

PRA Departmental Lead, Office of the Chief Information Officer.

[FR Doc. 2016–29394 Filed 12–7–16; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Census Bureau

Proposed Information Collection; Comment Request; Longitudinal Employer-Household Dynamics (LEHD)

AGENCY: U.S. Census Bureau, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: To ensure consideration, written comments must be submitted on or before February 6, 2017.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *jjessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Robert Sienkiewicz; *robert.sienkiewicz@census.gov;* phone: 301–763–1234.

SUPPLEMENTARY INFORMATION:

I. Abstract

A 21st century statistical system must provide information about the dynamic economy quickly, using data assets efficiently while minimizing the burden of collecting and providing data and fully preserving confidentiality. The Census Bureau's Longitudinal Employer-Household Dynamics (LEHD) program has demonstrated the power and usefulness of linking multiple business and employee data sets with state-of-the-art confidentiality protections to build a longitudinal national frame of jobs.

This program supports the Department of Commerce plan to improve American competitiveness and measures of innovation. It provides federal, state, and local policymakers and planners, businesses, private sector decision makers, and Congress with comprehensive and timely national, state, and local information on the dynamic nature of employers and employees.

The LEHD program significantly reduces the overall effort for the generation of its quarterly data product by:

- Leveraging exiting federal administrative and state data
- Avoiding costs required to expand existing surveys to collect the information directly
- Reducing respondent burden by limiting the number of required resources to just the owners of the required data

The LEHD program is a member of a partnership between the US Census Bureau and the Labor Market Information (LMI) agencies from 49 states, the District of Columbia, and the territories of Puerto Rico and the Virgin Islands. This partnership supports the development, promotion, and distribution of the following data products:

- QWI Public Use—The flagship data product of the LEHD program is the QWI Public Use which provides 32 statistical indicators on employment, job creation and destruction, accessions (hires and recalls), and separations (*e.g.* exits and layoffs). These statistics are released for the following by-groups for all quarters for which data are available for each partner state:
  - County, metropolitan, and workforce investment area
  - Age, sex, race, and ethnicity categories
  - Detailed industry (*i.e.,* type, firm age, firm size)
- LEHD Origin Destination Employment Statistics (LODES)—LODES data provide detailed spatial distributions of workers' employment and residential locations and the relation between the two at the Census Block level. LODES also provides characteristic detail on age, earnings, industry distributions, and local workforce indicators.
- Job-to-Job Flows (J2J)—Job-to-Job Flows (J2J) is a new set of statistics on worker reallocation in the United States constructed from the LEHD data. The initial release of national data distinguishes hires and separations associated with job change from hires and separations to non-employment. Future releases will be published at more detailed levels of aggregations, and will tabulate the origin and destination job characteristics of workers changing jobs.

These data products highlight state and local labor market dynamics that cannot be learned from other statistical sources and are therefore used in many different arenas. For example, the QWI can be used as local-labor-market controls in regression analysis; to identify long-term trends; to provide local context in performance evaluations, and a host of other applications.

II. Method of Collection

The collection of data occurs in accordance with the rules established by interagency agreements with the participating state partners or data sharing agreements that have been established within the Census Bureau. For state partners, their data is submitted directly to the Census secure servers where Personally Identifiable Information (PII) goes through a process to replace it with Protected Identification Keys (PIK). This ''PIKing'' process also applies to all other administrative data that are used by the LEHD program. For all other required administration data, they are transferred or referenced by the QWI production system. Data collection and processing also includes activities such as validation of data quality.

The data products created by the LEHD program are not generated by a traditional survey. Rather, all input data required is collected electronically as follows:

- State Unemployment Insurance (UI) and Quarterly Census of Employment and Wages (QCEW) are provided via secure File Transfer Protocol (FTP)

where each state LMI agency sends these data directly to the Census Bureau. This transfer of data is governed by a Memorandum of Understandings (MOUs) with each state partner.

• Federal and Census Administrative data are acquired from other directorates or divisions within the Census Bureau where an internal agreement has been established for the use of the data.

• Public Use data sets are acquired from public source Web sites or public File Transfer Protocol (FTP) servers.

III. Data

Data that is used by the LEHD program is defined in the following table.

TABLE III–1—INPUT DATA SETS FOR THE LEHD PROGRAM

File	Source	Delivery schedule	Number of respondents
American Housing Survey (AHS)	Census Bureau	Yearly	1
Business Dynamics Statistics (BDS)	Census Bureau	Quarterly	1
Quarterly Census of Employment and Wages (QCEW)	Bureau of Labor Statistics	Quarterly	1
Current Population Survey (CPS)	Census Bureau	Yearly	1
Federal Workers	Office of Personnel Management.	Quarterly	1
Geographic Reference File	Census Bureau	Yearly	1
Master Address File Extract	Census Bureau	Yearly	1
New Business Register	Census Bureau	Yearly	1
Geographic Database	Pitney Bowes Corporation	Quarterly	1
Composite Person Record	Census Bureau	Yearly	1
Master Address File Auxiliary Reference File	Census Bureau	Yearly	1
Residence Candidate File	Census Bureau	Yearly	1
Survey of Income and Program Participation	Census Bureau	Yearly	1
Topologically Integrated Geographic Encoding and Referencing.	Census Bureau	Yearly	1
Unemployment Insurance Wage File	State Partners	Quarterly	52
Quarterly Census of Employment and Wages (ES–202)	State Partners	Quarterly	52
WIB Definitions files	State Partners	Acquired as needed	52

OMB Control Number: 0607–XXXX.

Form Number(s): Not applicable as survey forms are not required to collect this data.

Type of Review: Regular submission as defined in Table III–1.

Affected Public: 0.

Estimated Number of Respondents: As defined in Table III–1.

Estimated Time per Response: No more than 4 hours required to identify and send/post required data sets.

Estimated Total Annual Burden Hours: Approximately 1964 hours.

Estimated Total Annual Cost to Public: Census Bureau collection of this data imposes no such costs to the respondents.

Respondent's Obligation: Voluntary.

Legal Authority: The authority to conduct the LEHD program is 13 U.S.C. Section 6. Of course, confidentiality is assured by 13 U.S.C. Section 9.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

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

Sheleen Dumas,

PRA Departmental Lead, Office of the Chief Information Officer.

[FR Doc. 2016–29395 Filed 12–7–16; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–52–2016]

Production Activity Not Authorized Foreign-Trade Zone (FTZ) 134—Chattanooga, Tennessee, Wacker Polysilicon North America LLC, (Polysilicon), Charleston, Tennessee

On August 5, 2016, Wacker Polysilicon North America LLC submitted a notification of proposed production activity to the Foreign-Trade Zones (FTZ) Board for its facility within FTZ 134, in Charleston, Tennessee.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (81 FR 54554, August 16, 2016). Pursuant to Section 400.37, the FTZ Board has determined that further review is warranted and has not authorized the proposed activity. If the applicant wishes to seek authorization for this activity, it will need to submit an application for production authority, pursuant to Section 400.23.

Dated: December 5, 2016.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2016–29435 Filed 12–7–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–836]

Glycine From the People's Republic of China: Final Results of the Expedited Sunset Review of the Antidumping Duty Order

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

SUMMARY: As a result of this sunset review, the Department of Commerce (the Department) finds that revocation

of the antidumping duty order on glycine from the People's Republic of China (PRC) would be likely to lead to continuation or recurrence of dumping at the rate identified in the ''Final Results of Review'' section of this notice.

FOR FURTHER INFORMATION CONTACT: Dena Crossland, AD/CVD Operations, Office VI, Enforcement and Compliance, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3362.

DATES: Effective December 8, 2016.

SUPPLEMENTARY INFORMATION:

Background

On March 29, 1995, the Department published the antidumping duty order on glycine from the PRC.[1] On August 1, 2016, the Department initiated a sunset review of the *Order* in accordance with section 751(c) of the Tariff Act of 1930, as amended (the Act).[2] On August 8, 2016, the Department received complete notices of intent to participate in the sunset review from GEO Specialty Chemicals, Inc. (GEO or domestic interested party) and Chattem Chemicals, Inc. within the deadline specified in 19 CFR 351.218(d)(1)(i). On August 25, 2016, Chattem Chemicals, Inc. withdrew its intent to appear as a party to this review. GEO is a producer of a domestic like product in the United States and, accordingly, is a domestic interested party pursuant to section 771(9)(C) of the Act.

On August 30, 2016, the Department received an adequate substantive response to the notice of initiation from GEO within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i). The Department did not receive any responses from the respondent interested parties, *i.e.,* glycine producers and exporters from the PRC. On the basis of the notice of intent to participate and adequate substantive response filed by the domestic interested party and no response from any respondent interested party, the Department has conducted an expedited sunset review of the *Order* pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C).

Scope of the Order

The product covered by the order is glycine, which is a free-flowing crystalline material, like salt or sugar. Glycine is produced at varying levels of purity and is used as a sweetener/taste enhancer, a buffering agent, reabsorbable amino acid, chemical intermediate, and a metal complexing agent. This order covers glycine of all purity levels. Glycine is currently classified under subheading 2922.49.4020 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and Customs purposes, the written description of the merchandise under the order is dispositive.[3]

Analysis of Comments Received

The issues discussed in the Decision Memorandum [4] are the likelihood of continuation or recurrence of dumping, and the magnitude of the margin of dumping likely to prevail if the *Order* were revoked. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in the Decision Memorandum which is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov* and is available to all parties in the Central Records Unit in room B8024 of the main Commerce building. In addition, a complete version of the Decision Memorandum can be accessed directly on the Internet at *http://trade.gov/enforcement/frn.* The signed Decision Memorandum and electronic versions of the Decision Memorandum are identical in content.

Final Results of Review

Pursuant to sections 752(c)(1) and (3) of the Act, we determine that revocation of the *Order* would be likely to lead to continuation or recurrence of dumping up to the following weighted-average percentage margin:

Exporter/producer	Margin (percent)
PRC-Wide Entity (all producers and exporters)	155.89

Administrative Protective Order

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

The Department is issuing and publishing these final results and notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act and 19 CFR 351.218.

Dated: November 28, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2016–29400 Filed 12–7–16; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Glycine from the People's Republic of China: Antidumping Duty Order,* 60 FR 16116 (March 29, 1995) (*Order*).

[2] *See Initiation of Five-Year (''Sunset'') Review,* 81 FR 50462 (August 1, 2016).

[3] In a separate scope ruling, the Department determined that D(-) Phenylglycine Ethyl Dane Salt is outside the scope of the order. *See Notice of Scope Rulings,* 62 FR 62288 (November 21, 1997).

[4] *See* Department Memorandum, ''Issues and Decision Memorandum for the Expedited Sunset Review of the Antidumping Duty Order on Glycine from the People's Republic of China; Final Results,'' dated concurrently with this notice (Decision Memorandum).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF065

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Geophysical Surveys in the Gulf of Mexico

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

ACTION: Notice; receipt of revised application for marine mammal incidental take regulations (ITRs); request for comments and information.

SUMMARY: NMFS has received a revised application for ITRs from the Bureau of Ocean Energy Management (BOEM), on behalf of oil and gas industry operators. The specified activity considered in the application is geophysical survey activity conducted in the Gulf of Mexico (GOM), over the course of five years from the date of issuance. Pursuant to regulations implementing the Marine Mammal Protection Act (MMPA), NMFS is announcing receipt of BOEM's request for the development of regulations governing the incidental taking of marine mammals. NMFS invites the public to provide information, suggestions, and comments on BOEM's application.

DATES: Comments and information must be received no later than January 9, 2017.

ADDRESSES: Comments on the application should be addressed to Jolie Harrison, Chief, Permits and

Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.Laws@noaa.gov.*

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *www.nmfs.noaa.gov/pr/permits/incidental/oilgas.htm* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Ben Laws, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Availability

Electronic copies of the application and supporting documents may be obtained online at: *www.nmfs.noaa.gov/pr/permits/incidental/oilgas.htm.* BOEM has separately released a draft Programmatic Environmental Impact Statement (EIS) for public review (September 30, 2016; 81 FR 67380). This draft EIS was prepared in order to evaluate the potential significant effects of multiple geological and geophysical activities on the GOM Outer Continental Shelf (OCS), pursuant to the National Environmental Policy Act. The document is available online at: *www.boem.gov/GOM-G-G-PEIS/.*

Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) if certain findings are made and regulations are issued.

Incidental taking shall be allowed if NMFS finds that the taking will have a negligible impact on the species or stock(s) affected and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).''

The use of sound sources such as those described in the application (*e.g.,* airgun arrays) may result in the disturbance of marine mammals through disruption of behavioral patterns or may cause auditory injury of marine mammals. Therefore, incidental take authorization under the MMPA is warranted.

Summary

BOEM was formerly known as the Minerals Management Service (MMS) and, later, the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE). On December 20, 2002, MMS petitioned NMFS for rulemaking under Section 101(a)(5)(A) of the MMPA to authorize take of sperm whales (*Physeter macrocephalus*) incidental to conducting geophysical surveys during oil and gas exploration activities in the GOM. On March 3, 2003, NMFS published a notice of receipt of MMS's application and requested comments and information from the public (68 FR 9991). This comment period was later extended to April 16, 2003 (68 FR 16263). MMS subsequently submitted a revised petition on September 30, 2004, to include a request for incidental take authorization of additional species of marine mammals. On April 18, 2011, BOEMRE submitted a revision to the petition, which incorporated updated information and analyses. NMFS published a notice of receipt of this revised petition on June 14, 2011 (76 FR 34656). In order to incorporate the best available information, BOEM submitted another revision to the petition on March 28, 2016, which was followed on October 17, 2016, by a revised version that we have deemed adequate and complete based on our implementing regulations at 50 CFR 216.104.

The requested regulations would establish a framework for authorization of incidental take by Level A and Level B harassment through Letters of Authorization (LOAs). Following development of the ITRs, implementation could occur via issuance of LOAs upon request from individual industry applicants planning specific geophysical survey activities.

Specified Activities

The application describes geophysical survey activity, conducted by industry operators in OCS waters of the GOM within BOEM's GOM planning areas (*i.e.,* the Western, Central, and Eastern Planning Areas). Geophysical surveys are conducted by industry operators to characterize the shallow and deep structure of the OCS, including the shelf, slope, and deepwater ocean environment, in order to obtain data for hydrocarbon exploration and production, aid in siting oil and gas structures and facilities, identify possible seafloor or shallow-depth geologic hazards, and locate potential archaeological resources and benthic habitats that should be avoided.

Deep penetration seismic surveys, used largely for oil and gas exploration and development and involving a vessel or vessels towing an airgun or array of airguns that emit acoustic energy pulses through the overlying water and into the seafloor, are one of the most extensive survey types and are expected to carry the greatest potential for effects to marine mammals. Non-airgun high resolution geophysical surveys are used to detect and monitor geohazards, archaeological resources, and certain types of benthic communities.

Information Solicited

Interested persons may submit information, suggestions, and comments concerning BOEM's request (see **ADDRESSES**). NMFS will consider all relevant information, suggestions, and comments related to the request during the development of proposed regulations governing the incidental taking of marine mammals, as appropriate.

Dated: December 2, 2016.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016–29388 Filed 12–7–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 16–43]

36(b)(1) Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Pam Young, DSCA/SA&E/RAN, (703) 697–9107.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 16–43 with attached Policy Justification and Sensitivity of Technology.

Dated: December 2, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

NOV 16 2016

The Honorable Paul D. Ryan
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 16-43, concerning the Department of the Air Force's proposed Letter(s) of Offer and Acceptance to the Republic of Korea for defense articles and services estimated to cost $141 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

J. W. Rixey
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Transmittal No. 16–43

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Republic of Korea.

(ii) *Total Estimated Value:*

Major Defense Equipment*	$ 41 million.
Other	$100 million.
TOTAL	$141 million.

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:* The Government of the Republic of Korea has requested the sale and installation of AN/AAQ–24(V) Large Aircraft Infrared Countermeasures (LAIRCM) systems on up to four (4) A–330 Multi-Role Tanker and Transport (MRTT) aircraft. Each LAIRCM system consists of three (3) Guardian Laser Terminal Assemblies (GLTA), six (6) Ultra-Violet Missile Warning System (UVMWS) Sensors AN/AAR–54, one (1) LAIRCM System Processor Replacements (LSPR), one (1) Control Indicator Unit Replacement (CIUR), one (1) Smart Card Assembly (SCA), one (1) High Capacity Card (HHC), and a User Data Memory (UDM) card.

Major Defense Equipment (MDE):

Twenty-six (26) GLTA AN/AAQ–24(V) (12 + 14 spares)

Twelve (12) LSPR AN/AAQ–24(V) (4 + 8 spares)

Fifty-four (54) UVMWS Sensors AN/AAR–54 (24 + 30 spares)

Non-MDE include:

CIURs, SCAs, HHCs, UDM cards, initial spares and repair parts, consumables, support equipment, technical data, engineering change proposals, minor modifications, publications, Field Service Representatives' (FSRs), repair and return, depot maintenance, training and training equipment, contractor technical and logistics personnel services, U.S. Government and contractor representative support, Group A and B installation support, flight test and certification, selective availability anti-spoofing module (SAASM) Global Positioning System, and other related elements of logistics support.

(iv) *Military Department:* Air Force

(v) *Prior Related Cases, if any:* None

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Annex Attached.

(viii) *Date Report Delivered to Congress:* November 16, 2016

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Republic of Korea—Large Aircraft Infrared Countermeasures (LAIRCM) System

The Government of the Republic of Korea (ROK) has requested the sale and installation of AN/AAQ- 24(V) Large Aircraft Infrared Countermeasures (LAIRCM) systems for up to four (4) A–330 Multi-Role Tanker and Transport (MRTT) aircraft. Each LAIRCM system consists of the following major defense equipment (MDE): three (3) Guardian Laser Terminal Assemblies (GLTA), six (6) Ultra-Violet Missile Warning System (UVMWS) Sensors AN/AAR–54, one (1) LAIRCM System Processor Replacement (LSPR), one (l) Control Indicator Unit Replacement (CIUR), one (1) Smart Card Assembly (SCA), one (1) High Capacity Card (HCC), and User Data Memory (UDM) card. The sale includes spares bringing the MDE total to twenty-six (26) GLTAs, twelve (12) LSPRs, and fifty-four (54) UVMWS Sensors AN/AAR–54.

The sale also includes the following non-MDE items: CIURs, SCAs, HHCs, UDM Cards, initial spares and repair parts, consumables, support equipment, technical data, engineering change proposals, minor modifications, publications, Field Service Representatives' (FSRs), repair and return, depot maintenance, training and training equipment, contractor technical and logistics personnel services, U.S. Government and contractor representative support, Group A and B installation support, flight test and certification, selective availability anti-spoofing module (SAASM) Global Positioning System, and other related elements of logistics support. The estimated cost is $141 million.

The ROK is procuring the LAIRCM system to defend and protect its future aerial refueling and troop transport capabilities. This helps the ROK Air Force become more capable of sustaining and projecting air power across large distances and transporting its forces and fighter aircraft for both operational and training missions with less reliance on foreign partners, such as the United States. The ROK will have no difficulty absorbing this equipment into its armed forces.

This proposed sale contributes to the foreign policy and national security of the United States. The ROK is one of the major political and economic powers in East Asia and the Western Pacific and a key partner of the United States in ensuring peace and stability in that region. It is vital to U.S. national interests to assist our Korean ally in developing and maintain a strong and ready self-defense capability. This sale increases the ROK's capability to participate in Pacific regional security operations and improves its national security posture as a key U.S. ally.

The proposed sale of this equipment and support does not affect the basic military balance in the region.

This sale includes provisions for one (1) FSR to live in Korea for up to two years. Implementation of this proposed sale requires multiple temporary trips to Korea involving U.S. Government or contractor representatives over a period of up to six (6) years for program execution, delivery, technical support, and training.

The principal contractor is Northrop Grumman Corporation, Rolling Meadows, IL. At this time, there are no known offset agreements proposed in connection with this potential sale.

There is no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 16–43

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex Item

No. vii

(vii) *Sensitivity of Technology:*

1. The AN/AAQ–24(V) Large Aircraft Infrared Countermeasures (LAIRCM) is a self contained, directed energy countermeasures system designed to protect aircraft from infrared guided surface-to-air missiles. The system features digital technology and micro-miniature solid state electronics. The system operates in all conditions, detecting incoming missiles and jamming infrared-seeker equipped missiles with aimed bursts of laser energy. The LAIRCM system consists of multiple Ultra-Violet Missile Warning System (UVMWS) Sensors AN/AAR–54, Guardian Laser Turret Assembly (GLTA), LAIRCM System Processor Replacement (LSPR), Control Indicator Unit Replacement (CIUR), and a classified High Capacity Card (HCC), and User Data Memory (UDM) card. The HCC is loaded into the CIUR prior to flight. When the classified HCC is not in use, it is removed from the CIUR and placed in onboard secure storage. LAIRCM Line Replaceable Unit (LRU) hardware is classified SECRET when the HCC is inserted into the CIUR. LAIRCM system software, including Operational Flight Program is classified SECRET. Technical data and documentation to be provided are UNCLASSIFIED.

a. The set of UVMWS Sensor units (AN/AAR–54) are mounted on the aircraft exterior to provide omni-

directional protection. The UVMWS detects the rocket plume of missiles and sends appropriate data signals to the LSPR for processing. The LSPR analyzes the data from each UVMWS Sensor and automatically deploys the appropriate countermeasure via the GLTA. The CIUR displays the incoming threat.

b. The AN/AAR–54 UVMWS Sensor warns of threat missile approach by detecting radiation associated with the rocket motor. The AN/AAR–54 is a small, lightweight, passive, electro-optic, threat warning device used to detect surface-to-air missiles fired at helicopters and low-flying fixed-wing aircraft and automatically provide countermeasures, as well as audio and visual warning messages to the aircrew. The basic system consists of multiple UVMWS Sensor units, three (3) GLTAs, a LSPR, and a CIUR. The set of UVMWS units (each A–330 MRTT has six (6)) are mounted on the aircraft exterior to provide omni-directional protection. Hardware is UNCLASSIFIED. Software is SECRET. Technical data and documentation to be provided are UNCLASSIFIED.

2. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures or equivalent systems which might reduce system effectiveness or be used in the development of a system with similar or advanced capabilities.

3. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy justification. Moreover, the benefits to be derived from this sale, as outlined in the Policy Justification, outweigh the potential damage that could result if the sensitive technology were revealed to unauthorized persons.

4. All defense articles and services listed in this transmittal are authorized for release and export to the Government of the Republic of Korea.

[FR Doc. 2016–29392 Filed 12–7–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 16–53]

36(b)(1) Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Pam Young, DSCA/SE&E–RAN, (703) 697–9107.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 16–53 with attached Policy Justification and Sensitivity of Technology.

Dated: December 2, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

The Honorable Paul D. Ryan
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

NOV 16 2016

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 16-53, concerning the Department of the Air Force's proposed Letter of Offer(s) and Acceptance to the United Kingdom for defense articles and services estimated to cost $1.00 billion. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

J. W. Rixey
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Transmittal No. 16–53

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* United Kingdom.

(ii) *Total Estimated Value:*

Major Defense Equipment *	$780 million
Other	$220 million
TOTAL	$1.00 billion

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):

Twenty-six (26) Certifiable Predator B Remotely Piloted Aircraft (16 with option for additional 10)

Twelve (12) Advanced Ground Control Stations (GCSs) (8 with option for additional 4)

Four (4) New Launch and Recovery Element GCSs

Four (4) Upgrades to existing Blk 15 Launch and Recovery Element GCSs (2 with option for additional 2)

Twenty-five (25) Multi-spectral Targeting Systems (12 + 2 spares, with option for additional 10 + 1 spare)

Twenty-five (25) AN/APY–8 Lynx IIe Block 20A Synthetic Aperture Radar and Ground Moving Target Indicators (SAR/GMTI) (12 + 2 spares, with option for additional 10 + 1 spare)

Eighty-six (86) Embedded Global Positioning System/Inertial Guidance Units (EGIs) (3 per aircraft) (48 + 5 spares, with option for additional 30 + 3 spares)

Non-MDE include:

Non-MDE items include: communications equipment, Identification Friend or Foe (IFF) equipment, weapons installation kits, and TPE331–10YGD engines. In addition, the package provides a unique and common spares package, support equipment, U.S. Air Force technical orders, country specific technical

orders, Contractor Logistics Support for two (optional three) years, contractor provided aircraft components, spares, and accessories, training, and other related elements of logistical and program support.

(iv) *Military Department:* Air Force (X6–D–SAC).

(v) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None.

(vi) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Annex Attached.

(vii) *Date Report Delivered to Congress:* November 16, 2016.

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

United Kingdom—Certifiable Predator B Remotely Piloted Aircraft

The United Kingdom (UK) requested a possible sale of up to twenty-six (26) Certifiable Predator B Remotely Piloted Aircraft (16 with option for additional 10); twelve (12) Advanced Ground Control Stations (GCSs) (8 with option for additional 4); four (4) New Launch and Recovery Element GCSs; four (4) Upgrades to existing Blk 15 Launch and Recovery Element GCSs (2 with option for additional 2); twenty-five (25) Multi-spectral Targeting Systems (12 + 2 spares, with option for additional 10 + 1 spare); twenty-five (25) AN/APY–8 Lynx IIe Block 20A Synthetic Aperture Radar and Ground Moving Target Indicators (SAR/GMTI) (12+ 2 spares, with option for additional 10 + 1 spare); Eighty-six (86) Embedded Global Positioning System/Inertial Guidance Units (EGIs) (3 per aircraft) (48 + 5 spares, with option for additional 30 + 3 spares). This sale also includes communications equipment, Identification Friend or Foe (IFF) equipment; weapons installation kits; TPE331–10YGD engines; unique and common spares package; support equipment; U.S. Air Force technical orders; country specific technical orders; Contractor Logistics Support for two (optional three) years; contractor provided aircraft components, spares, and accessories; personnel training; and other related elements of logistical and program support. The total estimated program cost is $1.0 billion.

The UK is a close ally and an important partner on critical foreign policy and defense issues. The proposed sale will enhance U.S. foreign policy and national security objectives by enhancing the UK's capabilities to provide national defense and contribute to NATO and coalition operations.

This sale will improve the UK's ability to meet current and future threats by providing improved Intelligence, Surveillance and Reconnaissance (ISR) coverage that enhances homeland security, promotes increased battlefield situational awareness, augments combat search and rescue, and provides ground troop support. The Certifiable Predator B will also be used to support the UK's armed forces and coalition forces engaged in current and future peacekeeping, peace-enforcing, counter-insurgent, and counterterrorism operations. The UK already operates armed remotely piloted aircraft, the MQ–9 Reaper, and will have no difficulty transitioning to the Certifiable Predator B.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractors will be General Atomics Aeronautical Systems, Inc. in San Diego, California. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to the UK.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 16–53

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex Item

No. vii

(vii) *Sensitivity of Technology:*

1. The Certifiable Predator B (CPB) Remotely Piloted Aircraft (RPA) is a weapons-capable aircraft designed for medium to high altitude-long endurance Intelligence, Surveillance and Reconnaissance (ISR), Target Acquisition, and Strike missions. Protector (formerly known as Scavenger) represents the CPB as modified to a UK-specific configuration which includes the design, development and integration of a UK-specific weapons installation kit for employment of UK-produced weapons (Paveway IV and Brimstone II). Building upon the legacy of Predator B's proven success, CPB/Protector provides up to 40 hours endurance, speeds up to 220 knots true air speed (KTAS) and a maximum altitude of 45,000 feet. The system is designed to be controlled by two operators within an Advanced Ground Control Station (AGCS). The AGCS is designed to emulate a reconnaissance aircraft cockpit, giving users extensive means to operate both the aircraft and sensors. CPB/Protector is able to operate using a direct Line-of-Sight (LOS) datalink or can be operated Beyond Line-of-Sight (BLOS) using satellite communications (SATCOM). The design enables unmanned aerial vehicle (UAV) control to be handed off between multiple AGCSs thus allowing remote-split operations and centralized mission control with other assets. The CPB/Protector system can be deployed from a single site that supports launch, recovery, mission control, and maintenance. The system also supports remote-split operations where launch, recovery, and maintenance occur at a Forward Operating Base and mission control is conducted from another geographically separated location, or Main Operating Base (MOB).

2. The United Kingdom CPB/Protector system includes the following components.

a. A secure Advanced CGCS with workstations that allow operators to control and monitor the aircraft, as well as record and exploit downlinked payload data.

b. The unclassified General Atomics AN/APY–8 Block 20 Lynx Ile Synthetic Aperture Radar and Ground Moving Target Indicator (SAR/GMTI) system provides an all-weather surveillance, tracking and targeting capability. The AN/APY–8 Block 20 operates in the Ku band, using an offset-fed dish antenna mounted on a three-axis stabilized gimbal. It has a large field of regard, produces a strip map and can image up to a l0km wide swath. Swaths from multiple passes can be combined for wide-area surveillance.

c. The Raytheon Multi-spectral Targeting System with Laser Target Designator (LTD) and multi-use Electro-Optical (EO)/lnfra-Red (IR) sensor provides long-range surveillance, high-altitude target acquisition, tracking, and range-finding with capabilities up to and including high definition color TV, high definition short-wave IR, medium-wave IR, and long wave IR sensors.

d. The weapons installation kit enables the integration of UK-produced munitions (Paveway IV and Brimstone II) onto the Protector platform. The integration of these munitions requires specialized non-recurring engineering work which will be performed by the platform OEM in the United States.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware or software in this proposed sale, any information gleaned from exploitation of hardware, publications and software could be used to develop countermeasures (electronic, infrared, or other types) as well as offensive and defensive counter-tactics and allow an adversary to exploit those vulnerabilities during combat.

4. A determination has been made that the recipient country can provide substantially the same degree of protection for the sensitive technology being released as the US Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

5. All defense articles and services listed in this transmittal have been authorized for release and export to the United Kingdom.

[FR Doc. 2016–29393 Filed 12–7–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2016–OS–0110]

Manual for Courts-Martial; Publication of Supplementary Materials

AGENCY: Joint Service Committee on Military Justice (JSC), Department of Defense.

ACTION: Publication of Discussion (Supplementary Materials) accompanying the Manual for Courts-Martial, United States (2012 ed.) (MCM).

SUMMARY: The JSC hereby publishes Supplementary Materials accompanying the MCM as amended by Executive Orders 13643, 13669, 13696, 13730, and 13740. These changes have not been coordinated within the Department of Defense under DoD Directive 5500.1, ''Preparation, Processing and Coordinating Legislation, Executive Orders, Proclamations, Views Letters and Testimony,'' June 15, 2007, and do not constitute the official position of the Department of Defense, the Military Departments, or any other Government agency. These Supplementary Materials have been approved by the JSC and the General Counsel of the Department of Defense, and shall be applied in conjunction with the rule with which they are associated. The Discussion is effective insofar as the Rules it supplements are effective, but may not be applied earlier than the date of publication in the **Federal Register**.

DATES: This Discussion is effective as of December 8, 2016.

FOR FURTHER INFORMATION CONTACT: Major Harlye S.M. Carlton, USMC, (703) 963–9299 or *harlye.carlton@usmc.mil.* The JSC Web site is located at: *http://jsc.defense.gov.*

SUPPLEMENTARY INFORMATION: The Discussion to Part IV of the Manual for Courts-Martial, United States, is amended as follows:

(a) The Discussion immediately after paragraph 60.c.(6)(a) is amended to read as follows:

''Clauses 1 and 2 are theories of liability that must be expressly alleged in a specification so that the accused will be given notice as to which clause or clauses to defend against. The words ''to the prejudice of good order and discipline in the armed forces'' encompass both paragraph c.(2)(a), prejudice to good order and discipline, and paragraph c.(2)(b), breach of custom of the Service. A generic sample specification is provided below:

In that _____ (personal jurisdiction data), did (at/on board location), on or about _____ 20____, (commit elements of Article 134 clause 1 or 2 offense), and that said conduct (was to the prejudice of good order and discipline in the armed forces) (and) (was of a nature to bring discredit upon the armed forces).

If clauses 1 and 2 are alleged together in the terminal element, the word ''and'' should be used to separate them. Any clause not proven beyond a reasonable doubt should be excepted from the specification at findings. *See* R.C.M. 918(a)(1). *See also* Appendix 23 of this Manual, Art. 79. Although using the conjunctive ''and'' to connect the two theories of liability is recommended, a specification connecting the two theories with the disjunctive ''or'' is sufficient to provide the accused reasonable notice of the charge against him. *See* Appendix 23 of this Manual, Art. 134.

Lesser included offenses are defined and explained under Article 79; however, in 2010, the Court of Appeals for the Armed Forces examined Article 79 and clarified the legal test for lesser included offenses. *See United States* v. *Jones,* 68 M.J. 465 (C.A.A.F. 2010). Under *Jones,* an offense under Article 79 is ''necessarily included'' in the offense charged only if the elements of the lesser offense are a subset of the elements of the greater offense alleged. 68 M.J. at 472; *see also* discussion following paragraph 3b(1)(c) in this part and the related analysis in Appendix 23 of this Manual. Practitioners should carefully consider lesser included offenses using the elements test in conformity with *Jones. See* paragraph 3b(4) in Appendix 23 of this Manual. If it is uncertain whether an Article 134 offense is included within a charged offense, the government may plead in the alternative or, with the consent of the accused, the government may amend the charge sheet. *Jones,* 68 M.J. at 472–73 (referring to R.C.M. 603(d) for amending a charge sheet).''

Dated: December 2, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–29384 Filed 12–7–16; 8:45 am]

BILLING CODE 5001–06–P

ELECTION ASSISTANCE COMMISSION

Sunshine Act Notice of Public Meeting Agenda

DATE AND TIME: Thursday, December 15, 2016 (10:30 a.m.–1:00 p.m.—EDT).

PLACE: 1335 East West Highway (First Floor Conference Room) Silver Spring, MD 20910.

AGENDA: Commissioners will meet to provide an initial de-brief on the 2016 election and to celebrate the 10th anniversary of the EAC's Testing and Certification Program. Commissioners will discuss the 2016 election with a panel of state and local election administrators, and a panel representing the perspectives of military and overseas voters, voters with disabilities and other election administration interest groups. Commissioners will hear from a panel to discuss the past ten years of EAC Testing and Certification of voting systems. Voting system manufacturers will discuss the evolution of the program from their perspective; a state certification official will provide insight into how EAC certification assists the states in their unique certification roles, and EAC program staff will provide their thoughts on ten years in the certification business.

STATUS: This meeting will be open to the public.

PERSON TO CONTACT FOR INFORMATION: Bryan Whitener, Telephone: (301) 563–3961.

Bryan Whitener,

Director of Communications and Clearinghouse, U.S. Election Assistance Commission.

[FR Doc. 2016–29592 Filed 12–6–16; 4:15 pm]

BILLING CODE 6820–KF–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER17–423–000]

Rubicon NYP Corp; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Rubicon

NYP Corp's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is December 20, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 30, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–29418 Filed 12–7–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER15–13–007.

Applicants: Transource Wisconsin, LLC.

Description: Compliance filing: Transource Wisconsin Protocols Compliance Filing to be effective 12/1/2014.

Filed Date: 11/30/16.

Accession Number: 20161130–5169

Comments Due: 5 p.m. ET 12/21/16.

Docket Numbers: ER17–427–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 1266R4 Kansas Municipal Energy Agency NITSA and NOA to be effective 2/1/2017.

Filed Date: 11/30/16.

Accession Number: 20161130–5156.

Comments Due: 5 p.m. ET 12/21/16.

Docket Numbers: ER17–428–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: Missouri River Energy Services Member Formula Rate (Vermillion) to be effective 2/1/2017.

Filed Date: 11/30/16.

Accession Number: 20161130–5178.

Comments Due: 5 p.m. ET 12/21/16.

Docket Numbers: ER17–429–000.

Applicants: Southern California Edison Company.

Description: § 205(d) Rate Filing: Fourth Amendment of SGIA for Western Antelope Dry Ranch Project to be effective 12/1/2016.

Filed Date: 11/30/16.

Accession Number: 20161130–5195.

Comments Due: 5 p.m. ET 12/21/16.

Docket Numbers: ER17–430–000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Cancellation: Notice of Cancellations for Service Agreements for Deactivated Units to be effective 9/1/2013.

Filed Date: 11/30/16.

Accession Number: 20161130–5196.

Comments Due: 5 p.m. ET 12/21/16.

Docket Numbers: ER17–431–000.

Applicants: Pacific Gas and Electric Company.

Description: § 205(d) Rate Filing: November 2016 Western Interconnection Agreement Biannual Filing to be effective 2/1/2017.

Filed Date: 11/30/16.

Accession Number: 20161130–5204.

Comments Due: 5 p.m. ET 12/21/16.

Docket Numbers: ER17–432–000.

Applicants: Pacific Gas and Electric Company.

Description: § 205(d) Rate Filing: November 2016 Western WDT Service Agreement Biannual Filing to be effective 2/1/2017.

Filed Date: 11/30/16.

Accession Number: 20161130–5207.

Comments Due: 5 p.m. ET 12/21/16.

Docket Numbers: ER17–433–000.

Applicants: Eagle Point Power Generation LLC.

Description: Compliance filing: Revised MBR Tariff to be effective 1/30/2017.

Filed Date: 11/30/16.

Accession Number: 20161130–5275.

Comments Due: 5 p.m. ET 12/21/16.

Docket Numbers: ER17–434–000.

Applicants: Alcoa Power Generating Inc.

Description: § 205(d) Rate Filing: Transmission Svc Agmt for Native Load Customer—APGI (Long Sault) & Alcoa to be effective 11/1/2016.

Filed Date: 11/30/16.

Accession Number: 20161130–5284.

Comments Due: 5 p.m. ET 12/21/16.

Docket Numbers: ER17–435–000.

Applicants: Alcoa Power Generating Inc.

Description: § 205(d) Rate Filing: Transmission Svc Agmt for Native Load Customer—APGI (Tapoco) & Arconic to be effective 11/1/2016.

Filed Date: 11/30/16.

Accession Number: 20161130–5285.

Comments Due: 5 p.m. ET 12/21/16.

Docket Numbers: ER17–436–000.

Applicants: Marcus Hook Energy, L.P.

Description: § 205(d) Rate Filing: Notice of Succession to be effective 11/21/2016.

Filed Date: 11/30/16.

Accession Number: 20161130–5307.

Comments Due: 5 p.m. ET 12/21/16.

Docket Numbers: ER17–437–000.

Applicants: Marcus Hook 50, L.P.

Description: § 205(d) Rate Filing: Notice of Succession to be effective 11/21/2016.

Filed Date: 11/30/16.

Accession Number: 20161130–5308.

Comments Due: 5 p.m. ET 12/21/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern

time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 30, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–29415 Filed 12–7–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP11–1591–000.
Applicants: Golden Pass Pipeline LLC.
Description: Report Filing: 2016 Annual Report of Penalty Revenue and Costs.
Filed Date: 11/29/16.
Accession Number: 20161129–5208.
Comments Due: 5 p.m. ET 12/12/16.

Docket Numbers: RP17–196–000.
Applicants: Millennium Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Out-of-Cycle RAM 2016 to be effective 1/1/2017.
Filed Date: 11/23/16.
Accession Number: 20161123–5045.
Comments Due: 5 p.m. ET 12/5/16.

Docket Numbers: RP17–197–000.
Applicants: Dominion Cove Point LNG, LP.
Description: § 4(d) Rate Filing: DCP—2016 Section 4 General Rate Case to be effective 1/1/2017.
Filed Date: 11/23/16.
Accession Number: 20161123–5060.
Comments Due: 5 p.m. ET 12/5/16.

Docket Numbers: RP17–198–000.
Applicants: Cameron Interstate Pipeline, LLC.
Description: Compliance filing Cameron Interstate Pipeline Annual Adjustment of Fuel Retainage Percentage to be effective 1/1/2017.
Filed Date: 11/23/16.
Accession Number: 20161123–5108.
Comments Due: 5 p.m. ET 12/5/16.

Docket Numbers: RP17–199–000.
Applicants: Southern Star Central Gas Pipeline, Inc.
Description: Compliance filing Annual Cash-Out Activity Report 2016.
Filed Date: 11/28/16.
Accession Number: 20161128–5075.
Comments Due: 5 p.m. ET 12/12/16.

Docket Numbers: RP17–200–000.
Applicants: Guardian Pipeline, L.L.C.
Description: § 4(d) Rate Filing: Expiration of Negotiated Rate Agreements to be effective 12/31/2016.
Filed Date: 11/28/16.
Accession Number: 20161128–5197.
Comments Due: 5 p.m. ET 12/12/16.

Docket Numbers: RP17–201–000.
Applicants: Natural Gas Pipeline Company of America.
Description: § 4(d) Rate Filing: City of Sullivan to be effective 12/1/2016.
Filed Date: 11/28/16.
Accession Number: 20161128–5199.
Comments Due: 5 p.m. ET 12/12/16.

Docket Numbers: RP17–202–000.
Applicants: Natural Gas Pipeline Company of America.
Description: § 4(d) Rate Filing: City of Bethany to be effective 12/1/2016.
Filed Date: 11/28/16.
Accession Number: 20161128–5201.
Comments Due: 5 p.m. ET 12/12/16.

Docket Numbers: RP17–203–000.
Applicants: Questar Pipeline, LLC.
Description: § 4(d) Rate Filing: Annual FGRP Report for 2017 for Questar Pipeline, LLC to be effective 1/1/2017.
Filed Date: 11/28/16.
Accession Number: 20161128–5229.
Comments Due: 5 p.m. ET 12/12/16.

Docket Numbers: RP17–204–000.
Applicants: Pine Needle LNG Company, LLC.
Description: Petition for Approval of a Negotiated Stipulation and Agreement [including Pro Forma sheets] of Pine Needle LNG Company, LLC.
Filed Date: 11/28/16.
Accession Number: 20161128–5266.
Comments Due: 5 p.m. ET 12/12/16.

Docket Numbers: RP17–205–000.
Applicants: Texas Eastern Transmission, LP.
Description: § 4(d) Rate Filing: Non-conforming Agreement—PSEG Power 400241 to be effective 12/1/2016.
Filed Date: 11/29/16.
Accession Number: 20161129–5061.
Comments Due: 5 p.m. ET 12/12/16.

Docket Numbers: RP17–206–000.
Applicants: Southern Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: SCRM Filing Nov 2016 to be effective 1/1/2017.
Filed Date: 11/29/16.
Accession Number: 20161129–5063.
Comments Due: 5 p.m. ET 12/12/16.

Docket Numbers: RP17–207–000.
Applicants: MarkWest Pioneer, L.L.C.
Description: § 4(d) Rate Filing: Quarterly FRP Filing to be effective 1/1/2017.
Filed Date: 11/29/16.
Accession Number: 20161129–5077.
Comments Due: 5 p.m. ET 12/12/16.

Docket Numbers: RP17–208–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: § 4(d) Rate Filing: 11/29/16. Negotiated Rates—Cargill Incorporated (HUB) 3085–89 to be effective 12/1/2016.
Filed Date: 11/29/16.
Accession Number: 20161129–5118.
Comments Due: 5 p.m. ET 12/12/16.

Docket Numbers: RP17–209–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Annual Fuel and L&U Filing to be effective 1/1/2017.
Filed Date: 11/29/16.
Accession Number: 20161129–5120.
Comments Due: 5 p.m. ET 12/12/16.

Docket Numbers: RP17–210–000.
Applicants: Florida Gas Transmission Company, LLC.
Description: § 4(d) Rate Filing: Exhibit B update—delete contracts, rearrange point volumes to be effective 12/1/2016.
Filed Date: 11/29/16.
Accession Number: 20161129–5154.
Comments Due: 5 p.m. ET 12/12/16.

Docket Numbers: RP17–211–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rate Agreement Update (SRP 2016) to be effective 12/1/2016.
Filed Date: 11/29/16.
Accession Number: 20161129–5258.
Comments Due: 5 p.m. ET 12/12/16.

Docket Numbers: RP17–212–000.
Applicants: Tennessee Gas Pipeline Company, L.L.C.
Description: Compliance filing Cashout Report 2015–2016 to be effective N/A.
Filed Date: 11/29/16.
Accession Number: 20161129–5272.
Comments Due: 5 p.m. ET 12/12/16.

Docket Numbers: RP17–213–000.
Applicants: Northwest Pipeline LLC.
Description: § 4(d) Rate Filing: Leap Year Rate Removal—2016 to be effective 1/1/2017.
Filed Date: 11/29/16.
Accession Number: 20161129–5274.
Comments Due: 5 p.m. ET 12/12/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and § 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 30, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–29417 Filed 12–7–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER17–424–000]

Footprint Power Salem Harbor Development LP; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Footprint Power Salem Harbor Development LP's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is December 20, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 30, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–29419 Filed 12–7–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC16–173–000.

Applicants: The Dayton Power and Light Company, AES Ohio Generation, LLC.

Description: Response of The Dayton Power and Light Company and AES Ohio Generation, LLC to Deficiency Letter of Nov. 8, 2016.

Filed Date: 12/1/16.

Accession Number: 20161201–5241.

Comments Due: 5 p.m. ET 12/22/16.

Docket Numbers: EC17–41–000.

Applicants: American Falls Solar, LLC, American Falls Solar II, LLC.

Description: Application of American Falls Solar, LLC and American Falls Solar, II LLC, for Authorization under Section 203 of the Federal Power Act and Requests for Confidential Treatment, Expedited Consideration, and Waivers.

Filed Date: 12/1/16.

Accession Number: 20161201–5423.

Comments Due: 5 p.m. ET 12/22/16.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER16–1213–002.

Applicants: New York Independent System Operator, Inc.

Description: Compliance filing: Amendment to BTM:NG compliance filing to be effective 12/13/2016.

Filed Date: 12/1/16.

Accession Number: 20161201–5404.

Comments Due: 5 p.m. ET 12/22/16.

Docket Numbers: ER17–213–001.

Applicants: Midcontinent Independent System Operator, Inc.

Description: Tariff Amendment: 2016–12–01_Amendment to Module D Clean-up filing to be effective 12/28/2016.

Filed Date: 12/1/16.

Accession Number: 20161201–5350.

Comments Due: 5 p.m. ET 12/22/16.

Docket Numbers: ER17–246–001.

Applicants: Dynegy Oakland, LLC.

Description: Tariff Amendment: Deferral of Commission Action to Permit Ongoing Settlement Discussions to be effective 12/31/9998.

Filed Date: 12/2/16.

Accession Number: 20161202–5126.

Comments Due: 5 p.m. ET 12/23/16.

Docket Numbers: ER17–428–000.

Applicants: Southwest Power Pool, Inc.

Description: Offer of Settlement of Southwest Power Pool, Inc., on behalf of Missouri River Energy Services and member Vermillion Light & Power.

Filed Date: 12/1/16.

Accession Number: 20161201–5430.

Comments Due: 5 p.m. ET 12/21/16.

Docket Numbers: ER17–436–001; ER17–437–001; ER11–4634–002.

Applicants: Marcus Hook Energy, L.P., Marcus Hook 50, L.P., Hazleton Generation LLC.

Description: Notice of Change in Status of Marcus Hook Energy, L.P., et al.

Filed Date: 12/1/16.

Accession Number: 20161201–5437.

Comments Due: 5 p.m. ET 12/22/16.

Docket Numbers: ER17–466–000.

Applicants: Louisville Gas and Electric Company.

Description: § 205(d) Rate Filing: EKPC NITSA Amendments to be effective 12/1/2016.

Filed Date: 12/1/16.

Accession Number: 20161201–5364.

Comments Due: 5 p.m. ET 12/22/16.

Docket Numbers: ER17–467–000.

Applicants: New York Independent System Operator, Inc., Consolidated Edison Company of New York.

Description: § 205(d) Rate Filing: 205 filing re: LGIA (SA 2310) among the NYISO, Con Edison, and Cricket Valley to be effective 11/16/2016.

Filed Date: 12/1/16.

Accession Number: 20161201–5365.

Comments Due: 5 p.m. ET 12/22/16.

Docket Numbers: ER17–468–000.

Applicants: Ohio Valley Electric Corporation.

Description: Compliance filing: Amendment to Attachments J, K and P Tariff Records to be effective 10/14/2016.

Filed Date: 12/1/16.

Accession Number: 20161201–5389.

Comments Due: 5 p.m. ET 12/22/16.

Docket Numbers: ER17–469–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: Midwest Energy Formula Rate Revisions to be effective 1/1/2017.

Filed Date: 12/1/16.

Accession Number: 20161201–5402.

Comments Due: 5 p.m. ET 12/22/16.

Docket Numbers: ER17–470–000.

Applicants: San Diego Gas & Electric Company.

Description: Fourth Annual Informational Filing [Cycle 4] of Fourth Transmission Owner Rate Formula rate mechanism of San Diego Gas & Electric Company.

Filed Date: 12/1/16.

Accession Number: 20161201–5434.

Comments Due: 5 p.m. ET 12/22/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 2, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–29421 Filed 12–7–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP17–19–000]

Valley Crossing Pipeline, LLC; Notice of Application

Take notice that on November 21, 2016, Valley Crossing Pipeline, LLC (Valley Crossing), 5400 Westheimer Court, Houston, Texas 77056, filed an application in Docket No. CP17–19–000 under section 3 of the Natural Gas Act (NGA), and Part 153 of the Commission's regulations requesting authorization to site, construct, and operate new natural gas facilities to import/export natural gas between the United States to the Republic of Mexico at a point on the International Boundary in Texas state waters (Border Crossing Project), all as more fully set forth in the application which is on file with the Commission and open to public inspection. The facilities will consist of a segment of 42-in-diameter pipe that extends 1,000 feet in the Gulf of Mexico in Texas state waters to the International Boundary between the United States and Mexico. The filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions concerning this application may be directed to Lisa A. Connolly, General Manager, Rates and Certificates Department, Valley Crossing Pipeline, LLC, 5400 Westheimer Court, Houston, TX 77056; by calling (713) 627–4102; by faxing (304) 357–5947; or by emailing *laconnolly@spectraenergy.com.*

Pursuant to section 157.9 of the Commission's rules (18 CFR 157.9), within 90 days of this Notice, the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit seven copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents

filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Comment Date: December 23, 2016.

Dated: December 2, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–29423 Filed 12–7–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–3697–000.

Applicants: Southern California Edison Company.

Description: Informational Filing of Notice of Revision to Formula Transmission Rate Annual Update of Southern California Edison Company.

Filed Date: 11/30/16.

Accession Number: 20161130–5418.

Comments Due: 5 p.m. ET 12/21/16.

Docket Numbers: ER12–1436–011; ER10–2329–008; ER10–2740–010; ER10–2742–009; ER10–3099–017; ER10–3143–018; ER10–3169–011; ER10–3300–014; ER12–1260–010; ER13–1488–008; ER13–1793–008; ER14–152–006; ER14–153–006; ER14–154–006; ER16–517–001.

Applicants: Eagle Point Power Generation LLC, Elgin Energy Center, LLC, Gibson City Energy Center, LLC, Grand Tower Energy Center, LLC, Hazle Spindle, LLC, La Paloma Generating Company, LLC, Michigan Power Limited Partnership, Quantum Pasco Power, LP, RC Cape May Holdings, LLC, Rocky Road Power, LLC, Sabine Cogen, LP, Shelby County Energy Center, LLC, Tilton Energy LLC, Vineland Energy, LLC, Stephentown Spindle, LLC.

Description: Notice of Non-Material Change in Status of the Rockland Sellers.

Filed Date: 11/30/16.

Accession Number: 20161130–5427.

Comments Due: 5 p.m. ET 12/21/16.

Docket Numbers: ER17–426–000.

Applicants: Southwest Power Pool, Inc.

Description: Offer of Settlement of Southwest Power Pool, Inc., on behalf of Missouri River Energy Services and member Denison Municipal Utilities.

Filed Date: 11/30/16.

Accession Number: 20161130–5420.

Comments Due: 5 p.m. ET 12/21/16.

Docket Numbers: ER17–460–000.

Applicants: Elgin Energy Center, LLC.

Description: Compliance filing: Revised MBR Tariff to be effective 1/30/2017.

Filed Date: 12/1/16.

Accession Number: 20161201–5188.

Comments Due: 5 p.m. ET 12/22/16.

Docket Numbers: ER17–461–000.

Applicants: Michigan Power Limited Partnership.

Description: Compliance filing: Revised MBR Tariff to be effective 1/30/2017.

Filed Date: 12/1/16.

Accession Number: 20161201–5189.

Comments Due: 5 p.m. ET 12/22/16.

Docket Numbers: ER17–462–000.

Applicants: Tilton Energy LLC.

Description: Compliance filing: Revised MBR Tariff to be effective 1/30/2017.

Filed Date: 12/1/16.

Accession Number: 20161201–5197.

Comments Due: 5 p.m. ET 12/22/16.

Docket Numbers: ER17–463–000.

Applicants: Rocky Road Power, LLC.

Description: Compliance filing: Revised MBR Tariff to be effective 1/30/2017.

Filed Date: 12/1/16.

Accession Number: 20161201–5208.

Comments Due: 5 p.m. ET 12/22/16.

Docket Numbers: ER17–464–000.

Applicants: New England Power Pool Participants Committee.

Description: § 205(d) Rate Filing: Dec 2016 Membership Filing to be effective 11/1/2016.

Filed Date: 12/1/16.

Accession Number: 20161201–5212.

Comments Due: 5 p.m. ET 12/22/16.

Docket Numbers: ER17–465–000.

Applicants: Appalachian Power Company.

Description: § 205(d) Rate Filing: OATT—Revise Attachment K, TCC and TNC Rate Update to be effective 12/31/9998.

Filed Date: 12/1/16.

Accession Number: 20161201–5244.

Comments Due: 5 p.m. ET 12/22/16.

Take notice that the Commission received the following qualifying facility filings:

Docket Numbers: QF17–244–000.

Applicants: Allegheny Solar 1, LLC.

Description: Refund Report of Allegheny Solar 1, LLC under QF17–244.

Filed Date: 12/1/16.

Accession Number: 20161201–5245.

Comments Due: 5 p.m. ET 12/22/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 1, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–29420 Filed 12–7–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC17–42–000.

Applicants: 96WI 8ME, LLC.

Description: Application for Authorization for Disposition of Jurisdictional Facilities and Request for Expedited Action of 96WI 8ME, LLC.

Filed Date: 12/2/16.

Accession Number: 20161202–5247.

Comments Due: 5 p.m. ET 12/23/16.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2249–005.

Applicants: Portland General Electric Company.

Description: Third Supplement to June 30, 2016 Triennial Market Power Analysis in the Northwest Region for Portland General Electric Company.

Filed Date: 12/2/16.

Accession Number: 20161202–5250.

Comments Due: 5 p.m. ET 12/23/16.

Docket Numbers: ER17–228–002.

Applicants: King Forest Industries, Inc.

Description: Report Filing: Supplemental Information MBR Application to be effective N/A.

Filed Date: 12/1/16.

Accession Number: 20161201–5211.

Comments Due: 5 p.m. ET 12/12/16.

Docket Numbers: ER17–471–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: First Revised ISA No. 3255; Queue No. W4–073 to be effective 11/2/2016.

Filed Date: 12/2/16.

Accession Number: 20161202–5159.

Comments Due: 5 p.m. ET 12/23/16.

Docket Numbers: ER17–472–000.

Applicants: ISO New England Inc., New England Power Pool.

Description: ISO New England Inc., et al. submits Installed Capacity Requirement, Hydro Quebec Interconnection Capability Credits and Related Values for the 2017/2018, 2018/2019 & 2019/2020 Annual Reconfiguration Auctions.

Filed Date: 12/1/16.

Accession Number: 20161201–5449.

Comments Due: 5 p.m. ET 12/22/16.

Docket Numbers: ER17–473–000.

Applicants: Southwestern Public Service Company.

Description: § 205(d) Rate Filing: NM Coops Operating Proc No. 2 to be effective 12/1/2016.

Filed Date: 12/2/16.

Accession Number: 20161202–5169.

Comments Due: 5 p.m. ET 12/23/16.

Docket Numbers: ER17–474–000.

Applicants: Public Service Company of New Mexico.

Description: § 205(d) Rate Filing: Modification to TCIA between PNM and Western Interconnect LLC to be effective 12/1/2016.

Filed Date: 12/2/16.

Accession Number: 20161202–5174.

Comments Due: 5 p.m. ET 12/23/16.

Docket Numbers: ER17–475–000.

Applicants: CED Ducor Solar 1, LLC.

Description: § 205(d) Rate Filing: Co-Tenancy and Common Facilities Agreement Filing to be effective 12/2/2016.

Filed Date: 12/2/16.

Accession Number: 20161202–5192.

Comments Due: 5 p.m. ET 12/23/16.

Docket Numbers: ER17–476–000.

Applicants: CED Ducor Solar 2, LLC.

Description: § 205(d) Rate Filing: Co-Tenancy and Common Facilities Agreement Filing to be effective 12/2/2016.

Filed Date: 12/2/16.

Accession Number: 20161202–5228.

Comments Due: 5 p.m. ET 12/23/16.

Docket Numbers: ER17–477–000.

Applicants: CED Ducor Solar 3, LLC.

Description: § 205(d) Rate Filing: Co-Tenancy and Common Facilities Agreement Filing to be effective 12/2/2016.

Filed Date: 12/2/16.

Accession Number: 20161202–5232.

Comments Due: 5 p.m. ET 12/23/16.

Docket Numbers: ER17–478–000.

Applicants: Mankato Energy Center, LLC.

Description: § 205(d) Rate Filing: Mankato Tariff Amendment Filing to be effective 12/3/2016.

Filed Date: 12/2/16.

Accession Number: 20161202–5241.

Comments Due: 5 p.m. ET 12/23/16.

Docket Numbers: ER17–479–000.

Applicants: PJM Interconnection, L.L.C., Virginia Electric and Power Company.

Description: § 205(d) Rate Filing: VEPCO submits revisions to Att. H–16A re Acquisition of Gainesville-Wheeler Line to be effective 2/1/2017.

Filed Date: 12/2/16.

Accession Number: 20161202–5255.

Comments Due: 5 p.m. ET 12/23/16.

Docket Numbers: ER17–480–000.

Applicants: CED Ducor Solar 4, LLC.

Description: Baseline eTariff Filing: Co-Tenancy and Common Facilities Agreement Filing to be effective 12/2/2016.

Filed Date: 12/2/16.

Accession Number: 20161202–5269.

Comments Due: 5 p.m. ET 12/23/16.

Docket Numbers: ER17–481–000.

Applicants: CPV Maryland, LLC.

Description: § 205(d) Rate Filing: Reactive Rate Schedule to be effective 2/1/2017.

Filed Date: 12/2/16.

Accession Number: 20161202–5277.

Comments Due: 5 p.m. ET 12/23/16.

Docket Numbers: ER17–482–000.

Applicants: BREG Aggregator LLC.

Description: Baseline eTariff Filing: Market-Based Authorization Tariff BREG Aggregator LLC to be effective 1/31/2017.

Filed Date: 12/2/16.

Accession Number: 20161202–5291.

Comments Due: 5 p.m. ET 12/23/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and § 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 2, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–29422 Filed 12–7–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER17–228–002.

Applicants: King Forest Industries, Inc.

Description: Tariff Amendment: 2nd Amended MBR Filing to be effective 12/1/2016.

Filed Date: 12/1/16.

Accession Number: 20161201–5000.

Comments Due: 5 p.m. ET 12/22/16.

Docket Numbers: ER17–438–000.

Applicants: Alcoa Power Generating Inc.

Description: § 205(d) Rate Filing: Transmission Svc Agmt for Native Load Customer—APGI (Long Sault) & Arconic to be effective 11/1/2016.

Filed Date: 11/30/16.

Accession Number: 20161130–5315.

Comments Due: 5 p.m. ET 12/21/16.

Docket Numbers: ER17–439–000.

Applicants: Midcontinent Independent System Operator, Inc., ITC Midwest LLC.

Description: § 205(d) Rate Filing: 2016–11–30_SA 1925 ITC Midwest-Interstate Power and Light 3rd Rev. DTIA to be effective 12/1/2016.

Filed Date: 11/30/16.

Accession Number: 20161130–5320.

Comments Due: 5 p.m. ET 12/21/16.

Docket Numbers: ER17–440–000.

Applicants: Alpaca Energy LLC.

Description: § 205(d) Rate Filing: Alpaca Reactive Supply Service Filing to be effective 2/1/2017.

Filed Date: 11/30/16.

Accession Number: 20161130–5322.

Comments Due: 5 p.m. ET 12/21/16.

Docket Numbers: ER17–441–000.

Applicants: Black Hills Power, Inc.
Description: § 205(d) Rate Filing: Powder River Energy Corporation Rate Modification in Joint Tariff to be effective 1/30/2017.
Filed Date: 11/30/16.
Accession Number: 20161130–5324.
Comments Due: 5 p.m. ET 12/21/16.
Docket Numbers: ER17–442–000.
Applicants: La Paloma Generating Company, LLC.
Description: Compliance filing: Revised MBR Tariff to be effective 1/30/2017.
Filed Date: 11/30/16.
Accession Number: 20161130–5328.
Comments Due: 5 p.m. ET 12/21/16.
Docket Numbers: ER17–443–000.
Applicants: Public Service Company of New Mexico.
Description: § 205(d) Rate Filing: PNM's Certificate of Concurrence with Arizona Public Service Company's RS 284 to be effective 10/31/2016.
Filed Date: 11/30/16.
Accession Number: 20161130–5330.
Comments Due: 5 p.m. ET 12/21/16.
Docket Numbers: ER17–444–000.
Applicants: Milan Energy LLC.
Description: § 205(d) Rate Filing: Milan Energy Reactive Supply Service Filing to be effective 2/1/2017.
Filed Date: 11/30/16.
Accession Number: 20161130–5331.
Comments Due: 5 p.m. ET 12/21/16.
Docket Numbers: ER17–445–000.
Applicants: Public Service Company of New Mexico.
Description: § 205(d) Rate Filing: Modifications to NITSA/NOA between PNM and Jicarilla Apache Nation to be effective 12/1/2016.
Filed Date: 11/30/16.
Accession Number: 20161130–5336.
Comments Due: 5 p.m. ET 12/21/16.
Docket Numbers: ER17–446–000.
Applicants: New York Independent System Operator, Inc.
Description: § 205(d) Rate Filing: NYISO 205 tariff filing re: Capacity exports from certain New York localities to be effective 1/29/2017.
Filed Date: 11/30/16.
Accession Number: 20161130–5342.
Comments Due: 5 p.m. ET 12/21/16.
Docket Numbers: ER17–447–000.
Applicants: Public Service Company of New Mexico.
Description: § 205(d) Rate Filing: Modifications to Contract P0695 between PNM and Western to be effective 12/1/2016.
Filed Date: 11/30/16.
Accession Number: 20161130–5355.
Comments Due: 5 p.m. ET 12/21/16.
Docket Numbers: ER17–448–000.
Applicants: Quantum Pasco Power, LP.
Description: Compliance filing: Revised MBR Tariff to be effective 1/30/2017.
Filed Date: 12/1/16.
Accession Number: 20161201–5006.
Comments Due: 5 p.m. ET 12/22/16.
Docket Numbers: ER17–449–000.
Applicants: RC Cape May Holdings, LLC.
Description: Compliance filing: Revised MBR Tariff to be effective 1/30/2017.
Filed Date: 12/1/16.
Accession Number: 20161201–5008.
Comments Due: 5 p.m. ET 12/22/16.
Docket Numbers: ER17–450–000.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Cancellation: Notice of Cancellation of Service Agreement No. 4529, Queue No. AA2–180 to be effective 11/27/2016.
Filed Date: 12/1/16.
Accession Number: 20161201–5100.
Comments Due: 5 p.m. ET 12/22/16.
Docket Numbers: ER17–451–000.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Cancellation: Notice of Cancellation of Service Agreement No. 3574, Queue No. Y1–034 to be effective 8/6/2016.
Filed Date: 12/1/16.
Accession Number: 20161201–5103.
Comments Due: 5 p.m. ET 12/22/16.
Docket Numbers: ER17–452–000.
Applicants: Gibson City Energy Center, LLC.
Description: Compliance filing: Revised MBR Tariff to be effective 1/30/2017.
Filed Date: 12/1/16.
Accession Number: 20161201–5117.
Comments Due: 5 p.m. ET 12/22/16.
Docket Numbers: ER17–453–000.
Applicants: Grand Tower Energy Center, LLC.
Description: Compliance filing: Revised MBR Tariff to be effective 1/30/2017.
Filed Date: 12/1/16.
Accession Number: 20161201–5120.
Comments Due: 5 p.m. ET 12/22/16.
Docket Numbers: ER17–454–000.
Applicants: Hazle Spindle, LLC.
Description: Compliance filing: Revised MBR Tariff to be effective 1/30/2017.
Filed Date: 12/1/16.
Accession Number: 20161201–5126.
Comments Due: 5 p.m. ET 12/22/16.
Docket Numbers: ER17–455–000.
Applicants: Stephentown Spindle, LLC.
Description: Compliance filing: Revised MBR Tariff to be effective 1/30/2017.
Filed Date: 12/1/16.
Accession Number: 20161201–5130.
Comments Due: 5 p.m. ET 12/22/16.
Docket Numbers: ER17–456–000.
Applicants: Vineland Energy LLC.
Description: Compliance filing: Revised MBR Tariff to be effective 1/30/2017.
Filed Date: 12/1/16.
Accession Number: 20161201–5133.
Comments Due: 5 p.m. ET 12/22/16.
Docket Numbers: ER17–457–000.
Applicants: Shelby County Energy Center, LLC.
Description: Compliance filing: Revised MBR Tariff to be effective 1/30/2017.
Filed Date: 12/1/16.
Accession Number: 20161201–5164.
Comments Due: 5 p.m. ET 12/22/16.
Docket Numbers: ER17–458–000.
Applicants: Sabine Cogen, LP.
Description: Compliance filing: Revised MBR Tariff to be effective 1/30/2017.
Filed Date: 12/1/16.
Accession Number: 20161201–5173.
Comments Due: 5 p.m. ET 12/22/16.
Docket Numbers: ER17–459–000.
Applicants: Public Service Company of New Mexico.
Description: Notice of Cancellation of Rate Schedule No. 152 of Public Service Company of New Mexico.
Filed Date: 11/30/16.
Accession Number: 20161130–5421.
Comments Due: 5 p.m. ET 12/21/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 1, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–29416 Filed 12–7–16; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2007–0268; FRL–9956–19–OAR]

Final Revision to the PAG Manual: Protective Action Guides and Planning Guidance for Radiological Incidents

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of document availability.

SUMMARY: As part of its mission to protect human health and the environment, the U.S. Environmental Protection Agency (EPA) publishes protective action guides to help federal, state, local and tribal emergency response officials make radiation protection decisions during emergencies. The EPA, in coordination with a multi-agency working group within the Federal Radiological Preparedness Coordinating Committee (FRPCC), has made final updates to the 1992 Manual of Protective Action Guides and Protective Actions for Nuclear Incidents, referred to as ''The 1992 PAG Manual'' (EPA 400–R–92–001, May 1992).

The updated guidance in the revised PAG Manual: Protective Action Guides and Planning Guidance for Radiological Incidents (''PAG Manual'' hereafter) applies the protective action guides (PAGs) to incidents other than nuclear power plant accidents, updates the radiation dosimetry and dose calculations based on current science and incorporates late phase guidance. The final revisions incorporate input from public comments received in 2013 and include clarifications based on those comments. The Agency plans to finalize drinking water guidance after incorporating public comments on a proposal published in June 2016. The intention is to add it as a section in the Intermediate Phase chapter of the PAG Manual and reissue the PAG Manual once complete. The final revision of the PAG Manual is available at *www.regulations.gov.*

DATES: The PAG Manual is available for use upon publication of this Notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Sara DeCair, Radiation Protection Division, Center for Radiological Emergency Management, Mail Code 6608T, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 343–9108; fax number: (202) 343–2304; Email: *decair.sara@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. How can I get copies of the PAG Manual and supporting information?

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. The EPA has established a docket for this action under Docket ID No. [EPA–HQ–OAR–2008–0268; FRL–9707–2]. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air and Radiation Docket in the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20004. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744 and the telephone number for the Air and Radiation Docket is (202) 566–1742. In accordance with EPA regulations at 40 CFR part 2 and in accordance with normal EPA docket procedures, if copies of any docket materials are requested, a reasonable fee may be charged for photocopying.

Electronic access: The PAG Manual in electronic form suitable for printing, as well as related guidelines and further information, can be found on the PAGs Web page at *http://www.epa.gov/radiation/protective-action-guides-pags.*

B. What authority does the EPA have to provide Protective Action Guidance?

The historical and legal basis of the EPA's role in the PAG Manual begins with Reorganization Plan No. 3 of 1970, in which the Administrator of the EPA assumed functions of the Federal Radiation Council (FRC), including the charge to ''. . . advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all federal agencies in the formulation of radiation standards and in the establishment and execution of programs of cooperation with states.'' (Reorg. Plan No. 3 of 1970, sec. 2(a)(7), 6(a)(2); § 274.h of the Atomic Energy Act of 1954, as amended (AEA), codified at 42 U.S.C. 2021(h)). Recognizing this role, the Federal Emergency Management Agency (FEMA) directed the EPA in their Radiological Emergency Planning and Preparedness Regulations to ''establish Protective Action Guides (PAGs) for all aspects of radiological emergency planning in coordination with appropriate federal agencies.'' (44 CFR 351.22(a)). FEMA also tasked the EPA with preparing ''guidance for state and local governments on implementing PAGs, including recommendations on protective actions which can be taken to mitigate the potential radiation dose to the population.'' (44 CFR 351.22(b)). All of this information was to ''be presented in the Environmental Protection Agency (EPA) 'Manual of Protective Action Guides and Protective Actions for Nuclear Incidents.' '' (44 CFR 351.22(b)).

Additionally, section 2021(h) charged the Administrator with performing ''such other functions as the President may assign to him [or her] by Executive order.'' Executive Order 12656 states that the Administrator shall ''[d]evelop, for national security emergencies, guidance on acceptable emergency levels of nuclear radiation. . . .'' (Executive Order No. 12656, sec.1601(2)). The EPA's role in PAGs development was reaffirmed by the *National Response Framework, Nuclear/Radiological Incident Annex* of June 2008.

C. What is the PAG Manual: Protective Action Guides and Planning Guidance for Radiological Incidents?

The PAG Manual provides federal, state and local emergency management officials with guidance for responding to radiological emergencies. A protective action guide (PAG) is the projected dose to an individual from a release of radioactive material at which a specific protective action to reduce or avoid that dose is recommended. Emergency management officials use PAGs for making decisions regarding actions to protect the public from exposure to radiation during an emergency. Such actions include, but are not limited to, evacuation, shelter-in-place, temporary relocation, and food restrictions.

Development of the PAGs was based on the following essential principles, which also apply to the selection of any protective action during an incident—

- Prevent acute effects,
- Balance protection with other important factors and ensure that actions result in more benefit than harm,
- Reduce risk of chronic effects.

The PAG Manual is not a legally binding regulation or standard and does not supersede any environmental laws. This guidance does not address or impact site cleanups occurring under other statutory authorities such as the EPA's Superfund program, the Nuclear Regulatory Commission's (NRC) decommissioning program, or other federal or state cleanup programs. As indicated by the use of non-mandatory

language such as ''may,'' ''should'' and ''can,'' the PAG Manual only provides recommendations and does not confer any legal rights or impose any legally binding requirements upon any member of the public, states or any federal agency. Rather, the PAG Manual recommends projected radiation doses at which specific actions may be warranted in order to reduce or avoid that dose. The PAG Manual is designed to provide flexibility to be more or less restrictive as deemed appropriate by decision makers based on the unique characteristics of the incident and the local situation.

D. How did EPA respond to public comments on the 2013 PAG Manual revision?

The proposed updates to the 1992 PAG Manual, published for public comment and interim use in 2013, were developed by a multi-agency Subcommittee of the Federal Radiological Preparedness Coordinating Committee (FRPCC) and published by the EPA with concurrence from the Department of Energy (DOE); the Department of Defense (DoD); the Department of Homeland Security (DHS), including the Federal Emergency Management Agency (FEMA); the Nuclear Regulatory Commission (NRC); the Department of Health and Human Services (HHS), including both the Centers for Disease Control (CDC) and the Food and Drug Administration (FDA); the U.S. Department of Agriculture (USDA); and the Department of Labor (DOL).

The Agency received about 5,000 comments from members of the public, state and local emergency response and health organizations, industry associations, and from national and international radiation protection organizations. In response to comments received, questions raised in comments and issues identified about implementing the updated PAG Manual, the EPA made a number of changes to the PAG Manual, as described below.

The EPA received comments and questions on the potassium iodide (KI) PAG from state radiation protection agencies and from industry organizations. In response, planning considerations were clarified regarding the lower FDA KI PAG in combination with deleting the thyroid-based evacuation threshold. The EPA added a Table (Table 2.2) with more details on the KI PAG; and also worked with the FDA to include a simplified approach to implementing this PAG and provided reference for the reader to the FDA's published guide. More explanation was included regarding the thyroid-based (organ-based) evacuation thresholds being deleted. This was done for simplicity and because modern dose projection tools now do a much better job of accounting for all-pathway exposures.

The EPA received many comments from PAG technical users suggesting terminology improvements and requesting more information about how the Federal Radiological Monitoring and Assessment Center (FRMAC)—the federal government lead for these calculations during radiological emergencies—provides calculation methods and tables of derived levels. Additional language is provided on the tables of derived values for implementing the PAGs. Specifically, clarifying text on FRMAC methods and dose factor terminology was added. Definitions for incident phases and several concepts around dose projection were also clarified.

The Agency received comments from state emergency management and radiation protection agencies, as well as federal agencies, requesting the inclusion of language from the 1992 PAG Manual Appendices in the revised PAG Manual. This text, focusing on the rationale and basis for setting early and intermediate phase PAGs, has been added to the revised PAG Manual. The 2013 proposal included this information only by reference, but the revised PAG Manual will serve the emergency response community better by providing a summarized description of the basis for setting PAGs directly in the new publication. The 1992 PAG Manual Appendices are still available online in a word-searchable format, for reference.

The EPA received limited, but important, comments on the worker protection section of the proposed Manual, requesting updates to reflect more recent publications on worker safety. These comments were considered by the EPA, the Occupational Safety and Health Administration and the NRC; changes were made to ensure consistency with the latest worker safety guidelines from other agencies.

Some commenters expressed concern over the removal of the 5 rem over 50 years Relocation PAG. Therefore, explanation about the removal of that PAG was expanded, adding language to better explain the deletion. The decision was made in order to eliminate confusion with long-term remediation timeframes and long-term cleanup goals.

The EPA received a number of comments, largely from environmental organizations, expressing concern about whether the PAGs are safe enough, and whether children and sensitive subpopulations are considered adequately. There is an abundant conservatism built into the derivation of the PAGs, and into the assumptions used to generate derived response levels, to ensure that the PAGs are appropriate emergency guides for all members of the public, including sensitive subpopulations. The Agency provided additional explanation in the revised Manual about the basis for the PAGs and how PAG levels are set. A discussion of the conservatism that has been built into the early and intermediate phase PAGs was also added to the Manual.

Some commenters expressed concerns that PAGs would weaken environmental standards and regulations. Environmental regulations or standards are legal limits designed to prevent health effects from everyday exposure to low levels of radiation over long periods. The PAG levels are guidance for emergency situations; they do not supplant any standards or regulations, nor do they affect the stringency or enforcement of any standards or regulations. The PAG levels are intended to be used only in an emergency when radiation levels have already exceeded environmental standards and could be high enough to cause health effects unless protective actions are taken. The PAG levels trigger public safety measures to minimize or avoid radiation exposures during an emergency.

The EPA also received some comments suggesting that the U.S. should rely solely on existing environmental standards and that PAGs are not needed. PAG levels do not replace environmental standards, and environmental standards do not fulfill the role of the PAGs. PAGs are used only during emergency situations when radiation levels are already exceeding environmental standards and could become high enough to cause adverse health effects unless protective action is taken. During a radiological emergency, the PAGs are designed to prevent adverse health effects by triggering public safety measures—protective actions, such as evacuation—and minimizing unnecessary exposures. The PAGs are set at a level where the health risk from radiation exposure that could be avoided with protective action outweighs the risk associated with taking the safety measures, *e.g.,* traffic accidents, trips and falls or anxiety associated with dislocation or the separation of family members.

Finally, the EPA received comments requesting edits to clarify, reword or reorder language in the PAG Manual. Based on those comments, a number of

editorial changes were made to improve both the clarity and readability of the Manual.

E. What is the timeframe for implementation of this PAG Manual?

Emergency management and radiation protection organizations that use the PAGs in their emergency plans are encouraged to incorporate this updated guidance as soon as possible. This may entail training, as well as updating plans and procedures. Outreach and technical training will be conducted by the EPA, the FRMAC and interagency partners on the PAG Subcommittee.

The Federal Emergency Management Agency (FEMA) expects certain organizations associated with nuclear power plant operations to use the PAG Manual in developing their emergency management plans. The FEMA plans to begin using the new PAG Manual during their evaluation of offsite response organizations around nuclear power facilities twelve months after the publication of this Notice in the **Federal Register**.

For further information and related guidelines, see the PAGs Web page: *http://www.epa.gov/radiation/protective-action-guides-pags.*

Dated: December 1, 2016.

Gina McCarthy,

Administrator.

[FR Doc. 2016–29439 Filed 12–7–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9956–29–OW]

National Lakes Assessment 2012 Final Report

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: This notice announces the availability of the Environmental Protection Agency's (EPA) final report on the National Lakes Assessment 2012. The NLA describes the results of the nationwide probabilistic survey that was conducted in the summer of 2012 by EPA and its state, tribal, and federal partners. The NLA report includes information on how the survey was implemented, what the findings are on a national scale, and future actions and challenges. The NLA Web site also includes findings at the ecoregional scale and allows users to explore additional results using a new interactive dashboard.

FOR FURTHER INFORMATION CONTACT: Amina Pollard, Office of Wetlands, Oceans and Watersheds, Office of Water, Washington DC. Phone: 202–566–2360; email: *pollard.amina@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

The *National Lakes Assessment 2012: A Collaborative Survey of Lakes in the United States* is the second report assessing the condition of the nation's lakes. The NLA is one of a series of National Aquatic Resource Surveys, a national-scale monitoring program designed to produce statistically-valid assessments that answer critical questions about the condition of waters in the United States. The key goals of the NLA report are to describe the ecological and recreational condition of the nation's lakes, how those conditions are changing, and the key stressors affecting those waters. Using a statistical survey design, 1,038 sites were selected at random to represent the condition of the larger population of lakes across the lower 48 states including natural lakes and manmade reservoirs.

The NLA finds that 40% of the nation's lakes have excessive levels of phosphorus. Compared to other measures, nutrient pollution is the most widespread stressor in the NLA and can contribute to algal blooms and affect recreational opportunities in lakes. Using a new biological measure, the NLA finds that 31% of lakes have degraded benthic macroinvertebrate communities. The report has undergone peer, state/tribal and EPA review.

A. How can I get copies of the NLA 2012 and other related information?

You may view and download the final report from EPA's Web site at *http://www.epa.gov/national-aquatic-resource-surveys/nla.*

Dated: December 2, 2016.

Joel Beauvais,

Deputy Assistant Administrator, Office of Water.

[FR Doc. 2016–29440 Filed 12–7–16; 8:45 am]

BILLING CODE 6560–50–P

FARM CREDIT ADMINISTRATION

Farm Credit Administration Board; Sunshine Act; Regular Meeting

AGENCY: Farm Credit Administration.

SUMMARY: Notice is hereby given, pursuant to the Government in the Sunshine Act, of the regular meeting of the Farm Credit Administration Board (Board).

DATE AND TIME: The regular meeting of the Board will be held at the offices of the Farm Credit Administration in McLean, Virginia, on December 8, 2016, from 9:00 a.m. until such time as the Board concludes its business.

FOR FURTHER INFORMATION CONTACT: Dale L. Aultman, Secretary to the Farm Credit Administration Board, (703) 883–4009, TTY (703) 883–4056.

ADDRESSES: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090. Submit attendance requests via email to *VisitorRequest@FCA.gov.* See **SUPPLEMENTARY INFORMATION** for further information about attendance requests.

SUPPLEMENTARY INFORMATION: Parts of this meeting of the Board will be open to the public (limited space available), and parts will be closed to the public. Please send an email to *VisitorRequest@FCA.gov* at least 24 hours before the meeting. In your email include: Name, postal address, entity you are representing (if applicable), and telephone number. You will receive an email confirmation from us. Please be prepared to show a photo identification when you arrive. If you need assistance for accessibility reasons, or if you have any questions, contact Dale L. Aultman, Secretary to the Farm Credit Administration Board, at (703) 883–4009. The matters to be considered at the meeting are:

Open Session

A. Approval of Minutes

- November 10, 2016

B. Reports

- Quarterly Report on Economic Conditions and FCS Conditions
- Semiannual Report on Office of Examination Operations

Closed Session *

- Office of Examination Quarterly Report

Dated: December 6, 2016.

Dale L. Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2016–29491 Filed 12–6–16; 11:15 am]

BILLING CODE 6705–01–P

FEDERAL MARITIME COMMISSION

Performance Review Board; Establishment of Members

AGENCY: Federal Maritime Commission.

ACTION: Notice.

* Session Closed-Exempt pursuant to 5 U.S.C. Section 552b(c)(8) and (9).

SUMMARY: Notice is hereby given of the names of the members of the Performance Review Board.

FOR FURTHER INFORMATION CONTACT: William ''Todd'' Cole, Director Office of Human Resources, Federal Maritime Commission, 800 North Capitol Street NW., Washington, DC 20573.

SUPPLEMENTARY INFORMATION: Sec. 4314(c) (1) through (5) of title 5, U.S.C., requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more performance review boards. The board shall review and evaluate the initial appraisal of a senior executive's performance by the supervisor, along with any recommendations to the appointing authority relative to the performance of the senior executive.

THE MEMBERS OF THE PERFORMANCE REVIEW BOARD ARE:

1. Rebecca F. Dye, Commissioner
2. Richard A. Lidinsky, Jr., Commissioner
3. Michael A. Khouri, Commissioner
4. William P. Doyle, Commissioner
5. Clay G. Guthridge, Chief Administrative Law Judge
6. Erin M. Wirth, Administrative Law Judge
7. Florence A. Carr, Director, Bureau of Trade Analysis
8. Rebecca A. Fenneman, Director, Office of Consumer Affairs & Dispute Resolution Services
9. Karen V. Gregory, Managing Director
10. Peter J. King, Director, Assistant Managing Director
11. Sandra L. Kusumoto, Director, Bureau of Certification and Licensing
12. Mary T. Hoang, Chief of Staff
13. Tyler J. Wood, General Counsel

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2016–29383 Filed 12–7–16; 8:45 am]

BILLING CODE 6731–AA–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Scientific Information Request on Short and Long Term Outcomes After Bariatric Therapies in the Medicare Population

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Request for Scientific Information Submissions.

SUMMARY: The Agency for Healthcare Research and Quality (AHRQ) is seeking scientific information submissions to inform our review of *Short and Long Term Outcomes after Bariatric Therapies in the Medicare Population,* which is currently being conducted by the AHRQ's Evidence-based Practice Centers (EPC) Programs. Access to published and unpublished pertinent scientific information will improve the quality of this review. AHRQ is conducting this systematic review pursuant to Section 902(a) of the Public Health Service Act, 42 U.S.C. 299a(a).

DATES: *Submission Deadline* on or before January 9, 2017.

ADDRESSES:

Email submissions: SEADS@epc-src.org.

Print submissions:

Mailing Address: Portland VA Research Foundation, Scientific Resource Center, ATTN: Scientific Information Packet Coordinator, P.O. Box 69539, Portland, OR 97239

Shipping Address (FedEx, UPS, etc.): Portland VA Research Foundation, Scientific Resource Center, ATTN: Scientific Information Packet Coordinator, 3710 SW., U.S. Veterans Hospital Road, Mail Code: R&D 71, Portland, OR 97239

FOR FURTHER INFORMATION CONTACT: Ryan McKenna, Telephone: 503–220–8262 ext. 51723 or Email: *SIPS@epc-src.org.*

SUPPLEMENTARY INFORMATION: The Agency for Healthcare Research and Quality has commissioned the Evidence-based Practice Centers (EPC) Programs to complete a review of the evidence for *Short and Long Term Outcomes after Bariatric Therapies in the Medicare Population.*

The EPC Program is dedicated to identifying as many studies as possible that are relevant to the questions for each of its reviews. In order to do so, we are supplementing the usual manual and electronic database searches of the literature by requesting information from the public (*e.g.,* details of studies conducted). We are looking for studies that report on *Short and Long Term Outcomes after Bariatric Therapies in the Medicare Population,* including those that describe adverse events. The entire research protocol, including the key questions, is also available online at: *http://www.ahrq.gov/sites/default/files/wysiwyg/research/findings/ta/topicrefinement/bariatric-surgery-protocol.pdf.*

This notice is to notify the public that the EPC Program would find the following information on *Short and Long Term Outcomes after Bariatric Therapies in the Medicare Population* helpful:

- A list of completed studies that your organization has sponsored for this indication. In the list, please indicate whether results are available on *ClinicalTrials.gov* along with the *ClinicalTrials.gov* trial number.
- For completed studies that do not have results on *ClinicalTrials.gov,* please provide a summary, including the following elements: Study number, study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion criteria, primary and secondary outcomes, baseline characteristics, number of patients screened/eligible/enrolled/lost to follow-up/withdrawn/analyzed, effectiveness/efficacy, and safety results.
- *A list of ongoing studies that your organization has sponsored for this indication.* In the list, please provide the *ClinicalTrials.gov* trial number or, if the trial is not registered, the protocol for the study including a study number, the study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion criteria, and primary and secondary outcomes.
- Description of whether the above studies constitute all Phase II and above clinical trials sponsored by your organization for this indication and an index outlining the relevant information in each submitted file.

Your contribution will be very beneficial to the EPC Program. The contents of all submissions will be made available to the public upon request. Materials submitted must be publicly available or can be made public. Materials that are considered confidential; marketing materials; study types not included in the review; or information on indications not included in the review cannot be used by the EPC Program. This is a voluntary request for information, and all costs for complying with this request must be borne by the submitter.

The draft of this review will be posted on AHRQ's EPC Program Web site and available for public comment for a period of 4 weeks. If you would like to be notified when the draft is posted, please sign up for the email list at: *https://subscriptions.ahrq.gov/accounts/USAHRQ/subscriber/new?topic_id=USAHRQ_18.*

The systematic review will answer the following questions. This information is provided as background. AHRQ is not requesting that the public provide answers to these questions. The entire research protocol, is available online at:

http://www.ahrq.gov/sites/default/files/wysiwyg/research/findings/ta/topicrefinement/bariatric-surgery-protocol.pdf.

KQ 1: What are the theorized mechanisms of action of bariatric procedures on weight loss and on type 2 diabetes in the Medicare population?

KQ 2: In studies that are applicable to the Medicare population and enroll patients who have undergone bariatric therapy, what are

I. the characteristics and indications of the patients including descriptives of age, BMI, and comorbid conditions

II. the characteristics of the interventions, including the bariatric procedures themselves as well as pre- and/or post-surgical surgical work-ups (*e.g.,* psychiatric evaluations, behavioral and nutritional counseling)

III. the outcomes that have been measured, including peri-operative (*i.e.,* 90 days or less after bariatric surgery), short-term (2 years or less from surgery), mid-term (more than 2 but 5 or less years), and long-term (more than 5 years after surgery) outcomes?

KQ 3:

I. In Medicare-eligible patients, what is the effect of different bariatric therapies (contrasted between them or vs. non-bariatric therapies) on weight outcomes (including failure to achieve at least minimal weight loss)?

II. What patient—(KQ2 I) and intervention-level characteristics (KQ2 II) modify the effect of bariatric therapies on weight outcomes (including failure to achieve at least minimal weight loss)?

III. In Medicare-eligible patients who have undergone bariatric therapy, what is the frequency and the predictors of failing to achieve at least minimal weight loss?

KQ 4:

I. In Medicare-eligible patients, what is the comparative effectiveness and safety of different bariatric interventions (contrasted between them or vs. non-bariatric interventions) with respect to the outcomes in KQ2 III?

II. What patient—(KQ2 I) and intervention-level (KQ2 II) characteristics modify the effect of the bariatric therapies on the outcomes in KQ2 III?

KQ 5:

I. In Medicare-eligible patients who have undergone bariatric therapy, what is the association between weight outcomes and eligible short- and long-term outcomes (other than weight outcomes)?

II. In Medicare-eligible patients, what proportion of the bariatric intervention effect on eligible short- and long-term outcomes (other than weight outcomes) is accounted for by changes in weight outcomes?

PICOTS (Population, Intervention, Comparator, Outcome, Timing, Setting)

Population: Medicare-eligible population to include those age 65 and older and the disabled.

Interventions: Bariatric treatments including anatomic alteration, FDA-approved device placements, open surgical procedures, as well as laparoscopic and endoscopic procedures

I. Surgical bariatric therapies
- A. Adjustable gastric banding (AGB)
- 1. LAP-band, pars flaccida technique
- 2. LAP-band, perigastric technique
- 3. Swedish-band (also known as REALIZE-band), pars flaccida technique
- 4. Swedish-band (also known as REALIZE-band), pars flaccida technique, single bolus filling
- 5. Gastroplasties
- B. Horizontal banded gastroplasty
- C. Vertical banded gastroplasty
- D. Endoluminal vertical gastroplasty
- 1. Sleeve gastrectomy
- 2. Gastric plication (also referred to as gastric greater curvature plication or gastric imbrication)
- 3. Jejunoileal bypass
- 4. Biliopancreatic diversion (BPD)
- E. Biliopancreatic diversion (BPD) with RYGB (BPD–RYGB)
- F. BPD with duodenal switch (BPD–DS)
- 1. Roux-en-Y Gastric Bypass (RYGB)
- 2. Mini-gastric bypass
- 3. Single Anastomosis Duodeno-Ileostomy (SADI)
- 4. Vagal blockade
- 5. Omentum removal (omentectomy)
- 6. Gastric stimulation (also referred to as gastric pacing)
- 7. Mucosal ablation

II. Endoscopic bariatric therapies
- A. Space-occupying endoscopic bariatric therapies
- 1. Intragastric balloons
- B. Nonballoon devices
- 1. Aspiration therapy
- 2. Endoscopic sleeve gastroplasty
- 3. Endoscopic gastrointestinal bypass devices
- C. Duodenojejunal bypass sleeve
- D. Gastroduodenojejunal bypass sleeve
- 1. Duodenal mucosal resurfacing
- 2. Self-assembling magnets for endoscopy

Comparisons: Comparisons of interest include comparisons between different surgical interventions, or between surgical and non-surgical interventions

Outcomes: Outcomes will be classified as peri-operative (*i.e.,* 90 days or less after bariatric surgery), short-term (2 years or less from surgery), mid-term (more than 2 but 5 or less years), and long-term (more than 5 years after surgery). The following outcome categories are of interest:

I. Mortality
II. Weight loss
III. Reoperations/need for revisional bariatric surgery
IV. Postoperative complications including mortality
V. Metabolic/diabetes-related outcomes
- A. Correction of glucose tolerance, including elimination of all medications with Hemoglobin A1c (HbA1c) <6
- B. Diabetes: New onset diabetes; treatment of diabetes; diabetic complications (microvascular disease, kidney disease, retinopathy)
- C. Hypoglycemic-like syndromes such as nesidioblastosis, post-gastric surgery hypoglycemia, and dumping syndrome
- D. Non-alcoholic steatohepatitis (NASH) and/or non-alcoholic fatty liver disease (NAFLD)

VI. Reflux
VII. Cardiovascular outcomes
- A. Myocardial infarction
- B. Stroke
- C. Hypertension

VIII. Respiratory disease
- A. Asthma
- B. COPD

IX. Orthopedic outcomes
- A. Fractures
- B. Falls
- C. Osteoporosis/bone-mineral density (DEXA, DEEG)

X. Sleep apnea including the discontinuation of CPAP or BiPAP
XI. Incidence of specific cancers (breast, colorectal cancer, endometrial cancer, esophageal adenocarcinoma, gall bladder cancer, and renal cell cancer)
XII. Nutritional deficiencies including zinc, iron, thiamine, and vitamin D, and associated disorders such as neuropathy and bone disease
XIII. Renal function as measured by creatinine clearance or urinary albumin excretion
XIV. Compliance to follow-up
XV. Mental health outcomes. Incidence of suicide and suicide attempts
- A. Incidence of depression
- B. Alcohol addiction after surgery/ Substance abuse
- C. Psychiatric hospitalizations
- D. Anxiety
- E. Panic disorder
- F. Borderline personality disorder
- G. PTSD
- H. Bipolar disorder

XVI. Function and quality of life (validated measurements only), *e.g.,*
- i. Cognitive functioning

A. Sexual functioning
B. Ability to participate in an exercise program
C. Ability to return to work
D. Physical performance test pain (joint pain, joint aches)
E. Regular daily activities
F. Polypharmacy
G. Admission to a skilled-nurse facility
XVII. Access to plastic surgery
XVIII. Readmissions/rehospitalizations
Timing:
No time limit
Setting:
Any

Sharon B. Arnold,

AHRQ Deputy.

[FR Doc. 2016–29408 Filed 12–7–16; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–17–0770]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The notice for the proposed information collection is published to obtain comments from the public and affected agencies.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address any of the following: (a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) Enhance the quality, utility, and clarity of the information to be collected; (d) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and (e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570 or send an email to *omb@cdc.gov.* Written comments and/or suggestions regarding the items contained in this notice should be directed to the Attention: CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

National HIV Behavioral Surveillance System ((NHBS), OMB Control No. 0920–0770, exp. 03/31/2017)—Revision—National Center for HIV, Hepatitis, STD, and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The CDC currently sponsors the National HIV Behavioral Surveillance (NHBS) System. The system is designed to describe and monitor the HIV risk behaviors, HIV seroprevalence and incidence, and HIV prevention experiences of persons at highest risk for HIV infection in the United States. NHBS awardees are state and local health departments that provide HIV-related services, conduct NHBS interviews, and submit non-identifiable information to CDC. To be eligible for NHBS funding, a health department must serve one of the 30 Metropolitan Statistical Areas (MSA) in the U.S. with high HIV prevalence. Twenty-two (22) programs receive NHBS funding and technical assistance from CDC at this time. Burden estimates are based on current availability of funds and recruitment targets for 22 CDC-funded NHBS awardees. If additional funding is received to support the participation of additional sites, CDC will submit a Change Request to make the appropriate adjustments to the total estimated annualized burden.

Information collection is based on rotating annual ''cycles'' of surveillance with three populations: Men who have sex with men (MSM), injecting drug users (IDUs), and heterosexuals at increased risk of HIV (HET). Screening interviews and specialized behavioral assessment interviews are conducted once every three years with each population: MSM in year 1, IDU in year 2, and HET in year 3. The target number of annual interviews for each NHBS-funded awardee is 500. Due to differences in the risk characteristics of the MSM, IDU and HET groups, the behavioral assessment is customized for each group. In addition, an HIV test and pre-test counseling session are offered to all persons who participate in an NHBS interview.

The surveillance system is focused on behaviors directly related to HIV transmission and those that are amenable to intervention through prevention programs. Information collected through the NHBS System allows CDC to: (a) Describe the prevalence of and trends in risk behaviors; (b) describe the prevalence of and trends in HIV testing and HIV infection; (c) describe the prevalence of and trends in use of HIV prevention services; and (d) identify met and unmet needs for HIV prevention services in order to inform health departments, community-based organizations, community planning groups and other stakeholders. No other federal agency systematically collects this type of information from persons at risk for HIV infection.

Venue-based sampling methods are used to identify respondents for the MSM information collection cycle and respondent-driven sampling methods are used to identify respondents for the IDU cycle and the HET cycle. Consistent with these methods, persons who participate in the IDU and HET interviews may be trained to recruit additional respondents. Each person who serves as a peer recruiter will be asked to participate in a short debriefing interview.

CDC requests OMB approval to continue information collection for three years, with revisions. Selected questions in the eligibility screener and the behavioral assessment interview instruments will be updated to improve usability and data quality, and new questions will be added to provide measures of high priority emerging issues including pre-exposure prophylaxis, treatment as prevention, and opioid use and abuse. Lower priority questions and repetitive content will be deleted in order to manage project cost and respondent burden. There are no changes to the estimated burden per response for any information collection instrument. However, total burden will decrease due to a reduction in the number of health departments funded to participate in the NHBS System (from 25 to 22). Compared to the previous period of OMB approval, this will reduce the total estimated number of interviews for each cycle from 12,500 (4,167 annualized) to 11,000 (3,667 annualized).

Information collected through the NHBS has a substantial impact on the design and delivery of targeted prevention programs aimed at reducing new HIV infections and evaluating

progress towards national public health goals. Participation is voluntary and there is no cost to respondents other than their time. The total estimated annualized burden hours are 8,735.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hr)
Persons Screened	Eligibility Screener	13,142	1	5/60
Eligible Participants	Behavioral Assessment for MSM	3,667	1	30/60
	Behavioral Assessment for IDU	3,667	1	54/60
	Behavioral Assessment for HET	3,667	1	39/60
Peer Recruiters	Recruiter Debriefing	3,667	1	2/60

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–29399 Filed 12–7–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–17–0904; Docket No. CDC–2016–0117]

Proposed Data Collection Submitted for Public Comment and Recommendations

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

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed revision of the ''SEARCH for Diabetes in Youth Study,'' a national multi-center study aimed at understanding more about diabetes among children and young adults in the United States.

DATES: Written comments must be received on or before February 6, 2017.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2016–0117 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to *Regulations.gov*, including any personal information provided. For access to the docket to read background documents or comments received, go to *Regulations.gov*.

Please note: All public comment should be submitted through the Federal eRulemaking portal (*regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact the Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Proposed Project

SEARCH for Diabetes in Youth Study (OMB Control No. 0920–0904, Expires 8/31/2017)—Revision—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Diabetes is one of the most common chronic diseases among children in the United States. When diabetes strikes during childhood, it is routinely assumed to be type 1, or juvenile-onset, diabetes. Type 1 diabetes (T1D)

develops when the body's immune system destroys pancreatic cells that make the hormone insulin. Type 2 diabetes begins when the body develops a resistance to insulin and no longer uses it properly. As the need for insulin rises, the pancreas gradually loses its ability to produce sufficient amounts of insulin to regulate blood sugar. Reports of increasing frequency of both type 1 and type 2 diabetes in youth have been among the most concerning aspects of the evolving diabetes epidemic. In response to this growing public health concern, the Centers for Disease Control and Prevention (CDC) and the National Institutes of Health (NIH) funded the SEARCH for Diabetes in Youth Study.

The SEARCH for Diabetes in Youth Study began in 2000 as a multi-center, epidemiological study, conducted in six geographically dispersed Study Centers that reflected the racial and ethnic diversity of the U.S. Phases 1 (2000–2005) and 2 (2005–2010) produced estimates of the prevalence and incidence of diabetes among youth age <20 years, according to diabetes type, age, sex, and race/ethnicity, and characterized selected acute and chronic complications of diabetes and their risk factors, as well as the quality of life and quality of health care. Phase 3 (2010–2015) built upon the activities in Phase 1 and 2 and added a cohort component to collect information on estimate the prevalence and incidence of risk factors and complications, including chronic microvascular (retinopathy, nephropathy, and autonomic neuropathy) and selected markers of macrovascular complications (hypertension, arterial stiffness) of diabetes.

SEARCH Phase 4 (2015–2020) continues the activities of the SEARCH Registry Study via cooperative agreements with the clinical sites, data coordinating center and CDC. Respondents will be youth <20 years of age who have been diagnosed with diabetes. Information will be collected from the study participants by five clinical sites and transmitted to the Coordinating Center for the study, each funded through a cooperative agreement. Information collection will support a case registry that can be used to estimate the incidence and prevalence of diabetes in youth in the U.S. The registry study will continue to collect information from participants related to diabetes diagnosis and will ask participants identified with incident diabetes in 2016 to complete an in-person study examination. CDC is no longer funding the cohort component of the SEARCH for Diabetes in Youth Study.

SEARCH Phase 3 identified an average of 1,361 incident cases of diabetes among youth under 20 years each year of the study and completed an average of 1,088 participant surveys each year (80% participation rate among registry study participants).

Respondents will be the Population-based Diabetes in Youth (SEARCH for Diabetes in Youth Phase 4) study participants. The information collection will include:

1. *Incident diabetes cases:*

• Collection of information on newly diagnosed incident diabetes cases in youth age <20 years. CDC estimates that each clinical site will identify and register an average of 302 to 303 cases per year, for a total of 1,511 cases across all sites. There are no changes for the Medication Inventory Form. The Initial Participant Survey form has been revised to eliminate questions that were not useful to the researchers and to improve readability and understanding for the participants. The overall burden for the form has not changed. The total estimated annualized burden for this information collection is 378 hours.

• Physical exam and specimen collection for the 2016 incident cases. CDC estimates that each clinical site will identify and register 1,511 cases during this incident year. Of these cases, CDC anticipants 80% will complete the Initial Participant Survey and be invited for an in-person visit. Of those, we anticipate a 65 to 70% response rate and complete 823 in-person visits. The Physical Exam Form has not changed. There was a change to the Specimen Collection Form since a spot urine will no longer be collected. The total estimated annualized burden for this information collection is 1,371 hours.

2. Prevalent diabetes cases:

• Collection of information on prevalent cases of diagnosed diabetes among youth <20 years. CDC estimates that the clinical sites will identify 776 cases. The items collected for each case include an Initial Participant Survey. The total estimated annualized burden for this information collection is 130 hours. This is a new data collection instrument.

The SEARCH for Diabetes in Youth Study was initially approved with 4,248 annualized burden hours. In this Revision, we request approval for 1,878 annualized burden hours (a net reduction of 2,369 annualized burden hours). The estimated annualized burden per participant respondent is reduced by 3.2 hours since the CDC is no longer funding the cohort component. The total annualized burden for this study is 1,878.

There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response	Total burden (in hours)
Incident cases	Medical Inventory	1,511	1	5/60	126
	Initial Participant Survey	1,511	1	10/60	252
Incident cases in 2016 who complete the survey.	Physical exam	823	1	80/60	1,097
	Specimen collection	823	1	20/60	274
Prevalent cases	Initial Participant Survey	776	1	10/60	129
Total					1,878

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–29428 Filed 12–7–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[CDC–2016–0090; Docket Number NIOSH 288–A]

A Performance Test Protocol for Closed System Transfer Devices Used During Pharmacy Compounding and Administration of Hazardous Drugs; Extension of Comment Period

AGENCY: National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice and extension of comment period.

SUMMARY: On September 15, 2016 the Director of the National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), published a notice in the **Federal Register** [81 FR 63482] announcing a public meeting and request for public comment on a draft testing protocol. Written comments were to be received by December 7, 2016. In response to a request from interested parties, NIOSH has extended the comment period until June 7, 2017. The longer timeframe will allow companies to acquire the proposed challenge agents and test their CSTDs with the proposed universal CSTD performance test protocol.

DATES: NIOSH is extending the comment period on the document published September 15, 2016 [81 FR 63482]. Electronic or written comments must be received by June 7, 2017.

FOR FURTHER INFORMATION CONTACT: Deborah V. Hirst, NIOSH, Alice Hamilton Laboratories, 1090 Tusculum Avenue, MS–R–5, Cincinnati, Ohio 45226, telephone (513) 841–4141 (not a toll free number), Email: *DHirst@cdc.gov.*

ADDRESSES: You may submit comments, identified by CDC–2016–0090 and Docket Number NIOSH 288–A, by either of the following two methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* National Institute for Occupational Safety and Health, NIOSH Docket Office, 1090 Tusculum Avenue, MS C–34, Cincinnati, Ohio 45226–1998.

Dated: December 5, 2016.

Frank Hearl,

Chief of Staff, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.

[FR Doc. 2016–29411 Filed 12–7–16; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Head Start Family and Child Experiences Survey (FACES).

OMB No.: 0970–0151.

Description: The Office of Planning, Research and Evaluation (OPRE), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is proposing to collect data for a new round of the Head Start Family and Child Experiences Survey (FACES). Featuring a new ''Core Plus'' study design, FACES will provide data on a set of key indicators, including information for performance measures. The design allows for more rapid and frequent data reporting (Core studies) and serves as a vehicle for studying more complex issues and topics in greater detail and with increased efficiency (Plus studies).

The FACES Core study will assess the school readiness skills of Head Start children, survey their parents, and ask their Head Start teachers to rate children's social and emotional skills.

In addition, FACES will include observations in Head Start classrooms, and program director, center director, and teacher surveys. FACES Plus studies include additional survey content of policy or programmatic interest, and may include additional programs or respondents beyond those participating in the Core FACES study.

Previous notices provided the opportunity for public comment on the proposed Head Start program recruitment and center selection process (FR V.78, pg.75569 12/12/2013; FR V.79, pg.8461 02/12/2014), the child-level data collection in fall 2014 and spring 2015 (FR V. 79, pg. 11445 02/28/2014; FR V. 79; pg. 27620 5/14/2014), the program- and classroom-level spring 2015 data collection activities (FR v.79; pg. 73077 12/09/2014), the American Indian and Alaska Native Head Start Family and Child Experiences Survey (AI/AN FACES) child-level data collection activities in fall 2015 and spring 2016 (FR V. 80, pg. 30250 08/07/2015) and AI/AN FACES program- and classroom-level spring 2016 data collection activities (FR V. 80, pg 70231 11/13/2015).

This 30-day notice describes the planned additional data collection activities for FACES program- and classroom-level data collection in spring 2017. Spring 2017 data collection includes site visits to 360 centers in 180 Head Start programs. As in spring 2015, for the Core study teachers, program directors, and center directors will each complete surveys, approximately 25 to 30 minutes in length. Two Plus studies are planned related to program functioning for spring 2017. First, program and center directors in all 180 programs (and 360 centers) will complete a 5-minute survey on how programs are planning for implementing the new Head Start program performance standards. Second, all 720 teachers will complete a survey on program functioning, initially piloted in spring 2015.

The purpose of the Core data collection is to support the 2007 reauthorization of the Head Start program (Pub. L. 110–134), which calls for periodic assessments of Head Start's quality and effectiveness. As additional information collection activities are fully developed, in a manner consistent with the description provided in the 60-day notice (79 FR 11445) and prior to use, we will submit these materials for a 30-day public comment period under the Paperwork Reduction Act.

Respondents: Head Start teachers and Head Start directors.

ANNUAL BURDEN ESTIMATES—CURRENT INFORMATION COLLECTION REQUEST

Instrument	Total number of respondents	Annual number of respondents	Number of responses per respondent	Average burden hour per response	Estimated annual burden hours
Classroom sampling form from Head Start staff	360	120	1	0.17	20
Head Start core teacher survey	720	240	1	0.50	120
Head Start core program director survey	180	60	1	0.50	30
Head Start core center director survey	360	120	1	0.42	50
Early care and education administrators survey for Plus study (Head Start Program Performance Standards)	540	180	1	0.08	14
Early care and education providers survey for Plus study (5E—Early Ed)	720	240	1	0.17	41
Total					275

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 330 C Street SW., Washington, DC 20201, Attn: OPRE Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *OPREinfocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: *OIRA_SUBMISSION@OMB.EOP.GOV*, *Attn:* Desk Officer for the Administration for Children and Families.

Mary Jones,

ACF/OPRE Reports Clearance Officer.

[FR Doc. 2016–29373 Filed 12–7–16; 8:45 am]

BILLING CODE 4184–22–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Requested

Title: RPG National Cross-Site Evaluation and Evaluation Technical Assistance.

OMB No.: 0970–0444.

Description: The Children's Bureau within the Administration for Children and Families of the U.S. Department of Health and Human Services seeks a renewal of clearance to collect information for the Regional Partnership Grants to Increase the Well-being of and to Improve Permanency Outcomes for Children Affected by Substance Abuse Cross-Site Evaluation and Evaluation-Related Technical Assistance and Data Collection Support for Regional Partnership Grant Program Round Three Sites or ''RPG'' projects. Under RPG, the Children's Bureau has issued 21 grants to organizations such as child welfare or substance abuse treatment providers or family court systems to develop interagency collaborations and integration of programs, activities, and services designed to increase well-being, improve permanency, and enhance the safety of children who are in an out-of-home placement or are at risk of being placed in out-of-home care as a result of a parent's or caretaker's substance use dependence. The Child and Family Services Improvement and Innovation Act (Pub. L. 112–34) includes a targeted grants program (section 437(f) of the Social Security Act) that directs the Secretary of Health and Human Services to reserve a specified portion of the appropriation for these Regional Partnership Grants, to be used to improve the well-being of children affected by substance abuse. The overall objective of the Cross-Site Evaluation and Technical Assistance projects (the RPG Cross-Site Evaluation) is to plan, develop, and implement a rigorous national cross-site evaluation of the RPG Grant Program, provide legislatively-mandated performance measurement, furnish evaluation-related technical assistance to the grantees in order to improve the quality and rigor of their local evaluations, and support their participation in the cross-site evaluation. The project will evaluate the programs and activities conducted through the RPG Program. The evaluation is being undertaken by the Children's Bureau and its contractor Mathematica Policy Research. The evaluation is being implemented by Mathematica Policy Research and its subcontractors, WRMA, Inc., and Synergy Enterprises.

The RPG Cross-Site Evaluation includes the following components:

1. *Implementation and Partnership Study.* The RPG cross-site implementation and partnership study will contribute to building the knowledge base about effective implementation strategies by examining the process of implementation in the 21 RPG projects, with a focus on factors shown in the research literature to be associated with quality implementation of evidence-based programs. This component of the study describes the RPG projects' target populations, selected interventions and their fit with the target populations, inputs to implementation, and actual services provided (including dosage, duration, content, adherence to curricula, and participant responsiveness). It examines the key attributes of the regional partnerships that grantees develop (for example, partnerships among child welfare and substance abuse treatment providers, social services, and family courts). It describes the characteristics and roles of the partner organizations, the extent of coordination and collaboration, and their potential to sustain the partnerships after the grant ends. Key data collection activities of the implementation and partnership study are: (1) Conducting site visits during which researchers interview RPG program directors, managers, supervisors, and frontline staff who work directly with families; (2) administering a survey to frontline staff involved in providing direct services to children, adults, and families; (3) asking grantees to provide information about implementation and their partnerships as part of their federally required semi-annual progress reports; (4) obtaining service use data from grantees, enrollment date and demographics of enrollees, exit date and reason, and

service participation, which are entered into a web-based system operated by Mathematica Policy Research and its subcontractors; and (5) administering a survey to representatives of the partner organizations.

2. Outcomes Study. The goal of the outcomes study is to describe the changes that occur in children and families who participate in the RPG programs. This study will describe participant outcomes in five domains: (1) Child well-being, (2) family functioning/stability, (3) adult recovery from substance use disorder, (4) child permanency, and (5) child safety. Two main types of outcome data will be used—both of which are being collected by RPG grantees: (1) Administrative child welfare and adult substance abuse treatment records and (2) standardized instruments administered to the parents and/or caregivers. The Children's Bureau is requiring grantees to obtain and report specified administrative records, and to use a prescribed set of standardized instruments. Grantees will provide these data to the cross-site evaluation team twice a year by uploading them to a data system operated by Mathematica Policy Research and its subcontractors.

3. Impact Study. The goal of the impact study is to assess the impact of the RPG interventions on child, adult, and family outcomes by comparing outcomes for people enrolled in RPG services to those in comparison groups, such as people who do not receive RPG services or receive only a subset of the services. The impact study will use demographic and outcome data on both program (treatment) and comparison groups from a subset of grantees with appropriate local evaluation designs such as randomized controlled trials or strong quasi-experimental designs; 5 of the 21 grantees have such designs. Site-specific impacts will be estimated for these seven grantees. Aggregated impact estimates will be created by pooling impact estimates across appropriate sites to obtain a more powerful summary of the effectiveness of RPG interventions.

In addition to conducting local evaluations and participating in the RPG Cross-Site Evaluation, the RPG grantees are legislatively required to report performance indicators aligned with their proposed program strategies and activities. A key strategy of the RPG Cross-Site Evaluation is to minimize burden on the grantees by ensuring that the cross-site evaluation, which includes all grantees in a study that collects data to report on implementation, the partnerships, and participant characteristics and outcomes, fully meets the need for performance reporting. Thus, rather than collecting separate evaluation and performance indicator data, the grantees need only participate in the cross-site evaluation. In addition, using the standardized instruments that the Children's Bureau has specified will ensure that grantees have valid and reliable data on child and family outcomes for their local evaluations. The inclusion of an impact study conducted on a subset of grantees with rigorous designs will also provide the Children's Bureau, Congress, grantees, providers, and researchers with information about the effectiveness of RPG programs.

A 60-day **Federal Register** Notice was published for this study on June 24, 2016. This 30-day **Federal Register** Notice covers the following data collection activities: (1) The site visits with grantees; (2) the web-based survey of frontline staff who provide direct services to children, adults, and families, and their supervisors; (3) the semi-annual progress reports; (4) enrollment and service data provided by grantees; (5) the web-based survey of grantee partners; and (6) outcome data provided by grantees.

Respondents. Respondents include grantee staff or contractors (such as local evaluators) and partner staff. Specific types of respondents and the expected number per data collection effort are noted in the burden table below.

Annual burden estimates. The following instruments are proposed for public comment under this 30-day **Federal Register** Notice. Burden for all components is annualized over three years.

RPG Cross-Site Evaluation Annualized Burden Estimates

Data collection activity	Total number of respondents	Number of responses per respondent	Average burden hours per response (in hours)	Estimatedtotal burden hours	Total annual burden hours
Implementation and Partnership Study					
Program director individual interview	4	1	2	8	2.67
Program manager/supervisor group interview	36	1	2	72	24
Program manager/supervisor individual interviews	24	1	1	24	8
Frontline staff individual interviews	24	1	1	24	8
Semi-annual progress reports	21	6	16.5	2,079	693
Case enrollment data	63	90	0.25	1,417.5	472.5
Service log entries	126	2,340	0.05	14,742	4,914
Staff survey	80	1	0.42	33.6	11.2
Partner survey	80	1	0.33	26.4	8.8
Data Entry for Outcomes Study					
Administrative Data:					
Obtain access to administrative data	21	2	18	378	126
Report administrative data	21	6	144	18,144	6,048
Standardized instruments:					
Enter data into local database	21	6	112.5	14,175	4,725
Review records and submit	21	6	100	12,600	4,200
Additional Data Entry for Impact Study					
Data entry for comparison study sites (7 grantees)	5	1	.25	1,085	361.6
Estimated Total Burden Hours					21,602.77

In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Children's Bureau within the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to Administration for Children and Families, Office of Planning, Research, and Evaluation, 330 C Street SW., Washington, DC 20416, Attn: ACF Reports Clearance Officer. Email address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Email: *OIRASUBMISSION@OMB.EoP.GOV,* Attn: Desk Officer for the Administration of Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2016–29406 Filed 12–7–16; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Privacy Act of 1974; Notice To Establish an Exempt System of Records

AGENCY: National Institutes of Health (NIH), Department of Health and Human Services (HHS).

ACTION: Notice to establish an exempt system of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, the National Institutes of Health (NIH) proposes to establish a new system of records, to be numbered and titled: SORN 09–25–0225 ''NIH Electronic Research Administration (eRA) Records, HHS/NIH/OD/OER,'' which will be related to, but separate from, the system of records covered in SORN 09–25–0036 ''NIH Extramural Awards and Chartered Advisory Committee (IMPAC II), Contract Information (DCIS), and Cooperative Agreement Information, HHS/NIH.'' The new system of records will cover records used by NIH throughout the research and development award lifecycle, from application to scientific peer review, post-award monitoring, and close-out.

Elsewhere in today's **Federal Register**, NIH has published a Notice of Proposed Rulemaking (NPRM) proposing to exempt confidential source-identifying material in the new system of records (*i.e.,* material that would inappropriately reveal the identities of referees who provide letters of recommendation and peer reviewers who provide written evaluative input and recommendations to NIH about particular funding applications under an express promise by the government that their identities in association with the written work products they authored and provided to the government will be kept confidential) from certain requirements of the Privacy Act, specifically, from the provisions pertaining to providing an accounting of disclosures, access and amendment and notification. The exemptions and the promises of confidentiality are necessary to protect the integrity of NIH extramural peer review and award processes and ensure that NIH efforts to obtain accurate and objective assessments and evaluations of funding applications from referees and peer reviewers is not hindered. The exemptions will become effective when NIH publishes a Final Rule, which will not occur until the 60-day comment period provided in the NPRM has expired and any comments received on the NPRM (or on this System of Records Notice) have been addressed.

DATES: The comment period for this System of Records Notice (SORN) is co-extensive with the 60-day comment period provided in the NPRM; *i.e.,* written comments on the SORN should be submitted within 60 days from today's publication date. The new system, including the routine uses and the exemptions, will become effective when NIH publishes a Final Rule, which will not occur until the 60-day comment period provided in the NPRM has expired and any comments received on the NPRM (or on this SORN) have been addressed.

ADDRESSES: You may submit comments, identified by the Privacy Act System of Records Number (09–25–0225), by any of the following methods: Email: *privacy@mail.nih.gov* and include PA SOR number (09–25–0225) in the subject line of the message. Phone: (301) 402–6201. Fax: (301) 402–0169. Mail or hand-delivery: NIH Privacy Act Officer, Office of Management Assessment, National Institutes of Health, 6011 Executive Boulevard, Suite 601, MSC 7669, Rockville, Maryland 20852. Comments received will be available for public inspection at this same address from 9:00 a.m. to 3:00 p.m., Monday through Friday, except Federal holidays. Please call 301–496–4606 for an appointment.

FOR FURTHER INFORMATION CONTACT: NIH Privacy Act Officer, Office of Management Assessment (OMA), Office of the Director (OD), National Institutes of Health (NIH), 6011 Executive Boulevard, Suite 601, MSC 7669, Rockville, Maryland 20852, or telephone (301) 402–6201.

SUPPLEMENTARY INFORMATION:

I. Background on the NIH Electronic Research Administration (eRA) Records System

The new system of records established in this Notice, ''NIH Electronic Research Administration (eRA) Records, HHS/NIH/OD/OER'' (hereinafter referred to as the ''NIH eRA Records'' system), will cover records used throughout the research and development award lifecycle, including pre-award stages of application submission, scientific peer review, award processing, post-award monitoring, and close-out. Many of the records in the system will contain information about more than one individual or type of individual (*e.g.,* applicants, awardees, faculty members of applicant and awardee entities, application reviewers). By design, any of the records can be (and in practice will be) retrieved using the name or other personal identifier of any of the individuals whose information is contained in the records, to the extent required to help ensure that award proceedings are carried out by the NIH in accordance with all applicable federal statutes and regulations.

The eRA information technology (IT) system associated with this system of records is an HHS-designated Center of Excellence, and is used as a grants management line of business system by other federal agencies to manage their award records. Records pertaining to awards of other agencies in the eRA IT system are not covered under SORN 09–25–0225, but would be covered under SORN(s) those agencies publish, if their records require a SORN.

II. The Privacy Act

The Privacy Act governs the collection, maintenance, use, and

dissemination of certain information about individuals by agencies of the Federal Government.

A System of Records (SOR) is a group of any records under the control of a Federal agency from which information about an individual is retrieved by the individual's name or other personal identifier. The Privacy Act requires each agency to publish in the **Federal Register** notice of the existence and character of each SOR that the agency maintains. The System of Records Notice (SORN) identifies or describes the laws authorizing the system to be maintained; the types and sources of records in the system; the categories of individuals to whom the records pertain; the purposes for which the records are used within the agency; the routine uses for which a record maybe disclosed to parties outside the agency without the individual's prior, written consent; agency policies and procedures for safeguarding, storing, retrieving, accessing, retaining, and disposing of the records; the procedures for an individual to follow to make notification, access, and amendment requests to the System Manager; and whether the SOR is exempt from certain Privacy Act requirements.

Dated: September 29, 2016.

Alfred C. Johnson,

Acting Deputy Director for Management, NIH.

System Number: 09–25–0225

SYSTEM NAME:

Electronic Research Administration (eRA) Records, HHS/NIH/OD/OER.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records will be located at:

- The Office of Extramural Research (OER), Office of the Director (OD), National Institutes of Health (NIH), Building 1, Room 144, 1 Center Drive, Bethesda, MD 20892; and
- any Federal Records Center where records from this system of records are archived and stored.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The records contained within this system will pertain to the following categories of individuals:

1. Applicants for or Awardees of biomedical and behavioral research and development, training, career development, or loan repayment grant awards; cooperative agreement awards; and research and development contract awards;

2. Individuals who are named in applications, or awards; or individuals named on NIH intramural projects; *e.g.,* program directors, key personnel, trainees, collaborators, consultants;

3. Peer Reviewers who review and provide evaluative input to the government about particular applications, in records such as reviewer critiques, preliminary or final individual overall impact/priority scores, and/or assignment of peer reviewers to an application;

4. Referees who, in association with a particular trainee application, supply a reference or letter of recommendation for an applicant;

5. Individual awardees and sub-awardees who are required to report inventions, patents, and utilization of subject invention(s) associated with NIH awards; and

6. Academic medical faculty, medical students and resident physicians (*e.g.,* faculty of Association of American Medical Colleges of member institutions).

CATEGORIES OF RECORDS IN THE SYSTEM:

This system will include a variety of pre-award and award management records that contain information needed to process applications and manage grant awards across the award lifecycle. Listed below are the categories of individuals mentioned above, matched with pre-award and award management records collected about them.

1. Applicants for or Awardees of awards—pre-award and award management (awardees) information;

2. Individuals named in applications, or awards—pre-award and award management (awardees) information;

3. Referees—pre-award information;

4. Peer Reviewers—pre-award information;

5. Individuals required to report inventions, etc.—award management information; and,

6. Academic medical faculty, medical students and resident physicians—award management information.

Pre-award information includes the (1) application and related materials, and (2) documents related to the composition and function of chartered advisory committees (*i.e.,* rosters). A record may consist of name, institution address, professional degree, demographic information, education and employment records and identifiers used by eRA Commons (*i.e.,* user name and an IMPAC II system-assigned, unique personal identification number).

Award management information consists of materials submitted in support of an award such as (1) recommendation letters; (2) peer review related information such as application scores, reviewer critiques, summary statements and express promises of confidentiality of any information concerning applications, scores, or critiques; (3) financial information such as obligated award amounts and awardee financial reports; (4) financial conflict of interest records; (5) inventions, utilization data, patent applications, and patents; (6) publications or other scholarly products reported as associated with awards; (7) reports related to management of awards; and (8) records and reports related to data querying, reporting, tracking, compliance, evaluation, audit, and communications activities. For the academic medical faculty category, records are used to support special studies, including research and policy evaluations and to complete biomedical workforce statistical reports and include (1) faculty name, (2) employing institution and institutional address; (3) degree and year obtained; (4) demographic information; (5) field of study; (6) appointment information; and (7) employment history. For the purpose of peer review, the eRA system contains limited information on loan repayment applications (which are managed through a different System of Records, NIH SORN 09–25–0165, Division of Loan Repayment Records) and research and development contract award information for purposes of complying with statutory requirements related to research and development awards at NIH such as reporting on the inclusion of minorities, women, and children in clinical research; obtaining approval for foreign grant components from the Department of State; and to satisfy research conditions, and disease categorization reporting requirements.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The legal authority to operate and maintain this Privacy Act records system is 42 U.S.C. 217a, 241, 242, 248, 281, 282, 284, 284a, 285, 285b, 285c, 285d, 285e, 285f, 285g, 285h, 285i, 285j, 285k, 285l, 285m, 285n, 285o, 285p, 285q, 285r, 285s, 285t, 286, 287, 287b, 287c–21, 287d, 288, 35 U.S.C. 200–212, 48 CFR Subpart 15.3 and 37 CFR 401.1–16.

PURPOSE:

Records about individuals will be used within the agency for these purposes:

1. To support NIH award programs and related processes, including (1) application preparation, receipt, referral, and assignment; (2) initial peer and council reviews; (3) award processing, funding, monitoring, and close-out; and (4) data querying,

reporting, tracking, compliance, evaluation, audit, and communications.

2. To track individual trainees who receive support from NIH through grants such as fellowship or career awards or who are supported through institutional training grant awards. Included are individuals in training for research and development supported in an investigator's laboratory which has an NIH-funded award (*e.g.,* R01); these trainees are defined as ''closely associated trainees''.

3. To communicate matters related to agency award programs with (1) applicant organizations, including associated systems or system providers; (2) applicant persons such as the authorized institutional representatives, principal investigator(s), trainees, or foreign collaborators; (3) peer reviewers; or (4) other entities such as Congress; federal departments or agencies, non-federal agencies or entities, or the general public.

4. To monitor the operation of review and award processes to detect and deal appropriately with any instances of real or apparent inequities.

5. To provide mandated and other requested reports to Congress and in compliance with statutory, regulatory, and policy requirements.

6. To maintain communication with former fellows and trainees who have incurred a payback obligation through the National Research Service Award Program and other federal research training programs.

7. To maintain official administrative files of agency-funded research programs.

8. To manage research portfolios.

9. To document inventions, patents, and utilization data and protect the government's right to patents made with NIH support.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Records about an individual may be disclosed from this system of records to the following parties outside HHS, without the individual's prior written consent, for the following purposes:

1. To a congressional office from the record of an individual in response to a written inquiry from the congressional office made at the written request of the individual.

2. To the Department of Justice (DOJ) or to a court or other adjudicative body when:

- HHS or any component thereof or participating agencies; or
- any employee of HHS or participating agencies in the employee's official capacity; or
- any employee of HHS agencies in the employee's individual capacity where the DOJ, HHS, or the participating agency has agreed to represent the employee; or
- the United States,

is a party to litigation or has a direct and substantial interest in the proceeding and the disclosure of such records is deemed by the agency to be relevant and necessary to the proceeding; provided, however, that in each case, it has been determined that the disclosure is compatible with the purpose for which the records were collected.

3. When a record on its face, or in combination with other records, indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule, or order issued pursuant thereto, disclosure may be made to the appropriate public authority, whether federal, foreign, state, local, tribal, or otherwise responsible for enforcing, investigating, or prosecuting the violation or charged with enforcing or implementing the statute, rule, regulation, or order issued pursuant thereto, if the information disclosed is relevant to the enforcement, regulatory, investigative, or prosecutorial responsibility of the receiving entity.

4. To appropriate federal agencies and HHS contractors, grantees, consultants, or volunteers who have been engaged by HHS to assist in the accomplishment of an HHS function relating to the purposes of this system of records and that need to have access to the records in order to assist HHS in performing the activity. Any contractor will be required to comply with the Privacy Act of 1974, as amended.

5. To appropriate federal agencies and HHS contractors with a need to know the information for the purpose of assisting agency efforts to respond to a suspected or confirmed breach of the security or confidentiality of information maintained in this system of records, if the information disclosed is relevant and necessary for that assistance.

6. To a party for a research purpose when NIH: (A) Has determined that the use or disclosure does not violate legal or policy limitations under which the record was provided, collected, or obtained; (B) has determined that the research purpose (1) cannot be reasonably accomplished unless the record is provided in individually identifiable form, and (2) warrants the risk to the privacy of the individual; (C) has required the recipient to (1) establish reasonable administrative, technical, and physical safeguards to prevent unauthorized use or disclosure of the record, (2) remove or destroy the information that identifies the individual at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the research project, unless the recipient has presented adequate justification of the research, and (3) makes no further use or disclosure of the record except when required by law, and reports results of the research in de-identified or aggregate form; and (D) has secured a written statement attesting to the recipient's understanding of and willingness to abide by these provisions (*i.e.,* signed data access agreement for system data) in which the data may relate to reports of the composition of biomedical and/or research and development workforce; authors of publications attributable to federally-funded awards; information made available through third-party systems as permitted by applicants or awardees for agency awards; information related to agency research integrity investigations; or award payment information reported to federal databases.

7. A record from this system may be disclosed to a federal, foreign, state, local, tribal or other public authority of the fact that this system of records contains information relevant to the hiring or retention of an employee, the issuance or retention of a security clearance, the letting of a contract, or the issuance or retention of a license, grant or other benefit. The other agency or licensing organization may then make a request supported by the written consent of the individual for further information if it so chooses. HHS will not make an initial disclosure unless the information has been determined to be sufficiently reliable to support a referral to another office within the agency or to another federal agency for criminal, civil, administrative, personnel, or regulatory action.

8. To qualified experts not within the definition of agency employees as prescribed in agency regulations or policies to obtain their opinions on applications for grants, CRADAs, inventions, or other awards as a part of the peer review process.

9. To the National Archives and Records Administration (NARA), General Services Administration (GSA), or other federal government agencies pursuant to records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

NIH may also disclose information about an individual, without the individual's prior written consent, from

this system of records to parties outside HHS for any of the purposes authorized directly in the Privacy Act at 5 U.S.C. 552a(b)(2) and (b)(4)–(11).

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, SAFEGUARDING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored in various electronic media and paper form, and maintained under secure conditions in areas with limited and/or controlled access. Only authorized users whose official duties require the use of this information will have regular access to the records in this system. In accordance with established NIH, HHS and other federal security requirements, policies, and controls, records may also be located, maintained and accessed from secure servers wherever feasible or located on approved portable/mobile devices designed to hold any kind of digital data including, but not limited to laptops, tablets, PDAs, USB drives, media cards, portable hard drives, smartphones, optical storage (CDs and DVDs), and/or other mobile storage devices. Records are stored on portable/mobile storage devices only for valid business purposes and with prior approval.

RETRIEVABILITY:

Records are retrieved by the name or other personal identifier (*e.g.,* Commons user ID) of a subject individual.

ACCESSIBILITY:

Authorized Users:

Access is strictly limited according to the principle of least privilege which means giving a user only those privileges which are essential to that user's work.

SAFEGUARDS:

Measures to prevent unauthorized disclosures are implemented as appropriate for each location or form of storage and for the types of records maintained. Safeguards conform to the HHS Information Security and Privacy Program, *http://www.hhs.gov/ocio/securityprivacy/index.html.* Site(s) implement personnel and procedural safeguards such as the following:

Administrative Safeguards:

Controls to ensure proper protection of information and information technology systems include, but are not limited to, the completion of a Security Assessment and Authorization (SA&A) package and a Privacy Impact Assessment (PIA) and mandatory completion of annual NIH Information Security and Privacy Awareness training or comparable specific in-kind training offered by participating agencies that has been reviewed and accepted by the NIH eRA Information Systems Security Officer (ISSO). The SA&A package consists of a Security Categorization, e-Authentication Risk Assessment, System Security Plan, evidence of Security Control Testing, Plan of Action and Milestones, Contingency Plan, and evidence of Contingency Plan Testing. When the design, development, or operation of a system of records on individuals is required to accomplish an agency function, the applicable Privacy Act Federal Acquisition Regulation (FAR) clauses are inserted in solicitations and contracts.

Physical Safeguards:

Controls to secure the data and protect paper and electronic records, buildings, and related infrastructure against threats associated with their physical environment include, but are not limited to, the use of the HHS Employee ID and/or badge number and NIH key cards, security guards, cipher locks, biometrics, and closed-circuit TV. Paper records are secured under conditions that require at least two locks to access, such as in locked file cabinets that are contained in locked offices or facilities. Electronic media are kept on secure servers or computer systems.

Technical Safeguards:

Controls executed by the computer system are employed to minimize the possibility of unauthorized access, use, or dissemination of the data in the system. They include, but are not limited to user identification, password protection, firewalls, virtual private network, encryption, intrusion detection system, common access cards, smart cards, biometrics and public key infrastructure.

Alleged or Confirmed Security Incidents:

The NIH will report and take action to remediate security incidents involving the unauthorized access or disclosure of personally identifiable and sensitive information according to applicable law, regulations, OMB guidance, HHS and NIH policies.

RETENTION AND DISPOSAL:

Records are retained and disposed of in accordance with the NIH Records Control Schedule contained in NIH Manual Chapter 1743, ''Keeping and Destroying Records,'' which provides these disposition periods:

- Item E–0001 (DAA–0443–2013–0004–0001)—Official case files of construction, renovation, endowment and similar grants.

Disposition: Temporary. Cut off annually following completion of final grant-related activity that represents closing of the case file (*e.g.,* project period ended). Destroy 20 years after cut-off;

- Item E–0002 (DAA–0443–2013–0004–0002)—Official case files of funded grants, unfunded grants, and award applications, appeals and litigation records.

Disposition: Temporary. Cut off annually following completion of final grant-related activity that represents closing of the case file (*e.g.,* end of project period, completed final peer review, litigation or appeal proceeding concluded). Destroy 10 years after cut-off;

- Item E–0003 (DAA–0443–2013–0004–0003)—Animal welfare assurance files.

Disposition: Temporary. Cut off annually following closing of the case file. Destroy 4 years after cut-off; and,

- Item E–0004 (DAA–0443–2013–0004–0004)—Extramural program and grants management oversight records.

Disposition: Temporary. Cut off annually. Destroy 3 years after cut-off.

Refer to the NIH Manual Chapter for specific retention and disposition instructions: *http://www1.od.nih.gov/oma/manualchapters/management/1743.*

SYSTEM MANAGER AND ADDRESS:

OER Privacy Coordinator, Office of Extramural Research (OER), Office of the Director (OD), National Institutes of Health (NIH), 1 Center Drive, Room 144, Bethesda, MD 20814.

NOTIFICATION PROCEDURE:

Certain material will be exempt from notification; however, consideration will be given to all notification requests addressed to the System Manager. Any individual who wants to know whether this system of records contains a record about him or her must make a written request to the System Manager identified above. The requester should provide either a notarization of the request or a written certification that the requester is who he or she claims to be and understands that the knowing and willful request of a record pertaining to an individual under false pretenses is a criminal offense under the Privacy Act, subject to a five thousand dollar fine. The request should include the requester's full name and address, and should also include the following information, if known: The approximate date(s) the information was collected, the type(s) of information collected, and the office(s) or official(s) responsible for the collection of information.

RECORD ACCESS PROCEDURE:

Certain material will be exempt from access; however, consideration will be given to all access requests addressed to the System Manager. To request access to a record about you, write to the System Manager identified above, and provide the information described under ''Notification Procedure''. Individuals may also request an accounting of disclosures that have been made of their records, if any.

CONTESTING RECORD PROCEDURE (REDRESS):

Certain material will be exempt from amendment; however, consideration will be given to all amendment requests addressed to the System Manager. To contest information in a record about you, write to the System Manager identified above, reasonably identify the record and specify the information being contested, state the corrective action sought and the reason(s) for requesting the correction, and provide supporting information. The right to contest records is limited to information that is factually inaccurate, incomplete, irrelevant, or untimely (obsolete).

RECORD SOURCE CATEGORIES:

Information in records retrieved by a particular individual's identifier will be obtained directly from that individual or from other individuals and entities named in, contacted about, or involved in processing the records, including applicant institutions; NIH and customer agency acquisition personnel; educational, trainee and awardee institutions; and third parties that provide references or recommendations concerning the subject individual.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE PRIVACY ACT:

Pursuant to 5 U.S.C. 552a(k)(5), the following subset of records in this system of records qualifies as investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal contracts, and will be exempted from the Privacy Act requirements pertaining to providing an accounting of disclosures, access and amendment, and notification (5 U.S.C. 552a (c)(3) and (d)):

Material that would inappropriately reveal the identities of referees who provide letters of recommendation and peer reviewers who provide written evaluative input and recommendations to NIH about particular funding applications under an express promise by the government that their identities in association with the written work products they authored and provided to the government will be kept confidential; this includes only material that would reveal a particular referee or peer reviewer as the author of a specific work product (*e.g.,* reference or recommendation letters, reviewer critiques, preliminary or final individual overall impact/priority scores, and/or assignment of peer reviewers to an application and other evaluative materials and data compiled by NIH/OER); it includes not only an author's name but any content that could enable the author to be identified from context.

The exemptions will be effective upon publication of a final rule in the **Federal Register**, promulgating the exemptions as an amendment to HHS' Privacy Act regulations at 45 CFR 5b.11. To the extent that records in System No. 09–25–0225 are retrieved by personal identifiers for individuals other than referees and peer reviewers (for example, individual funding applicants, and other individuals who are the subject of assessment or evaluation), the exemptions will enable the agency to prevent, when appropriate, those individual record subjects from having access to, and other rights under the Privacy Act with respect to, the above-described confidential source-identifying material in the records.

[FR Doc. 2016–29059 Filed 12–7–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Customs and Border Protection

Approval of Petrospect, Inc., as a Commercial Gauger

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of approval of Petrospect, Inc. as a commercial gauger.

SUMMARY: Notice is hereby given, pursuant to CBP regulations, that Petrospect, Inc. has been approved to gauge petroleum and certain petroleum products for customs purposes for the next three years as of June 10, 2016.

DATES: *Effective Dates:* The approval of Petrospect, Inc. as commercial gauger became effective on June 10, 2016. The next triennial inspection date will be scheduled for June 2019.

FOR FURTHER INFORMATION CONTACT: Approved Gauger and Accredited Laboratories Manager, Laboratories and Scientific Services Directorate, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW., Suite 1500N, Washington, DC 20229, tel. 202–344–1060.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to 19 CFR 151.13, that Petrospect, Inc., 499 N. Nimitz Highway, Pier 21, Honolulu, HI 96817, has been approved to gauge petroleum and certain petroleum products for customs purposes, in accordance with the provisions of 19 CFR 151.13. Petrospect, Inc. is approved for the following gauging procedures for petroleum and certain petroleum products from the American Petroleum Institute (API):

API chapters	Title
3	Tank Gauging.
7	Temperature Determination.
8	Sampling.
11	Physical Properties Data.
12	Calculations.
17	Marine Measurement.

Anyone wishing to employ this entity to conduct gauger services should request and receive written assurances from the entity that it is approved by the U.S. Customs and Border Protection to conduct the specific gauger service requested. Alternatively, inquiries regarding the specific gauger service this entity is approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *CBPGaugersLabs@cbp.dhs.gov.* Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories. *http://www.cbp.gov/about/labs-scientific/commercial-gaugers-and-laboratories.*

Dated: November 30, 2016.

Ira S. Reese,

Executive Director, Laboratories and Scientific Services Directorate.

[FR Doc. 2016–29402 Filed 12–7–16; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4291–DR; Docket ID FEMA–2016–0001]

Virginia; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the

Commonwealth of Virginia (FEMA–4291–DR), dated November 2, 2016, and related determinations.

DATES: *Effective Date:* November 17, 2016.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the Commonwealth of Virginia is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of November 2, 2016.

The independent city of Hampton for Individual Assistance.

The independent cities of Portsmouth and Suffolk for Individual Assistance (already designated for Public Assistance).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2016–29378 Filed 12–7–16; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4287–DR; Docket ID FEMA–2016–0001]

Kansas; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Kansas (FEMA–4287–DR), dated October 20, 2016, and related determinations.

DATES: *Effective Date:* November 21, 2016.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Kansas is hereby amended to include the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of October 20, 2016.

Woodson County for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2016–29377 Filed 12–7–16; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4285–DR; Docket ID FEMA–2016–0001]

North Carolina; Amendment No. 15 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of North Carolina (FEMA–4285–DR), dated October 10, 2016, and related determinations.

DATES: *Effective Date:* November 21, 2016.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of North Carolina is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of October 10, 2016.

Montgomery County for Public Assistance, including direct federal assistance.

Beaufort, Bertie, Brunswick, Camden, Carteret, Chowan, Columbus, Craven, Currituck, Dare, Duplin, Edgecombe, Gates, Greene, Harnett, Hertford, Hyde, Jones, Lenoir, Martin, Moore, Northampton, Onslow, Pasquotank, Pender, Perquimans, Pitt, Robeson, Sampson, Tyrrell, Washington, Wayne, and Wilson Counties for Public assistance [Categories C–G] (already designated for Individual Assistance and assistance for debris removal and emergency protective measures [Categories A and B], including direct federal assistance, under the Public Assistance program).

New Hanover and Pamlico Counties for Public Assistance [Categories C–G] (already designated for assistance for debris removal and emergency protective measures [Categories A and B], including direct federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2016–29376 Filed 12–7–16; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2016–0032; OMB No. 1660–0107]

Agency Information Collection Activities: Proposed Collection; Comment Request; Federal Emergency Management Agency Public Assistance Customer Satisfaction Surveys

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a revision of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning the collection of Public Assistance customer satisfaction survey responses and information for assessment and improvement of the delivery of disaster assistance to States, Local and Tribal governments, and eligible non-profit organizations.

DATES: Comments must be submitted on or before February 6, 2017.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at *www.regulations.gov* under Docket ID FEMA–2016–0032. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Docket Manager, Office of Chief Counsel, DHS/FEMA, 500 C Street SW., 8NE, Washington, DC 20472–3100.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available via the link in the footer of *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Kristin Brooks, Statistician, Customer Survey Analysis Section, Reporting and Analytics Division, Recovery Directorate, at (940) 891–8579 or *kristin.brooks@fema.dhs.gov.* You may contact the Records Management Division for copies of the proposed collection of information at email address: *FEMA-Information-Collections-Management@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: This collection is in accordance with Executive Orders 12862 and 13571 requiring all Federal agencies to survey customers to determine the kind and quality of services they want and their level of satisfaction with existing services. The Government Performance and Results Act of 1993 (GPRA) requires Federal agencies to set missions and goals and to measure agency performance against them. *See* Public Law 103–62, 107 Stat 285 (1993). The GPRA Modernization Act of 2010 requires quarterly performance assessments of government programs for the purposes of assessing agency performance and improvement. *See* Public Law 111–352, 124 Stat 3875 (2011). The Federal Emergency Management Agency fulfills these requirements by collecting customer satisfaction program information through surveys of States, Local and Tribal governments, and eligible non-profit organizations.

Collection of Information

Title: FEMA Public Assistance Customer Satisfaction Surveys.

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0107.

FEMA Forms: FEMA Form 519–0–32, Public Assistance Initial Customer Satisfaction Survey (Telephone); FEMA Form 519–0–33, Public Assistance Initial Customer Satisfaction Survey (Internet); FEMA Form 519–0–34, Public Assistance Assessment Customer Satisfaction Survey (Telephone); FEMA Form 519–0–35, Public Assistance Assessment Customer Satisfaction Survey (Internet).

Abstract: Federal agencies are required to survey their customers to determine the kind and quality of services customers want and their level of satisfaction with those services. FEMA managers use the survey results to measure performance against standards for performance and customer service, measure achievement of strategic planning objectives, and generally gauge and make improvements to disaster service that increase customer satisfaction.

Affected Public: Not-for-profit institutions, State, Local, or Tribal government.

Number of Respondents: 7,804.

Number of Responses: 7,804.

Estimated Total Annual Burden Hours: 2,293.

Estimated Cost: The estimated annual cost to respondents for the hour burden is $150,116.19. There are no annual costs to respondents' operations and maintenance costs for technical services. The annual costs to respondents' for Non-Labor Cost (expenditures on training, travel and other resources) is $11,664.00. There are no annual start-up or capital costs. The cost to the Federal Government is $697,526.37.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Dated: November 30, 2016.

Richard W. Mattison,

Records Management Program Chief, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2016–29380 Filed 12–7–16; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4290–DR; Docket ID FEMA–2016–0001]

Minnesota; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Minnesota (FEMA–4290–DR), dated November 2, 2016, and related determinations.

EFFECTIVE DATES: November 29, 2016.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Minnesota is hereby amended to include the Individual Assistance program for the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of November 2, 2016.

Hennepin County for Individual Assistance.

Blue Earth, Freeborn, Le Sueur, Rice, Steele, and Waseca Counties for Individual Assistance (already designated for Public Assistance.)

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2016–29379 Filed 12–7–16; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2016–0074]

Privacy Act of 1974; Department of Homeland Security/United States Coast Guard—031 USCG Law Enforcement (ULE) System of Records

AGENCY: Privacy Office, Department of Homeland Security.

ACTION: Notice of Privacy Act System of Records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Homeland Security proposes to establish a new Department of Homeland Security system of records titled, ''Department of Homeland Security/United States Coast Guard—031 USCG Law Enforcement (ULE) System of Records.'' This system of records allows the Department of Homeland Security/United States Coast Guard to collect and maintain records related to maritime law enforcement, marine environmental protection, and the determinations supporting enforcement action taken by the United States Coast Guard. Additionally, the Department of Homeland Security is issuing a Notice of Proposed Rulemaking to exempt this system of records from certain provisions of the Privacy Act, elsewhere in the **Federal Register**. This newly established system will be included in the Department of Homeland Security's inventory of record systems.

DATES: Submit comments on or before January 9, 2017. This new system will be effective January 9, 2017.

ADDRESSES: You may submit comments, identified by docket number DHS–2016–0074 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–343–4010.
- *Mail:* Jonathan R. Cantor, Acting Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528–0655.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, please visit *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions, please contact: Marilyn Scott-Perez (202–475–3515), Privacy Officer, Commandant (CG–61), United States Coast Guard, Mail Stop 7710, Washington, DC 20593. For privacy questions, please contact: Jonathan R. Cantor, (202) 343–1717, Acting Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528–0655.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the Department of Homeland Security (DHS) United States Coast Guard proposes to establish a new DHS system of records titled, ''DHS/United States Coast Guard-031 USCG Law Enforcement (ULE) System of Records.''

The collection and maintenance of this information will allow the DHS/USCG to collect and maintain records regarding maritime law enforcement, security, marine safety, and environmental protection activities. USCG Law Enforcement consists of certain records that were formerly covered under the DHS/USCG–013 Marine Information for Safety and Law Enforcement (MISLE) system of records. These records are being moved under ULE to maintain USCG law enforcement and case-related data in one repository. In addition to the transfer of this law enforcement data out from under MISLE to ULE, this notice also serves to inform that USCG Biometrics at Sea System records, which are collected under the purpose and identified authorities cited herein, are maintained in the Automated Biometric Identification System (IDENT)—the DHS biometric repository maintained by the DHS Office of Biometric Identity Management. Separately and elsewhere in the **Federal Register**, the remaining portions of the records covered under MISLE will be republished under two new systems of records: The Vessel Identification System and the Merchant Vessel Documentation System. The MISLE SORN will be retired upon the publication of all three new systems of records.

USCG Law Enforcement may contain information on persons who come into contact with USCG through its law enforcement, safety, and environmental protection activities, including vessel and facility owners, operators, crew, employees, passengers, and other persons associated with a USCG law enforcement or environmental protection activity or having an interest in the subject vessel or facility involved or identified in the respective case file. Consistent with the authority being enforced, ULE collects and maintains in case files both biographic and, as appropriate, references to biometric records obtained from individuals and persons, as well as identifying information relating to ownership, registry, and location of vessels and facilities.

Consistent with DHS's information-sharing mission, information stored in the DHS/USCG–031 USCG Law Enforcement (ULE) System of Records may be shared with other DHS components that have a need to know the information to carry out their national security, law enforcement, immigration, intelligence, or other homeland security functions. In addition, information may be shared with appropriate federal, state, local, tribal, territorial, foreign, or

international government agencies consistent with the routine uses set forth in this system of records notice.

Additionally, DHS is issuing a Notice of Proposed Rulemaking to exempt this system of records from certain provisions of the Privacy Act elsewhere in the **Federal Register**. This newly established system will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which Federal Government agencies collect, maintain, use, and disseminate individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals when systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors.

Below is the description of the DHS/USCG–031 USCG Law Enforcement (ULE) System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget and to Congress.

System of Records

Department of Homeland Security (DHS)/USCG–31

SYSTEM NAME:

DHS/USCG–031 USCG Law Enforcement (ULE) System of Records.

SECURITY CLASSIFICATION:

Sensitive but Unclassified.

SYSTEM LOCATION:

Records are maintained at the United States Coast Guard (USCG) Headquarters in Washington, DC, USCG Operations Systems Center (OSC) in Kearneysville, WV, and other field locations. Records collected from the USCG Biometrics at Sea System (BASS) are maintained at the DHS Office of Biometric Identity Management in Washington, DC. The Marine Information for Safety and Law Enforcement (MISLE) System is the information technology (IT) repository for marine safety, security, environmental protection, and law enforcement records. The Automated Biometric Identification System (IDENT) is the IT repository for USCG BASS records.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals with established relationship(s) or associations to maritime vessels or marine transportation facilities that are the subject of enforcement or compliance activities regulated by the USCG. This may include:

- Vessel owners or operator;
- Charterers;
- Masters;
- Crew members;
- Vessel or boat agents;
- Mortgagees;
- Lien claimants;
- Vessel builders;
- Transportation facility owners, managers, or employees;
- Individuals who own, operate, or represent marine transportation companies; and
- Other individuals come into contact with the USCG as part of an enforcement or compliance activity.

CATEGORIES OF RECORDS IN THE SYSTEM:

The following information may appear in case files, reports, investigations, and other documents (either physical or electronic) maintained by USCG relating to an enforcement or compliance activity:

- Name of individual, vessel, or facility;
- Home and work address;
- Home, work, and mobile phone numbers;
- Facility number;
- Involved party identification number;
- Social Security number (SSN);
- Driver license number;
- Alien Registration Number (A-Number);
- Military identification number;
- U.S. Coast Guard license number;
- Foreign seaman's booklet number;
- Resident alien number;
- Merchant mariners license or documentation number;
- Taxpayer Identification Number (TIN);
- Casualty case number;
- Pollution incident case number;
- Date of incident;
- Civil penalty case number;
- Biometric information, which may include:
  - Photographs and digital images,
  - Height,
  - Weight,
  - Eye color,
  - Hair color,
  - Fingerprints, and
  - Irises.Videos;
- Vessel or boat registration data;
- Port visits;
- Vessel or boat inspection data;
- Vessel or boat documentation data;
- Port Safety boarding;
- Casualties;
- Pollution incidents, civil violations (as applicable), and associated information (data pertaining to people or organizations associated with the subject vessels);
- Information on marine transportation facilities including:
  - Name,
  - Identification number,
  - Location,
  - Commodities handled,
  - Equipment certificates,
  - Approvals,
  - Inspection reports,
  - Pollution incidents, and
  - Casualties.
  - Violations of U.S. laws and data pertaining to people or organizations associated with those facilities;
- For owners, operators, agents, and crew members;
- Statements submitted by USCG personnel relating to boarding;
- Investigations as a result of a pollution and/or casualty incident, as well as any violations of United States law, along with civil penalty actions taken as a result of such violations. Such reports could contain names of passengers on vessels, as well as witnesses to such violations; and
- Narratives, reports, and documents by USCG personnel describing their activities on vessels and within facilities, including incident reports, violations of laws, and international treaties

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

14 U.S.C 89a, 93(a) and (c), 632; 16 U.S.C 1431; 33 U.S.C 1223; 33 U.S.C. 1228; 46 U.S.C. 3717; 46 U.S.C. 12119, 12501–502.

PURPOSE(S):

The purpose of this system is to collect and maintain USCG case records and other reported information relating to the safety, security, law enforcement, environmental, and compliance activities of vessels, facilities, organizations engaged in marine transportation, and related persons.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C.

552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (DOJ), including Offices of the U.S. Attorneys, or other Federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body, when it is relevant or necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee or former employee of DHS in his/her official capacity;

3. Any employee or former employee of DHS in his/her individual capacity when DOJ or DHS has agreed to represent the employee; or

4. The U.S. or any agency thereof.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration (NARA) or General Services Administration pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency or organization for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. DHS has determined that as a result of the suspected or confirmed compromise, there is a risk of identity theft or fraud, harm to economic or property interests, harm to an individual, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate federal, state, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To federal and state safety enforcement agencies, including, but not limited to, the Maritime Administration and National Transportation Safety Board, U.S. Department of Transportation, to access historical data that may assist in safety investigations and improve transportation safety.

I. To federal, state, and local environmental agencies, including, but not limited to, the U.S. Environmental Protection Agency, to access historical data that may improve compliance with U.S. laws relating to environmental protection.

J. To the U.S. Department of Defense and related entities, including, but not limited to, the Military Sealift Command and U.S. Navy, to access data on safety information regarding vessels chartered by those agencies.

K. To the International Maritime Organization or intergovernmental organizations, nongovernmental organizations, or foreign governments in order to conduct joint investigations, operations, and inspections;

L. To federal, state, or local agencies with which the U.S. Coast Guard has a Memorandum of Understanding, Memorandum of Agreement, or Inspection and Certification Agreement pertaining to Marine Safety, Maritime Security, Maritime Law Enforcement, and Marine Environmental Protection activities.

M. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information, when disclosure is necessary to preserve confidence in the integrity of DHS, or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

DHS/USCG stores records in this system electronically or on paper in secure facilities in a locked drawer behind a locked door. The records may be stored on magnetic disc, tape, and digital media.

RETRIEVABILITY:

Records may be retrieved by name of individual, vessel, or facility, facility number, involved party identification number, SSN, TIN, driver license number, (A-Number), military identification number, U.S. Coast Guard license number, cellular number, foreign seaman's booklet number, resident alien number, merchant mariners license or documentation number, person or organization name, casualty case number, pollution incident case number, date of incident, civil penalty case number, USCG unit entering data, or incident location.

Biometric records associated with case files or reports may be retrieved from IDENT by reference to the applicable Organization/Unit/Subunit designations for the Biometrics-at-Sea-System.

SAFEGUARDS:

DHS/USCG safeguards records in this system according to applicable rules and policies, including all applicable DHS automated systems security and access policies. USCG has imposed strict controls to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

Records are retained in accordance with National Archives and Records Administration (NARA) schedule N1–026–05–15 approved July 7, 2005. Most of the records in this system are retained indefinitely by NARA; however law enforcement boarding activities are retained for three years. A copy of this

system has been transferred to the National Archives and Records Administration permanent records collection. Updates of system information are transferred to NARA every 5 years. All system hardware and data is stored at OSC, Kearneysville, WV. Backups are performed daily. Copies of backups are stored at an off-site location.

SYSTEM MANAGER AND ADDRESS:

Commandant (CG–633), United States Coast Guard, Mail Stop 7710, Washington, DC 20593; Commandant (BSX), United States Coast Guard, Mail Stop 7501, Washington, DC 20593; Director, United States Coast Guard, National Vessel Documentation Center, 792 T J Jackson Drive, Falling Waters, WV 25419; IDENT Program Management Office, U.S. Department of Homeland Security, Washington, DC 20528.

NOTIFICATION PROCEDURE:

The Secretary of Homeland Security has exempted this system from the notification, access, and amendment procedures of the Privacy Act because it is a law enforcement system. However, DHS/USCG will consider individual requests to determine whether or not information may be released. Thus, individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the Chief Privacy Officer and Commandant (CG–611), United States Coast Guard, whose contact information can be found at *http://www.dhs.gov/foia* under ''Contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her, the individual may submit the request to the Chief Privacy Officer and Chief Freedom of Information Act (FOIA) Officer, Department of Homeland Security, Washington, DC 20528–0655.

When seeking records about yourself from this system of records or any other Departmental system of records, your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address, and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Chief Privacy Officer and Chief Freedom of Information Act Officer, *http://www.dhs.gov/foia* or 1–866–431–0486. In addition, you should:

- Explain why you believe the Department would have information on you;
- Identify which component(s) of the Department you believe may have the information about you;
- Specify when you believe the records would have been created; and
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records;

If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without the above information, the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

Records are obtained from USCG boardings, USCG inspections, USCG investigations, USCG documentation offices, and vessel notice of arrival reports in the course of normal routine business. This information is gathered from the owners, operators, crew members, agents, passengers, witnesses, other government agencies, and USCG personnel. In addition records or record identifiers are ingested from other DHS and Federal systems, including IDENT, Vessel Identification System (VIS), Merchant Vessel Documentation System (MVDS), and the National Crime Information Center (NCIC).

EXEMPTIONS CLAIMED FOR THE SYSTEM:

The Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(j)(2), has exempted this system from the following provisions of the Privacy Act: 5 U.S.C. 552a(c)(3–4), (d), (e)(1–3), (e)(5), (e)(8), and (g). Additionally, the Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(k)(2) has exempted this system from the following provisions of the Privacy Act, 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

When this system receives a record from another system exempted in that source system under 5 U.S.C. 552a(j)(2), DHS will claim the same exemptions for those records that are claimed for the original primary systems of records from which they originated and claims any additional exemptions set forth here.

Dated: December 1, 2016.

Jonathan R. Cantor,

Acting Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2016–29341 Filed 12–7–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. 5914–N–03]

60 Day Notice of Proposed Information Collection: American Healthy Homes Survey II

AGENCY: Office of Lead Hazard Control and Healthy Homes, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement concerning an American Healthy Homes Survey II in homes across the country will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* February 6, 2017.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Ms. Ashley Mack, Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street SW., Room 8236, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Peter Ashley, (202) 402–7595 (this is not a toll-free number), or *Peter.J.Ashley@hud.gov,* for copies of the proposed information collection instruments and other available documents electronically or on paper.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995, (44 U.S.C. chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance

the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Title of Proposal: American Healthy Homes Survey II.

OMB Control Number: Pending.

Need for the Information and Proposed Use: Lead is a highly toxic heavy metal that adversely affects virtually every organ system in the body. Young children are particularly susceptible to its effects, with nervous system development and lower IQ the most serious. Lead poisoning remains one of the top childhood environmental health problems today. The most current national survey of young children's blood lead levels, the National Health and Nutrition Examination Survey (NHANES) conducted by the Centers for Disease Control and Prevention (CDC) (2007–2010), shows that about 535,000 young children have elevated blood lead levels (Note: The CDC changed to a lower ''reference value'' of 5 μg/dl to define an elevated blood lead level (EBLL) in 2012, increasing the number of children to be considered as having an EBLL, including for this analysis.) The most common source of lead exposure for children today is deteriorating lead paint in older housing and the contaminated dust and soil it generates. The National Survey of Lead and Allergens in Housing (NSLAH), conducted by HUD and the National Institute of Environmental Health Sciences in 1998–2000, estimated that 37.9 million homes had lead-based paint and 24.0 million homes had significant lead-based paint hazards; the American Healthy Homes Survey (AHHS I, 2005–6), conducted by HUD and the Environmental Protection Agency, found that 37.1 million homes had lead-based paint, and that 23.2 million homes had significant lead-based paint hazards.

With the more recent of these surveys being over a decade old, new information is needed to identify the extent of progress toward achieving the goal of the President's Task Force on Environmental Health Risks and Safety Risks to Children of eliminating lead paint hazards in housing where children under six live, and help target control strategies toward achieving the goal.

Asthma is a chronic respiratory disease characterized by episodes of airway inflammation and narrowing. It is generally accepted that asthma results from the interaction between genetic susceptibility and environmental exposures. Exposure to indoor allergy-producing substances (allergens) is believed to play an important role in the development and exacerbation of asthma. NSLAH (1998–2000) found that most U.S. homes had detectable levels of dust mite allergen associated with allergic sensitization and asthma. AHHS I (2005–2006) found allergens, pesticides and mold in homes nationwide. Dust mite, dog and cat allergen levels at and above the allergen concentration threshold level that can result in the development of allergic sensitivity or asthma symptoms in susceptible individuals were widespread in housing. Mouse and cockroach allergens were also found. This AHHS II will collect allergy-related samples only for pesticide and mold analyses.

Such airborne chemicals as carbon monoxide, airborne particulate matter, and formaldehyde, such chemicals on surfaces as pesticides, and such unintentional injury factors as housing conditions associated with falls, fires and poisons, are known to have adverse health or safety effects. National residential prevalence estimates for these factors are generally unavailable, limiting the ability of HUD and other agencies to develop data-driven control strategies.

Results from this survey will provide current information needed for regulatory and policy decisions and enable an assessment of progress in making the U.S. housing stock safe.

This information will be used to revise policy and guidance targeting the housing with the greatest needs for evaluation and control of lead and additional housing-related safety and health hazards.

Agency Form Number: None.

Members of Affected Public: Homeowners and rental housing tenants.

Total Burden Estimate (First Year):

Number of respondents: 600.

Frequency of response: 1.

Hours per response: 4.0.

Total Estimated Burden Hours: 2,400.

Status of the Proposed Information Collection: New request.

Dated: December 2, 2016.

Jon L. Gant,

Director, Office of Lead Hazard Control and Healthy Homes.

[FR Doc. 2016–29447 Filed 12–7–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management.

[LLES960000 L14400000.BJ0000]

Eastern States: Filing of Plat of Survey; Mississippi

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management (BLM) will file the plat of survey of the lands described below in the BLM-Eastern States office in Washington, District of Columbia, 30 calendar days from the date of publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management—Eastern States, 20 M Street SE., Washington, District of Columbia 20003, Attn: Dominica Van Koten. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The survey was requested by the Bureau of Indian Affairs.

The lands surveyed are:

Choctaw Meridian, Mississippi

T. 7 N., R. 10 E.

The dependent resurvey and subdivision of Section 8, 9, and 17 in Township 7 North, Range 10 East, of the Choctaw Meridian, in the State of Mississippi, and was accepted August 31, 2016.

Copies of the described plat will be placed in the open file. It will be available to the public as a matter of information.

If a protest is received against the survey, as shown on the plat, prior to the date of the official filing, the filing will be postponed pending our consideration of the protest.

The plat will not be officially filed until the day after the protest is accepted or dismissed and has become final, including decisions on appeals.

Dated: December 2, 2016.

Dominica Van Koten,

Chief Cadastral Surveyor.

[FR Doc. 2016–29405 Filed 12–7–16; 8:45 am]

BILLING CODE 4310–GJ–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–SER–CALO–22427; PPSESEROC3, PPMPSASIY.YP0000]

Final Environmental Impact Statement Off-Road Vehicle Management Plan for Cape Lookout National Seashore, North Carolina

AGENCY: National Park Service, Interior.

ACTION: Notice of Availability.

SUMMARY: The National Park Service (NPS) announces the availability of the Final Environmental Impact Statement (EIS) for the Off-Road Vehicle (ORV) Management Plan (Plan), Cape Lookout National Seashore (Seashore), North Carolina.

DATES: The NPS will execute the Record of Decision (ROD) no sooner than 30 days following publication by the Environmental Protection Agency of its Notice of Availability of the Final EIS in the **Federal Register**.

ADDRESSES: An electronic copy of the Plan/Final EIS will be available for public review at *http://parkplanning.nps.gov/calo.* A limited number of hard copies will be available at Park Headquarters, 131 Charles St., Harkers Island, North Carolina 28531.

FOR FURTHER INFORMATION CONTACT: Patrick Kenney, Superintendent, Cape Lookout National Seashore,131 Charles St., Harkers Island, North Carolina 28531; phone 252–728–2250 extension 3014.

SUPPLEMENTARY INFORMATION: Pursuant to the National Environmental Policy Act of 1969, 42 U.S.C 4332(2)(C), the Plan/Final EIS evaluates the impacts of four alternatives for designation of ORV routes and resource management, as well as one alternative that would prohibit ORV use, described as follows:

Alternative A

- the no action alternative
- continues current levels of ORV use with no numerical limit
- continues species management measures from the Seashore's Interim Species Management Plan/ Environmental Assessment (EA)

Alternative B

- designates specific ORV routes and areas similar to alternative A
- establishes vehicle permits with no numerical limit
- continues species management measures from the Seashore's Interim Species Management Plan/EA
- establishes seasonal night driving restrictions
- phases out high-performance sport model and two stroke all-terrain vehicles (ATVs) and utility vehicles (UTVs)
- creates an adaptive management strategy

Alternative C

- the NPS preferred alternative
- designates specific ORV routes and areas
- creates additional pedestrian-only areas
- establishes a vehicle permit program that would maintain ORV use at their highest current levels of 6200 vehicles per year
- phases out high-performance sport model and two stroke ATVs and UTVs
- continues species management measures from the Seashore's Interim Species Management Plan/EA
- establishes seasonal night driving restrictions on the beach with slightly expanded hours on the back route from 5am to 6am and 9pm to 10pm
- creates an adaptive management strategy

Alternative D

- designates specific ORV routes and areas
- creates additional pedestrian-only areas compared to alternative C
- establishes a vehicle permit program that would maintain ORV use at average current levels, based on 5500 vehicles per year, minus 8% to reflect additional closure areas
- phases out all ATVs while allowing non-sport UTVs with seasonal use restrictions
- continues species management measures from the Seashore's Interim Species Management Plan/EA while increasing some resource buffers
- establishes seasonal night driving restrictions
- creates an adaptive management strategy

Alternative E

- prohibits private, recreational ORV use
- continuation of species protection measures as appropriate

Executive Order 11644, issued in 1972 and amended by Executive Order 11989 in 1977, states that Federal agencies allowing ORV use must designate the specific areas and trails on public lands on which the use of ORVs may be permitted, and areas in which the use of ORVs may not be permitted. NPS policy requires that areas and trails that are designated for ORV use must be established based upon the protection of the resources of the public lands, promotion of the safety of all users of those lands, and minimization of conflicts among the various uses of those lands. 36 CFR 4.10 requires that ''Routes and areas designated for off-road motor vehicle use shall be promulgated as special regulations.'' In addition, such routes and areas may only be designated in national recreation areas, national seashores, national lakeshores and national preserves.

The Final EIS responds to, and incorporates, agency and public comments received on the Draft EIS, including comments on night driving restrictions, vehicle permit durations and numerical limits, pedestrian-only areas, species management and closures, infrastructure improvements to the back route, and consistency of closure dates. The Draft EIS was available for public review and comment for 60 days from May 23, 2014, through July 21, 2014, then extended another 60 days to September 19, 2014. During the comment period, 1,146 pieces of correspondence were received; 268 of these were form letters. In total, 2,423 comments were received. Alternative E is the environmentally preferable alternative and alternative C is the NPS preferred alternative.

Dated: November 30, 2016.

Ed Buskirk,

Associate Regional Director, Administration, Southeast Region.

[FR Doc. 2016–29426 Filed 12–7–16; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Arrowheads with Arcuate Blades and Components Thereof, DN 3185.* The Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing under § 210.8(b) of the Commission's Rules of Practice and Procedure (19 CFR 210.8(b)).

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. The

public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Flying Arrow Archery, LLC, Inc. on December 2, 2016. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain arrowheads with arcuate blades and components thereof. The complaint names as respondents Alice of China; Dongguan hong Song hardware alma iao of China; Huntingsky of China; mengbao of China; Jianfeng Mao of China; In-Sail Sandum Precision Industry (China) Co. Ltd. of China; Arthur Sifuentes of Spring, TX; Taotao (IT60) of China; Wanyuxue of China; Wei Ran of China; YanDong of China; and Zhou Yang of China. The complainant requests that the Commission issue a general exclusion order, cease and desist orders and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to § 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 3185'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures).[1] Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Dated: December 2, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–29396 Filed 12–7–16; 8:45 am]

BILLING CODE 7020–02–P

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *http://edis.usitc.gov.*

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1032]

Certain Single-Molecule Nucleic Acid Sequencing Systems and Reagents, Consumables, and Software for Use With Same; Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 2, 2016, under section 337 of the Tariff Act of 1930, as amended, on

behalf of Pacific Biosciences of California, Inc. of Menlo Park, California. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain single-molecule nucleic acid sequencing systems and reagents, consumables, and software for use with same by reason of infringement of certain claims of U.S. Patent No. 9,404,146 (''the '146 patent''). The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Room 112, Washington, DC 20436, telephone (202) 205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2016).

Scope of investigation: Having considered the complaint, the U.S. International Trade Commission, on December 2, 2016, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain single-molecule nucleic acid sequencing systems and reagents, consumables, and software for use with same by reason of infringement of one or more of claims 1, 5–7, 10, 14, 16–21, and 23–25 of the '146 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to Commission Rule 210.50(b)(1), 19 CFR 210.50(b)(1), the presiding administrative law judge shall take evidence or other information and hear arguments from the parties and other interested persons with respect to the public interest in this investigation, as appropriate, and provide the Commission with findings of fact and a recommended determination on this issue, which shall be limited to the statutory public interest factors set forth in 19 U.S.C. 1337(d)(1), (f)(1), (g)(1);

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is:

Pacific Biosciences of California, Inc., 1380 Willow Park Road, Menlo Park, CA 94025

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Oxford Nanopore Technologies Ltd., Edmund Cartwright House, 4 Robert Robinson Avenue, Oxford Science Park, Oxford, OX4 4GA, United Kingdom

Oxford Nanopore Technologies, Inc., 1 Kendall Square, Building 200, Cambridge, MA 02139

Metrichor, Ltd., Edmund Cartwright House, 4 Robert Robinson Avenue, Oxford Science Park, Oxford, OX4 4GA, United Kingdom

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW., Suite 401, Washington, DC 20436; and

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

Issued: December 2, 2016.

By order of the Commission.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–29403 Filed 12–7–16; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–1174–1175 (Review)]

Seamless Refined Copper Pipe and Tube From China and Mexico; Determination

On the basis of the record [1] developed in these subject five-year reviews, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that revocation of the antidumping duty orders on seamless refined copper pipe and tube from China and Mexico would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission, pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)), instituted these reviews on October 1, 2015 (80 FR 59186) and determined on January 4, 2016 that it would conduct full reviews (81 FR 1967, January 14, 2016). Notice of the scheduling of the Commission's reviews and of a public hearing to be held in connection

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on June 23, 2016 (81 FR 40922). The hearing was held in Washington, DC, on October 11, 2016, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission made these determinations pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determinations in these reviews on December 2, 2016. The views of the Commission are contained in USITC Publication 4650 (November 2016), entitled *Seamless Refined Copper Pipe and Tube from China and Mexico: Investigation Nos. 731–TA–1174–1175 (Review).*

Issued: December 5, 2016.

By order of the Commission.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–29414 Filed 12–7–16; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Resource Conservation and Recovery Act

On December 2, 2016, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the District of Wyoming in the lawsuit entitled *United States* v. *Jim's Water Service, Inc.,* Civil Action No. 16–cv–296–S.

The United States filed this action under the Resource Conservation and Recovery Act. The complaint seeks injunctive relief, mitigation, and a civil penalty for failure to comply with an Administrative Order (''AO) issued to the Defendant by the Environmental Protection Agency in 2008. The AO was aimed at redressing conditions endangering wildlife at the Defendant's commercial oilfield waste disposal facility known as the Werner Facility in Converse County, Wyoming. In return for a covenant not to sue, the Defendant is obligated under the Consent Decree to take measures to prevent future endangering conditions at the Werner Facility; to implement a mitigation project at Burlington Lake in Gillette, Wyoming consisting of construction of an artificial island to enhance nesting and bird habitat; and to pay a civil penalty of $90,000.

The publication of this notice opens a period for public comment on the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Jim's Water Service, Inc.,* D.J. Ref. No. 90–7–1–10446. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By e-mail	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Under section 7003(d) of RCRA, a commenter may request an opportunity for a public meeting in the affected area.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department Web site: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $10.25 (25 cents per page reproduction cost) payable to the United States Treasury.

Robert Brook,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2016–29397 Filed 12–7–16; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2009–0025]

Underwriters Laboratories, Inc.: Grant of Expansion of Recognition

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: In this notice, OSHA announces its final decision to expand the scope of recognition for Underwriters Laboratories, Inc., as a Nationally Recognized Testing Laboratory (NRTL).

DATES: The expansion of the scope of recognition becomes effective on December 8, 2016.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–3647, Washington, DC 20210; telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–3655, Washington, DC 20210; telephone: (202) 693–2110; email: *robinson.kevin@dol.gov.* OSHA's Web page includes information about the NRTL Program (see *http://www.osha.gov/dts/otpca/nrtl/index.html*).

SUPPLEMENTARY INFORMATION:

I. Notice of Final Decision

OSHA hereby gives notice of the expansion of the scope of recognition of Underwriters Laboratories, Inc. (UL), as an NRTL. UL's expansion covers the addition of twenty-five test standards to its scope of recognition.

OSHA recognition of an NRTL signifies that the organization meets the requirements specified by 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within its scope of recognition and is not a delegation or grant of government authority. As a result of recognition, employers may use products properly approved by the NRTL to meet OSHA standards that require testing and certification of the products.

The Agency processes applications by an NRTL for initial recognition, or for expansion or renewal of this recognition, following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the Agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides its preliminary finding and, in the second notice, the Agency provides its final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational Web page

for each NRTL that details its scope of recognition. These pages are available from the Agency's Web site at *http://www.osha.gov/dts/otpca/nrtl/index.html.*

UL submitted an application, dated June 30, 2015, (OSHA–2009–0025–0017) to expand its recognition to include twenty-five additional test standards. OSHA staff performed a detailed analysis of the application packet and reviewed other pertinent information. OSHA performed an on-site review in relation to this application on April 4–5, 2016.

OSHA published the preliminary notice announcing UL's expansion application in the **Federal Register** on September 14, 2016 (81 FR 63229). The Agency requested comments by September 29, 2016, but it received no comments in response to this notice. OSHA now is proceeding with this final notice to grant expansion of UL's scope of recognition.

To obtain or review copies of all public documents pertaining to the UL's application, go to *www.regulations.gov* or contact the Docket Office, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–2625, Washington, DC 20210. Docket No. OSHA–2009–0025 contains all materials in the record concerning UL's recognition.

II. Final Decision and Order

OSHA staff examined UL's expansion application, its capability to meet the requirements of the test standards, and other pertinent information. Based on its review of this evidence, OSHA finds that UL meets the requirements of 29 CFR 1910.7 for expansion of its recognition, subject to the conditions listed below. OSHA, therefore, is proceeding with this final notice to grant UL's scope of recognition. OSHA limits the expansion of UL's recognition to testing and certification of products for demonstration of conformance to the test standards listed in Table 1 below.

TABLE 1—LIST APPROPRIATE TEST STANDARDS FOR INCLUSION IN UL'S NRTL SCOPE OF RECOGNITION

Test standard	Test standard title
ISA 60079–0	Explosive Atmospheres—Part 0: Equipment—General Requirements.
ISA 60079–1	Explosive Atmospheres—Part 1: Equipment Protection by Flameproof Enclosures ''d''.
ISA 60079–2	Explosive Atmospheres—Part 2: Equipment Protection by Flameproof Enclosures ''p''.
ISA 60079–5	Explosive Atmospheres—Part 5: Equipment Protection by Powder Filling ''q''.
ISA 60079–6	Explosive Atmospheres—Part 6: Equipment Protection by Oil Immersion ''o''.
ISA 60079–7	Explosive Atmospheres—Part 7: Equipment Protection by Increased Safety ''e''.
ISA 60079–11	Explosive Atmospheres—Part 11: Equipment Protection by Intrinsic Safety ''i''.
ISA 60079–15	Explosive Atmospheres—Part 15: Equipment Protection by Type of Protection ''n''.
ISA 60079–18	Explosive Atmospheres—Part 18: Equipment Protection by Encapsulation ''m''.
ISA 60079–26	Explosive Atmospheres—Part 26: Equipment for Use in Class I, Zone 0 Hazardous (Classified) Locations.
ISA 60079–28	Explosive Atmospheres—Part 28: Protection of Equipment and Transmission Systems Using Optical Radiation, Edition 1.1.
ISA 60079–31	Explosive Atmospheres—Part 31: Equipment Dust Ignition Protection by Enclosure ''t''.
ISA 61241–0	Electrical Apparatus for Use in Zone 20, Zone 21 and Zone 22 Hazardous (Classified) Locations—General Requirements.
ISA 61241–1	Electrical Apparatus for Use in Zone 21 and Zone 22 Hazardous (Classified) Locations—Protection by Enclosures ''tD''.
ISA 61241–2	Electrical Apparatus for Use in Zone 21 and Zone 22 Hazardous (Classified) Locations—Protection by Pressurization ''pD''.
ISA 61241–11	Electrical Apparatus for Use in Zone 20, Zone 21 and Zone 22 Hazardous (Classified) Locations—Protection by Intrinsic Safety ''iD''.
ISA 61241–18	Electrical Apparatus for Use in Zone 20, Zone 21 and Zone 22 Hazardous (Classified) Locations—Protection by Encapsulation ''mD''.
ANSI/UL 60079–0	Explosive Atmospheres—Part 0: Equipment—General Requirements.
ANSI/UL 60079–1	Explosive Atmospheres—Part 1: Equipment Protection by Flameproof Enclosures ''d''.
ANSI/UL 60079–5	Explosive Atmospheres—Part 5: Equipment Protection by Powder Filling ''q''.
ANSI/UL 60079–6	Explosive Atmospheres—Part 6: Equipment Protection by Oil Immersion ''o''.
ANSI/UL 60079–7	Explosive Atmospheres—Part 7: Equipment Protection by Increased Safety ''o''.
ANSI/UL 60079–11	Explosive Atmospheres—Part 11: Equipment Protection by Intrinsic Safety ''i''.
ANSI/UL 60079–15	Explosive Atmospheres—Part 15: Equipment Protection by Type of Protection ''n''.
ANSI/UL 60079–18	Explosive Atmospheres—Part 18: Equipment Protection by Encapsulation ''m''.

OSHA's recognition of any NRTL for a particular test standard is limited to equipment or materials for which OSHA standards require third-party testing and certification before using them in the workplace. Consequently, if a test standard also covers any products for which OSHA does not require such testing and certification, an NRTL's scope of recognition does not include these products.

The American National Standards Institute (ANSI) may approve the test standards listed above as American National Standards. However, for convenience, we may use the designation of the standards-developing organization for the standard as opposed to the ANSI designation. Under the NRTL Program's policy (see OSHA Instruction CPL 1–0.3, Appendix C, paragraph XIV), any NRTL recognized for a particular test standard may use either the proprietary version of the test standard or the ANSI version of that standard. Contact ANSI to determine whether a test standard is currently ANSI-approved.

A. Conditions

In addition to those conditions already required by 29 CFR 1910.7, UL must abide by the following conditions of the recognition:

1. UL must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel, and of any major change in its operations as an NRTL, and provide details of the change(s);

2. UL must meet all the terms of its recognition and comply with all OSHA policies pertaining to this recognition; and

3. UL must continue to meet the requirements for recognition, including all previously published conditions on UL's scope of recognition, in all areas for which it has recognition.

Pursuant to the authority in 29 CFR 1910.7, OSHA hereby expands the scope of recognition of UL, subject to the limitation and conditions specified above.

III. Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue NW., Washington, DC 20210, authorized the preparation of this notice. Accordingly, the Agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 1–2012 (77 FR 3912, Jan. 25, 2012), and 29 CFR 1910.7.

Signed at Washington, DC, on December 2, 2016.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2016–29437 Filed 12–7–16; 8:45 am]

BILLING CODE 4510–26–P

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

Anti-Trafficking Risk Management Best Practices & Mitigation Considerations Guidance

AGENCY: Office of Federal Procurement Policy, Office of Management and Budget.

ACTION: Notice; request for comments.

SUMMARY: The Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget (OMB) is seeking comment on a draft memorandum that it has developed in coordination with the Office to Monitor and Combat Trafficking in Persons in the Department of State (DOS) and the Department of Labor (DOL), as Co-Chairs of the Procurement and Supply Chains Committee of the Senior Policy Operating Group of the President's Interagency Task Force to Monitor and Combat Trafficking in Persons (the ''SPOG Committee''), to address anti-trafficking risk management best practices and mitigation considerations. This guidance is designed to help an agency determine if a contractor is taking adequate steps to meet its anti-trafficking responsibilities under the Federal Acquisition Regulation (FAR).

DATES: Interested parties should submit comments in writing to the address below on or before January 9, 2017.

ADDRESSES: Comments may be submitted by any of the following methods:

Via email: OFPPData@omb.eop.gov

Facsimile: 202–395–5105

Instructions: Please submit comments only and cite ''Proposed Memo on Anti-Trafficking'' in all correspondence.

FOR FURTHER INFORMATION CONTACT: Porter Glock, Office of Federal Procurement Policy at 202–395–3145 or *pglock@omb.eop.gov.*

Availability: Copies of the draft memorandum may be obtained at the OMB home page at *https://www.whitehouse.gov/omb/procurement.*

SUPPLEMENTARY INFORMATION: Executive Order 13627, *Strengthening Protections Against Trafficking in Persons in Federal Contracts,* and Title XVII of the National Defense Authorization Act (NDAA) for FY 2013, *Ending Trafficking in Government Contracting,* established requirements for government contracts to prevent trafficking in persons. As a result, the Federal Acquisition Regulatory Council amended the FAR to implement these requirements.

The co-chairs of the SPOG Committee, OMB, DOS, and DOL (''Co-Chairs''), expect contractors to be proactive and forthcoming in their efforts to address and reduce the risk of human trafficking in their operations and supply chains. At the same time, OMB, State, and DOL recognize that not all contractors are similarly situated and some, such as those with large supply chains, may face more challenges than others in meeting their responsibilities. In addition, not all risks are equal in their impact. To this end, the Co-Chairs developed a set of best practices and mitigation considerations to help contracting officers determine if a contractor is taking adequate steps to meet its anti-trafficking responsibilities under the FAR. In addition, to promote clarity and consistency in the implementation of anti-trafficking requirements, the Co-Chairs also developed responses to a number of frequently asked questions posed by stakeholders following the publication of the final FAR rule.

The Co-Chairs encourage feedback on the draft guidance. Comments are especially welcome on identified best practices and mitigating steps as well as any additional information that may be relevant to helping a contracting officer determine if an existing Federal contractor who reports a trafficking incident has taken reasonable actions or if a prospective contractor is able to address trafficking challenges where the agency is planning an acquisition in an environment that is at high risk of trafficking.

This draft memorandum is another step in an ongoing effort to provide tools to the federal acquisition community—both contracting officers and contractors—to ensure the effective implementation of E.O. 13627 and the NDAA. These tools include (i) an interactive online platform, *www.ResponsibleSourcingTool.org,* which enables federal contractors and other entities to visualize human trafficking risks by location, industry sector, and commodity, (ii) online training for both contractors and government acquisition officers on the FAR changes to address the strengthened trafficking requirements for federal contracts, and (iii) additional rulemaking to help ensure contractors fully understand what is expected of them to be in compliance with the prohibition on charging employees and potential employees recruitment fees.

Lesley A. Field,

Acting Administrator.

[FR Doc. 2016–29434 Filed 12–7–16; 8:45 am]

BILLING CODE P

OFFICE OF MANAGEMENT AND BUDGET

Public Availability of Fiscal Year 2014 and Fiscal Year 2015 Agency Inventories Under the Federal Activities Inventory Reform Act

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Notice of public availability of agency inventories of activities that are not inherently governmental and of activities that are inherently governmental.

SUMMARY: The Federal Activities Inventory Reform (FAIR) Act, Public Law 105–270, requires agencies to develop inventories each year of activities performed by their employees that are not inherently governmental functions. The FAIR Act further requires OMB to review the inventories in consultation with the agencies. Once that review is complete, agencies are required to make the list available to the public and OMB must publish a notice of public availability in the **Federal Register**. In accordance with the FAIR Act, OMB is publishing this notice to announce the availability of inventories for Fiscal Year (FY) 2014 and FY 2015 from the agencies listed below. These inventories identify activities that are

not inherently governmental and those activities that are inherently governmental. If an agency has not yet posted its inventory on its Web site, the agency's point of contact should be able to assist.

As provided in the FAIR Act, interested parties who disagree with the agency's initial judgment may challenge the inclusion or the omission of an activity on the list of activities that are not inherently governmental within 30 working days of this Notice and, if not satisfied with this review, may appeal to a higher level within the agency.

Shaun Donovan,

Director.

ATTACHMENT: FAIR ACT RELEASE FY 2014 AND FY 2015

	Agency	Point of contact	Email	Telephone
Chief Financial Officer (CFO) Act Agencies				
1. Department of Commerce	Virna Winters	*vwinters@doc.gov*	202–482–3483	*www.commerce.gov.*
2. Department of Defense	Sara Streff	*Sara.I.Streff.civ@mail.mil*	571–372–6843	*www.acq.osd.mil.*
	Warren Champ	*Warren.Champ@DODIG.MIL.*	703–699–5418	*http://w.dodig.mil.*
3. Department of Education	AnMarie Lippert	*Anmarie.Lippert@ed.gov*	202–538–5816	*http://www.ed.gov.*
4. Department of Energy	Jeff Davis	*jeff.davis@hq.doe.gov*	202–287–1877	*http://energy.gov.*
5. Department of Health and Human Services.	William Kim	*William.Kim@hhs.gov*	202–205–1341	*http://www.hhs.gov/.*
6. Department of Homeland Security.	Kelly Lorick	*Kelly.Lorick@hq.dhs.gov*	202–447–0831	*www.dhs.gov.*
7. Department of Housing and Urban Development.	Richard Robinson	*richard.d.robinson@hud.gov.*	202–402–3896	*http://portal.hud.gov.*
8. Department of the Interior	Samantha Marx	*samantha_marx@ios.doi.gov.*	202–513–0699	*www.doi.gov.*
9. Department of Justice	Neil Ryder	*Neil.Ryder@usdoj.gov*	202–616–5499	*http://w.justice.gov/.*
10. Department of Labor	Tanisha Bynum-Frazier	*bynum.frazier.t@dol.gov*	202–693–4546	*www.dol.gov.*
11. Department of State	Barry Thomas	*thomasBD2@state.gov*	202–485–7190	*http://www.state.gov.*
12. Department of Transportation.	Diane Morrison	*diane.morrison@dot.gov*	202–366–4960	*www.dot.gov.*
13. Department of the Treasury	Jim Sullivan	*James.Sullivan@treasury.gov.*	202–622–9395	*http://www.treasury.gov/.*
14. Department of Veterans Affairs.	Julie Plush	*Julie.Plush@va.gov*	202–297–2166	*http://www.va.gov.*
15. Environmental Protection Agency.	Jennifer Cranford	*Cranford.Jennifer@epa.gov.*	202–564–0798	*www.epa.gov.*
16. General Services Administration.	James Summers	*James.summers@gsa.gov*	202–322–0453	*www.gsa.gov.*
17. National Aeronautics and Space Administration.	Jeff Cullen	*Jeffrey.m.cullen@nasa.gov*	202–358–1463	*http://www.nasa.gov/.*
18. National Science Foundation.	Kurtis Shank	*kshank@nsf.gov*	703–292–2261	*www.nsf.gov.*
19. Nuclear Regulatory Commission.	Joe Schmidt	*Joseph.Schmidt@nrc.gov*	301–287–0938	*www.nrc.gov.*
20. Office of Personnel Management.	Greg Blaszko	*Gregory.Blaszko@opm.gov*	215–861–3051	*http://www.opm.gov/.*
21. Small Business Administration.	Paul Marshall	*Paul.Marshall@sba.gov*	202–205–6240	*www.sba.gov.*
22. Social Security Administration.	Lauren Morton	*Lauren.C.Morton@ssa.gov*	410–966–6127	*www.socialsecurity.gov.*
23. United States Agency for International Development.	Nancy Sanders	*nsanders@usaid.gov*	202–712–4236	*www.usaid.gov.*
24. United States Department of Agriculture.	Joe Ware	*Joe.ware@dm.usda.gov*	202–690–5407	*http://www.usda.gov.*
Non-CFO Act Agencies				
1. Broadcasting Board of Governors.	Chris Luer	*cluer@bbg.gov*	202–203–4608	*www.bbg.gov.*
2. Commodity Futures Trading Commission.	Sonda Owens	*sowens@cftc.gov*	202–418–5182	*www.cftc.gov.*
3. Consumer Financial Protection Bureau.	Roland Jacob	*Roland.Jacob@cfpb.gov*	202–435–9625	*www.consumerfinance.gov.*
4. Consumer Product Safety Commission.	Barbara Denny	*bdenny@cpsc.gov*	301–504–7246	*http://www.cpsc.gov.*
5. Court Services and Offender Supervision Agency for the District of Columbia.	Paul Girardo	*Paul.Girardo@csosa.gov*	202–220–5718	*www.csosa.gov.*
6. Defense Nuclear Facilities Safety Board.	Mark Welch	*markw@dnfsb.gov*	202–694–7043	*http://www.dnfsb.gov.*
7. Equal Employment Opportunity Commission.	Arlethia Munroe	*Arlethia.monroe@eeoc.gov*	202–663–4340	*http://www.eeoc.gov.*
8. Farm Credit Administration	Veronica McCain	*McCainV@fca.gov*	703–883–4031	*www.fca.gov.*

ATTACHMENT: FAIR ACT RELEASE FY 2014 AND FY 2015—Continued

	Agency	Point of contact	Email	Telephone
9. Federal Communications Commission.	Tom Green	*Tom.Green@fcc.gov*	202–418–0116	*www.fcc.gov.*
10. Federal Election Commission.	Gilbert Ford	*gford@fec.gov*	202–694–1216	*www.fec.gov.*
11. Federal Energy Regulatory Commission.	Nicole Yates	*Nicole.Yates@ferc.gov*	202–502–6327	*www.ferc.gov.*
12. Federal Housing Financing Agency.	Bruce Crippin	*Bruce.crippin@fhfa.gov*	202–649–3070	*www.fhfa.gov.*
13. Federal Labor Relations Authority.	Sarah Whittle Spooner	*SSpoon@flra.gov*	202–218–7791	*http://www.flra.gov.*
14. Federal Maritime Commission.	Kathleen Keys	*kkeys@fmc.gov*	202–523–5788	*www.fmc.gov.*
15. Federal Mediation & Conciliation Service.	Paul Voight	*pvoight@fmcs.gov*	202–606–5464	*www.fmcs.gov.*
16. Federal Retirement Thrift Investment Board.	Sandra Byers	*Sandra.Byers@tsp.gov*	202–864–8664	*http://www.frtib.gov/.*
17. Federal Trade Commission	Michelle Thornton	*Mthornton@ftc.gov*	202–393–0301	*http://www.ftc.gov.*
18. Holocaust Memorial Museum.	Helen Shepherd	*hshepherd@ushmm.org*	202–488–0400 x396	*http://www.ushmm.org.*
19. International Trade Commission.	Debra Bridge	*Debra.Bridge@usitc.gov*	202–205–2004	*www.usitc.gov.*
20. Merit Systems Protection Board.	Kevin Nash	*Kevin.Nash@mspb.gov*	202–653–6772 x4407	*www.mspb.gov.*
21. National Archives and Records Administration.	Susan Ashtianie	*susan.ashtianie@nara.gov*	301–837–1490	*www.archives.gov.*
22. National Endowment for the Arts.	Ned Read	*readn@arts.gov*	202–682–5782	*www.arts.gov.*
23. National Endowment for the Humanities.	Robert Straughter	*rstraughter@neh.gov*	202–606–8237	*www.neh.gov.*
24. National Labor Relations Board.	Marsha Porter	*Marsha.Porter@nlrb.gov*	202–273–3726	*http://www.nlrb.gov.*
25. National Transportation Safety Board.	Lisa Kleiner	*Lisa.Kleiner@ntsb.gov*	202–314–6462	*www.ntsb.gov.*
26. Office of Management and Budget.	Amanda Kepko	*akepko@omb.eop.gov*	202–395–4844	*www.whitehouse.gov.*
27. Office of Special Counsel	Edward Snyder	*esnyder@osc.gov*	202–254–3648	*http://www.osc.gov/.*
28. Office of the United States Trade Representative.	Deborah Tidwell	*Deborah_Tidwell@ustr.eop.gov.*	202–395–9410	*https://ustr.gov/.*
29. Peace Corps	Amanda Miesionczek	*amiesionczek@peacecorps.gov.*	202–509–6533	*www.peacecorps.gov.*
30. Railroad Retirement Board	Keith Earley	*Keith.Earley@rrb.gov*	312–751–4990	*www.rrb.gov.*
31. Securities and Exchange Commission.	Victoria Stevenson	*stevensonv@sec.gov*	202–551–4178	*www.sec.gov.*
32. Selective Service System	Jennise Magruder	*Jennise.Magruder@sss.gov.*	703–605–4024	*www.sss.gov.*

[FR Doc. 2016–29433 Filed 12–7–16; 8:45 am]

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NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Information Security Oversight Office

[NARA–2017–010]

State, Local, Tribal, and Private Sector Policy Advisory Committee (SLTPS–PAC)

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of advisory committee meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act (5 U.S.C. app 2) and implementing regulation 41 CFR 101–6, NARA announces the following committee meeting.

DATES: The meeting will be held January 25, 2017, from 10:00 a.m. to 12:00 p.m. EDT.

ADDRESSES: National Archives and Records Administration, 700 Pennsylvania Avenue NW., Jefferson Room, Washington, DC 20408.

FOR FURTHER INFORMATION CONTACT: Robert J. Skwirot, Senior Program Analyst, by mail at Information Security Oversight Office (ISOO); National Archives and Records Administration; 700 Pennsylvania Avenue NW., Washington, DC 20408, by telephone at 202.357.5398, or by email at *robert.skwirot@nara.gov.* Contact ISOO at *ISOO@nara.gov.*

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to discuss matters relating to the Classified National Security Information Program for State, Local, Tribal, and Private Sector Entities. The meeting will be open to the public. However, due to space limitations and access procedures, you must submit the name and telephone number of individuals planning to attend to ISOO no later than Friday, January 18, 2017. ISOO will provide additional instructions for accessing the meeting's location.

Patrice Little Murray,

Committee Management Officer.

[FR Doc. 2016–29398 Filed 12–7–16; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2016–0246]

Withdrawal of Regulatory Guides 1.3, 1.4, and 1.5

AGENCY: Nuclear Regulatory Commission.

ACTION: Regulatory Guides 1.3, 1.4, and 1.5; withdrawal.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is withdrawing three regulatory guides (RGs): RG 1.3, Revision 2, ''Assumptions Used for Evaluating the Potential Radiological Consequences of a Loss of Coolant Accident for Boiling Water Reactors,'' dated June 1974; RG 1.4, Revision 2, ''Assumptions Used for Evaluating the Potential Radiological Consequences of a Loss of Coolant Accident for Pressurized Water Reactors,'' dated June 1974; and RG 1.5 (Safety Guide 5), ''Assumptions Used for Evaluating the Potential Radiological Consequences of a Steam Line Break Accident for Boiling Water Reactors,'' dated March 1971. These three RGs are being withdrawn because the guidance contained in them has been superseded and is now incorporated into RG 1.183, ''Alternative Radiological Source Terms for Evaluating Design Basis Accidents at Nuclear Power Reactors,'' and RG 1.195, ''Methods and Assumptions for Evaluating Radiological Consequences of Design Basis Accidents at Light-Water Nuclear Power Reactors.''

DATES: The effective date of the withdrawal of RGs 1.3, 1.4, and 1.5 is December 8, 2016.

ADDRESSES: Please refer to Docket ID NRC–2016–0246 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0246. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced. The withdrawal notices for RGs 1.3, 1.4, and 1.5 are available in ADAMS under Accession No. ML16210A319.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: John Parillo, Office of Nuclear Reactor Regulation, telephone: 301–415–1344; email *John.Parillo@nrc.gov;* or Mark Orr, Office of Nuclear Regulatory Research, telephone: 301–415–6003; email: *Mark.Orr@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION: Regulatory guides may be withdrawn by the NRC when their guidance no longer provides useful information, or is superseded by technological innovations, congressional actions, or other events. The withdrawal of an RG should be thought of as the final revision of the guide.

The NRC is withdrawing RG 1.3, Revision 2, ''Assumptions Used for Evaluating the Potential Radiological Consequences of a Loss of Coolant Accident for Boiling Water Reactors,'' dated June 1974 (ADAMS Accession No. ML16215A353); RG 1.4, Revision 2, ''Assumptions Used for Evaluating the Potential Radiological Consequences of a Loss of Coolant Accident for Pressurized Water Reactors,'' dated June 1974 (ADAMS Accession No. ML16215A351); and RG 1.5 (Safety Guide 5), ''Assumptions Used for Evaluating the Potential Radiological Consequences of a Steam Line Break Accident for Boiling Water Reactors,'' dated March 1971 (ADAMS Accession No. ML16215A352).

The NRC is withdrawing these three RGs because the guidance contained in them has been superseded by more current guidance which has been incorporated into RG 1.183, ''Alternative Radiological Source Terms for Evaluating Design Basis Accidents at Nuclear Power Reactors,'' (ADAMS Accession No. ML003716792), and RG 1.195, ''Methods and Assumptions for Evaluating Radiological Consequences of Design Basis Accidents at Light-Water Nuclear Power Reactors,'' (ADAMS Accession No. ML031490640). The information in RG 1.183 provides guidance for new and existing light-water reactor (LWR) plants that have adopted the alternative source term (AST), and RG 1.195 provides guidance for those LWR plants that have not adopted the AST.

The withdrawal of RGs 1.3, 1.4, and 1.5 does not alter any prior or existing NRC licensing approval or the acceptability of licensee commitments to these RGs. Although RGs 1.3, 1.4, and 1.5 are withdrawn, current licensees may continue to use them, and withdrawal does not affect any existing licenses or agreements. However, by withdrawing RGs 1.3, 1.4, and 1.5, the NRC no longer approves for use the guidance in these RGs in future requests or applications for NRC licensing actions.

Dated at Rockville, Maryland, this 2nd day of December, 2016.

For the Nuclear Regulatory Commission.

Thomas H. Boyce,

Chief, Regulatory Guidance and Generic Issues Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2016–29407 Filed 12–7–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2015–0203]

Instructions for Recording and Reporting Occupational Radiation Dose Data

AGENCY: Nuclear Regulatory Commission.

ACTION: Regulatory guide; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing Revision 3 to Regulatory Guide (RG) 8.7, ''Instructions for Recording and Reporting Occupational Radiation Dose Data.'' Regulatory Guide 8.7 describes methods that the staff of NRC considers acceptable for licensees to use for the preparation, retention, and reporting of records of occupational radiation doses. Revision 3 addresses changes to applicable NRC regulations and related staff practices since Revision 2 was issued in November 2005. Revision 3 includes changes in the process a licensee needs to follow in order to monitor occupational exposure, determine prior doses, record monitoring results, and report the results, when required. In addition, Revision 3 references revised versions of NRC Form 4, ''Cumulative Occupational

Dose History,'' and NRC Form 5, ''Occupational Dose Record for a Monitoring Period.'' The revised forms, which are already available, should be used by NRC licensees beginning in January 2017.

DATES: Revision 3 to RG 8.7 is available on December 8, 2016.

ADDRESSES: Please refer to Docket ID NRC–2015–0203 when contacting the NRC about the availability of information regarding this document. You may obtain publically-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2015–0203. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Document collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced. Revision 3 to RG 8.7 and the regulatory analysis may be found in ADAMS under Accession Nos. ML16054A170 and ML15169A219, respectively.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

FOR FURTHER INFORMATION CONTACT: Terry Brock, telephone: 301–415–1793; email: *Terry.Brock@nrc.gov* or Harriet Karagiannis, telephone: 301–415–2493; email: *Harriet.Karagiannis@nrc.gov.* Both are staff of the Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Discussion

The NRC is issuing a revision to an existing guide in the NRC's ''Regulatory Guide'' series. This series was developed to describe and make available to the public information regarding methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the NRC staff uses in evaluating specific issues or postulated events, and data that the NRC staff needs in its review of applications for permits and licenses.

Proposed Revision 3 of RG 8.7 was issued with a temporary identification of Draft Regulatory Guide DG–8030 and is available under ADAMS Accession No. ML15169A218. The NRC published DG–8030 for public comment on August 28, 2015 (80 FR 52345). The public comment period closed on October 27, 2015. The NRC received one set of comments from an industry association and those comments and the NRC staff's responses are available under ADAMS Accession No. ML16060A392. In a related action, the NRC requested public comments on its proposed revisions to Form 5, ''Occupational Dose Record for a Monitoring Period'' on June 19, 2012 (77 FR 36583). The public comment period closed on July 20, 2012. The NRC received four sets of comments from industry and those comments and the NRC staff's responses are available under ADAMS Accession No. ML16308A071.

Revision 3 of RG 8.7 addresses changes identified since Revision 2 was issued in November 2005. In particular, the regulations in 10 CFR 20.1201(c) concerning the measurement of external exposure by either deep-dose equivalent or effective dose equivalent (for external exposures) (EDEX), and the regulations in 10 CFR 20.1003 and 10 CFR 50.2 regarding the definition of the ''total effective dose equivalent'' (TEDE), were amended and became effective on January 3, 2008 (72 FR 68043; December 4, 2007). As a result of the revised definition of TEDE, the NRC staff developed the additional acronym EDEX and this term was included in the revised NRC Forms 4 and 5 that were updated in April 2015. Revision 3 of RG 8.7 references the revised versions of NRC Forms 4 and 5, as well as detailed instructions for completing these forms. The acronym EDEX and the term ''total organ dose equivalent'' are included in the revised forms to be consistent with current NRC practice.

II. Use of Revised NRC Forms 4 and 5

The new NRC Form 4, ''Cumulative Occupational Dose History (04–2015),'' or its electronic equivalent, is available for use by NRC licensees to record an individual's cumulative occupational dose history. NRC licensees may also continue to use the old NRC Form 4, ''Cumulative Occupational Dose History (10/2001),'' until December 31, 2016. All NRC licensees should use the new NRC Form 4 or its equivalent beginning January 1, 2017.

The new NRC Form 5, ''Occupational Dose Record for a Monitoring Period (04–2015),'' or its electronic equivalent, is available for use by NRC licensees to record the occupational dose for any monitoring period beginning on or after January 1, 2016. NRC licensees may also continue to use the old NRC Form 5, ''Occupational Dose Record for a Monitoring Period (10/2001),'' for any monitoring period beginning on or before December 31, 2016. All NRC licensees should use the new NRC Form 5 or its equivalent, for any monitoring period beginning on or after January 1, 2017. Both forms are available online through the NRC Library on the NRC's public Web site at *http://www.nrc.gov/reading-rm/doc-collections.*

III. Congressional Review Act

This RG is a rule as defined in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

IV. Backfitting

This RG addresses compliance with the NRC's requirements in 10 CFR part 20 to record and report an individual's cumulative occupational dose history and the occupational dose received by an individual for a specific monitoring period. The NRC regards these requirements as constituting information collection and reporting requirements. The NRC has long taken the position that information collection and reporting requirements are not subject to the NRC's backfitting and issue finality regulations in 10 CFR 50.109, 10 CFR 70.76, 10 CFR 72.62, 10 CFR 76.76, and 10 CFR part 52 (*e.g.,* ''Material Control and Accounting Methods,'' December 23, 2002 (67 FR 78130); and ''Regulatory Improvements to the Nuclear Materials Management and Safeguards System,'' June 9, 2008 (73 FR 32453)). Therefore, the NRC has determined that its backfitting and issue finality regulations do not apply to this RG because the RG does not include any provisions within the scope of matters covered by the backfitting provisions in 10 CFR parts 50, 70, or 72, or the issue finality provisions of 10 CFR part 52.

Dated at Rockville, Maryland, this 2nd day of December 2016.

For the Nuclear Regulatory Commission.

Thomas H. Boyce,

Chief, Regulatory Guidance and Generic Issues Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2016–29391 Filed 12–7–16; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2014–4; CP2015–53; MC2017–26 and CP2017–51; MC2017–27 and CP2017–52; MC2017–28 and CP2017–53; MC2017–29 and CP2017–54; MC2017–30 and CP2017–55; MC2017–31 and CP2017–56; MC2017–32 and CP2017–57; MC2017–33 and CP2017–58; MC2017–34 and CP2017–59]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing recent Postal Service filings for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 12, 2016 (Comment due date applies to Docket Nos. CP2014–4; Docket No. CP2015–53; Docket Nos. MC2017–26 and CP2017–51; Docket Nos. MC2017–27 and CP2017–52; Docket Nos. MC2017–28 and CP2017–53); December 13, 2016 (Comment due date applies to Docket Nos. MC2017–29 and CP2017–54; Docket Nos. MC2017–30 and CP2017–55; Docket Nos. MC2017–31 and CP2017–56; Docket Nos. MC2017–32 and CP2017–57); and December 14, 2016 (Comment due date applies to Docket Nos. MC2017–33 and CP2017–58; Docket Nos. MC2017–34 and CP2017–59).

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's Web site (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.40.

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2014–4; *Filing Title:* Notice of United States Postal Service of Change in Prices Pursuant to Amendment to Parcel Return Service Contract 5; *Filing Acceptance Date:* December 2, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Gregory Stanton; *Comments Due:* December 12, 2016.

2. *Docket No(s).:* CP2015–53; *Filing Title:* Notice of United States Postal Service of Change in Prices Pursuant to Amendment to Parcel Return Service Contract 6; *Filing Acceptance Date:* December 2, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Gregory Stanton; *Comments Due:* December 12, 2016.

3. *Docket No(s).:* MC2017–26 and CP2017–51; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 259 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 2, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Erin Mahagan; *Comments Due:* December 12, 2016.

4. *Docket No(s).:* MC2017–27 and CP2017–52; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 260 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 2, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Erin Mahagan; *Comments Due:* December 12, 2016.

5. *Docket No(s).:* MC2017–28 and CP2017–53; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 261 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 2, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Erin Mahagan; *Comments Due:* December 12, 2016.

6. *Docket No(s).:* MC2017–29 and CP2017–54; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 262 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 2, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Helen Fonda; *Comments Due:* December 13, 2016.

7. *Docket No(s).:* MC2017–30 and CP2017–55; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 263 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 2, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Helen Fonda; *Comments Due:* December 13, 2016.

8. *Docket No(s).:* MC2017–31 and CP2017–56; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 264 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 2, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Jennaca D. Upperman; *Comments Due:* December 13, 2016.

9. *Docket No(s).:* MC2017–32 and CP2017–57; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 265 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 2, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Jennaca D. Upperman; *Comments Due:* December 13, 2016.

10. *Docket No(s).:* MC2017–33 and CP2017–58; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Express, Priority Mail & First-Class Package Service Contract 14 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 2, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Lyudmila Y. Bzhilyanskaya; *Comments Due:* December 14, 2016.

11. *Docket No(s).:* MC2017–34 and CP2017–59; *Filing Title:* Request of the United States Postal Service to Add First-Class Package Service Contract 67 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 2, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Lyudmila Y. Bzhilyanskaya; *Comments Due:* December 14, 2016.

This notice will be published in the **Federal Register**.

Stacy L. Ruble,

Secretary.

[FR Doc. 2016–29425 Filed 12–7–16; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79457; File No. SR–BatsBZX–2016–79]

Self-Regulatory Organizations; Bats BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Make Non-Substantive Changes to the Equity Options Fee Schedule

December 2, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 29, 2016, Bats BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange filed a proposal to make certain non-substantive and clarifying changes to the fee schedule applicable to Members [5] and non-members of the Exchange pursuant to Exchange Rules 15.1(a) and (c).

The text of the proposed rule change is available at the Exchange's Web site at *www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify its fee schedule applicable to the Exchange's equity options platform (''BZX Options'') to make certain clarifying and non-substantive changes to its fee schedule in order to improve formatting, eliminate certain redundancies, increase overall readability, and provide users with straightforward descriptions to augment overall comprehensibility and usability of the existing fee schedule. The Exchange notes that these changes are purely clerical and do not substantively amend any fee or rebate, nor do they alter the manner in which the Exchange assesses fees or calculates rebates. The proposed changes are simply intended to provide greater transparency to market participants regarding how the Exchange assesses fees and calculates rebates. Specifically, the Exchange proposes to:

- Alphabetize defined terms under the ''Definitions'' section; [6]
- amend criteria for Tier 3 under footnote 5 to add a zero after 2.5% to ensure that it is represented to the hundredths decimal point, like all other percentages included in the fee schedule;
- ensure each tier requiring multiple criteria is conjoined using ''; and'' to clarify that all of a tier's criteria must be satisfied to receive the applicable rate;
- amend the title of the column setting forth each tier's rate to simply state ''Fee Per Contract to Remove'', ''Fee Per Contract to Add'' or ''Rebate Per Contract to Add'' as applicable. Renaming these column is intended to clearly indicate whether the footnote provides a fee and/or a rebate, and whether that enhanced pricing applies to orders which add or remove liquidity. In renaming these columns, the Exchange also proposes to remove certain other descriptive language as such language is redundant and set forth in the tier's title and list of its applicable fee codes;

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] A Member is defined as ''any registered broker or dealer that has been admitted to membership in the Exchange.'' *See* Exchange Rule 1.5(n).

[6] The Exchange does not proposes to alphabetize the definitions under the Market Data section of its fee schedule as those terms are generally grouped with similar terms.

• amend the name under first column of the tiers listed under footnotes 1, 3, 4, 5, 12, and 13 to simply state ''Tier 1'', Tier 2'' etc. as the deleted language is redundant with the respective tier's title or with the description of the tier's criteria;

• replace the phrase ''equal to or greater than'' and ''greater than or equal to'' with ''≥'' in all required criteria cells under footnotes 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13; and

• amend the NBBO Setter Tier under footnote 4 to specify at the top of the footnote that the additional rebates provided by the tier are only applicable to orders that establish a new National Best Bid or Offer (''NBBO'') and to delete such language from each tier's criteria.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.[7] Specifically, the Exchange believes that the proposed rule change is consistent with Sections 6(b)(4) of the Act,[8] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange believes that the proposed changes are reasonable and equitable because they are intended to simplify the Exchange's fee schedule and provide greater transparency to market participants regarding how the Exchange assesses fees and calculates rebates. The Exchange notes that these changes are purely clerical and do not substantively amend any fee or rebate, nor do they alter the manner in which the Exchange assesses fees or calculates rebates. The Exchange also believes that the proposal is non-discriminatory because it applies uniformly to all Members. Finally, the Exchange believes that the proposed changes will make the fee schedule clearer and eliminate potential investor confusion, thereby removing impediments to and perfecting the mechanism of a free and open market and a national market system, and, in general, protecting investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. To the contrary, the Exchange believes that the proposed rule change will not impose any burden on competition as the changes are purely clerical and do not amend any fee or rebate.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and paragraph (f) of Rule 19b–4 thereunder.[10] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov*. Please include File Number SR–BatsBZX–2016–79 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BatsBZX–2016–79. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BatsBZX–2016–79, and should be submitted on or before December 29, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–29387 Filed 12–7–16; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79458; File No. SR–NYSE–2016–69]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Chapter Nine of the NYSE Listed Company Manual

December 2, 2016.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 23, 2016, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Chapter Nine of the NYSE Listed Company Manual (the ''Manual'') to amend certain of its listing fee provisions. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Chapter Nine of the Manual to amend certain of its listing fee provisions. The amended fees will take effect in the 2017 calendar year. The following are the proposed fee increases:

- The fee per share charged in connection with the initial listing of a new class of equity securities will be increased from $0.0032 per share to $0.004 per share.
- The minimum initial listing fee in connection with a new class of equity securities will be increased from $125,000 to $150,000 and the maximum fee will be increased from $250,000 to $295,000.
- A number of categories of securities are currently billed an annual fee of $0.001025 per share. This rate will be increased to $0.00105 per share.[4]
- The minimum annual fee applicable to the primary class of common shares (including Equity Investment Tracking Stock) or the primary class of preferred stock (if no class of common shares is listed) will be increased from $52,500 to $59,500.
- The minimum annual fee applicable to structured products listed under Section 902.05 and short-term securities listed under Section 902.06 (except for warrants to purchase equity securities) will be increased from $15,000 to $20,000.
- The initial and annual listing fees for debt listed under Section 102.03 and 103.05 of NYSE equity issuers and affiliated companies will each be increased from $15,000 to $20,000.
- The initial and annual listing fees for debt listed under Section 102.03 and 103.05 of companies other than NYSE equity issuers and affiliated companies will each be increased from $15,000 to $40,000.[5]
- The initial and annual listing fees for securities (including short-term securities) that list under the debt standard in Section 703.19 and trade on NYSE Bonds will each be increased from $15,000 to $20,000.

As described below, the Exchange proposes to make the aforementioned fee increases to better reflect the Exchange's costs related to listing equity securities and the corresponding value of such listing to issuers.

The Exchange also proposes to remove a number of references throughout Chapter Nine to fees that are no longer applicable as they were superseded by new few [sic] rates specified in the rule text and to delete other obsolete rule text

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Sections 6(b)(4)[7] of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges and is not designed to permit unfair discrimination among its members and issuers and other persons using its facilities. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(5) of the Act, in particular in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange believes that it is reasonable to amend Chapter Nine of the Manual to increase the various listing fees as set forth above because the resulting fees would better reflect the Exchange's costs related to such listing and the resulting value that that such listings provide to the issuers. In that regard, the Exchange notes that it has incurred increased expenses as it continues to improve and increase the services it provides to listed companies. These improvements include the development and roll-out of a new interactive web-based platform designed to improve communication between the Exchange and listed companies and significant capital improvements to the Exchange's facility at 11 Wall Street to create state-of-the-art conference facilities to be used by listed companies. The Exchange believes that the proposed fee increases are equitably allocated because the per share fee increase will be the same for all issuers on the Exchange. Therefore, the proposed fee increases will not be unfairly discriminatory towards any individual issuer. The Exchange believes it is consistent with Section 6(b)(5) of the Act to apply different fees to bonds of companies that do not have their equity securities listed on the NYSE than to companies with NYSE-listed equity securities and their affiliates, as there is a greater regulatory and administrative burden associated with listing bonds of companies with which the Exchange does not otherwise have a regulatory or listing relationship.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is designed to ensure that the fees charged by the Exchange accurately reflect the services provided and benefits realized by listed companies. The market for listing services is extremely competitive. Each listing exchange has a different fee schedule that applies to issuers seeking

[4] The affected securities are as follows: Primary class of common shares (including Equity Investment Tracking Stock); each additional class of common shares (including tracking stock); primary class of preferred stock (if no class of common shares is listed); each additional class of preferred stock (whether primary class is common stock or preferred stock); each class of warrants; structured products listed under Section 902.05; and short-term securities.

[5] Domestic debt of issuers not subject to registration under the Act is exempt from all listing fees.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

to list securities on its exchange. Issuers have the option to list their securities on these alternative venues based on the fees charged and the value provided by each listing. Because issuers have a choice to list their securities on a different national securities exchange, the Exchange does not believe that the proposed fee changes impose a burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[8] of the Act and subparagraph (f)(2) of Rule 19b–4[9] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[10] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2016–69 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2016–69. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2016–69, and should be submitted on or before December 29, 2016

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–29389 Filed 12–7–16; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(2).

[10] 15 U.S.C. 78s(b)(2)(B).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79456; File No. SR–NASDAQ–2016–162]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Transaction Fees at Rule 7047

December 2, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on November 21, 2016, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's data fees at Rule 7047 to: (i) Reduce the enterprise license fee for Nasdaq Basic from $350,000 to $100,000 per month for broker-dealers distributing Nasdaq Basic to Non-Professional and Professional Subscribers with whom the broker-dealer has a brokerage relationship; and (ii) eliminate a requirement that broker-dealers purchase other products—specifically, Nasdaq Last Sale and Nasdaq TotalView/OpenView—to qualify for the license. The Exchange also proposes a number of conforming changes: (1) To clarify which Subscribers may receive the data; (2) to limit the use of the data by Professional Subscribers; and (3) to specify that each electronic system used to distribute data under the enterprise license must be separately approved. The proposal is described in further detail below.

These amendments are effective upon filing.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to: (i) Reduce the enterprise license fee for Nasdaq Basic from $350,000 to $100,000 per month for broker-dealers distributing Nasdaq Basic to Professional and Non-Professional Subscribers with whom the broker-dealer has a brokerage relationship; and (ii) eliminate the requirement that broker-dealers purchase other products—specifically, Nasdaq Last Sale and Nasdaq TotalView/OpenView—to qualify for the license. To clarify how to apply the proposed fee reduction, the Exchange is also proposing language specifying that Subscribers must be natural persons; limiting use of the data by Professional Subscribers to their brokerage relationships with the broker-dealer; and requiring that each electronic system used to distribute data from the enterprise license be separately approved by the Exchange.

Current Nasdaq Basic Enterprise License

Nasdaq Basic provides best bid and offer and last sale information from the Nasdaq Market Center and from the FINRA/Nasdaq Trade Reporting Facility (''FINRA/NASDAQ TRF''). Data is taken from three sources, which may be purchased individually or in combination: (i) Nasdaq Basic for Nasdaq, which contains the best bid and offer on the Nasdaq Market Center and last sale trade reports for Nasdaq and the FINRA/Nasdaq TRF for Nasdaq-listed stocks; (ii) Nasdaq Basic for NYSE, which contains the best bid and offer on the Nasdaq Market Center and last sale trade reports for Nasdaq and the FINRA/Nasdaq TRF for NYSE-listed stocks; and (iii) Nasdaq Basic for NYSE MKT, which contains the best bid and offer on the Nasdaq Market Center and last sale trade reports for Nasdaq and the FINRA/Nasdaq TRF for stocks listed on NYSE MKT and other listing venues whose quotes and trade reports are disseminated on Tape B.

Nasdaq Basic may be purchased through per-subscriber monthly charges, per-query fees, or, for broker-dealers, monthly enterprise licenses. These monthly enterprise licenses are available in two types: An internal license for Professional Subscribers, and a license for Non-Professional and Professional Subscribers with whom the broker-dealer has a brokerage relationship.

The second type of license, for Professional and Non-Professional Subscribers in a brokerage relationship with the broker-dealer, is currently available for $350,000 per month. To qualify for this license, the broker-dealer must also: (i) Distribute Nasdaq Last Sale for Nasdaq or Nasdaq Last Sale for NYSE/NYSE MKT via an internet-based electronic system approved by Nasdaq pursuant to Rule 7039(b)(2)(B), at a level that allows it to qualify for the fee cap provided for in Rule 7039(b); (ii) distribute Nasdaq TotalView or Nasdaq OpenView data under an enterprise license pursuant to Rule 7023(c)(1); and (iii) pay the Distributor Fee for Nasdaq Basic under paragraph [sic] (c)(1) or for Nasdaq Last Sale under Rule 7039(c). The electronic system used to distribute Nasdaq Basic must be approved by Nasdaq, and the broker-dealer must report the number of Subscribers at least once per calendar year.

Proposed Changes

The Exchange proposes: (i) Reducing the enterprise license fee for Nasdaq Basic from $350,000 to $100,000 per month for broker-dealers distributing Nasdaq Basic to Non-Professional and Professional Subscribers with whom the broker-dealer has a brokerage relationship; and (ii) eliminating the two requirements that the purchaser distribute Nasdaq Last Sale for Nasdaq or Nasdaq Last Sale for NYSE/NYSE MKT at a level that allows it to qualify for the fee cap provided for in Rule 7039(b), and distribute Nasdaq TotalView or Nasdaq OpenView data under an enterprise license pursuant to Rule 7023(c)(1). The proposed changes will promote the use of Nasdaq Basic by lowering its cost to investors and broadening the scope of its distribution to the investing public.

The Exchange also proposes three conforming changes to clarify how to apply the proposed fee reduction.

First, although the term ''Professional Subscribers'' is defined elsewhere in the rule to include legal entities that are not natural persons, the enterprise license set forth under Rule 7047(b)(5) may not be used to provide information to any business or other entity that is not a natural person. This is a clarification of current practice.

Second, Professional Subscribers may use the data obtained through this license only in the context of the brokerage relationship between the Professional Subscriber and the broker-dealer, and may not use such data within the scope of any professional engagement or registration identified in Rule 7047(d)(3)(A). Specifically, a Professional Subscriber may not use that data in his or her capacity as a person who is: (i) Registered or qualified in any capacity with the Commission, the Commodity Futures Trading Commission, any state securities agency, or any securities exchange or association; (ii) engaged as an 'investment adviser' as that term is defined in Section 201(11) of the Investment Advisers Act of 1940 (whether or not registered or qualified under that Act); or (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt.[3] Professional Subscribers who use Nasdaq Basic in the course of their professional duties will be charged for such usage as appropriate, based on the service(s) used. This clarifying language does not change current practice.

Third, if more than one electronic system is used to distribute information under this license, each such system must be separately approved by the Exchange. In addition, the approved electronic systems may be used to distribute information to any customer eligible to receive such information under this rule. Prior language limiting distribution to employees of the broker-dealer is deleted. Language is also added to clarify that the broker-dealer must pay for any Nasdaq Last Sale data distributed under Rule 7039(c), if the broker-dealer elects to distribute such data. None of these proposed modifications represent a change from current practice.

The enterprise license fee is entirely optional, in that it applies only to broker-dealers that opt to distribute Nasdaq Basic to Professional and Non-Professional Subscribers as described herein.[4] It does not impact or raise the cost of any other Nasdaq product, and in fact serves to decrease the cost of Nasdaq Basic in instances where a broker-dealer elects to purchase this license.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b)

[3] The phrase ''any commodities or futures contract market or association'' has been deleted from this summary of Rule 7047(d)(3)(A) as unduly repetitive. Only natural persons may be Subscribers under this rule. A ''commodities or futures contract market or association'' is not a natural person, and therefore is not eligible to receive information under this rule.

[4] Nasdaq notes, moreover, that no broker-dealer may provide, in a context in which a trading or order-routing decision can be implemented, a display of any information with respect to quotations for or transactions in an NMS stock without also providing, in an equivalent manner, a consolidated display for such stock. 17 CFR 242.603(c).

of the Act,[5] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[6] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [7]

Likewise, in *NetCoalition* v. *Securities and Exchange Commission* [8] (''NetCoalition'') the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.[9] As the court emphasized, the Commission ''intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost.'' [10]

Further, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . .'' [11]

The Exchange believes that the proposed fee reduction and the elimination of conditions to qualify for the Nasdaq Basic enterprise license under Rule 7047(b)(5) is reasonable. The proposed changes will benefit the investing public by lowering the cost and increasing the availability of information in the marketplace. Moreover, the fees for Nasdaq Basic, like all proprietary data fees, are constrained by the Exchange's need to compete for order flow, and are subject to competition from other products and among broker-dealers for customers.

The Exchange believes that the proposed fee reduction is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same fee to all similarly situated broker-dealers. Moreover, by allocating the fee reduction to broker-dealers that distribute the product widely among customers, the change will assist in promoting a wider distribution of information to the investing public.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

The proposed change will: (i) Reduce the enterprise license fee for Nasdaq Basic from $350,000 to $100,000 per month for broker-dealers distributing Nasdaq Basic to Non-Professional and Professional Subscribers with whom the broker-dealer has a brokerage relationship; and (ii) eliminate the requirement that broker-dealers purchase other products—specifically, Last Sale for Nasdaq or Last Sale for NYSE/NYSE MKT, and TotalView or OpenView—to qualify for the license. This will reduce the cost of Nasdaq Basic to investors, resulting in information becoming more widely available to the investing public.

As illustrated by the proposed fee reduction, market forces constrain fees for Nasdaq Basic. This occurs in three distinct respects. First, all fees related to Nasdaq Basic are constrained by competition among exchanges and other entities attracting order flow. Firms make decisions regarding Nasdaq Basic and other proprietary data based on the total cost of interacting with the Exchange, and order flow would be harmed by the supracompetitive pricing of any proprietary data product. Second, the price of Nasdaq Basic is constrained by the existence of multiple substitutes that are offered, or may be offered, by entities that offer proprietary or non-proprietary data. The proposed price reduction itself provides evidence of the need to maintain low prices in a competitive marketplace. Third, competition among broker-dealers for customers will further constrain the cost of a Nasdaq Basic enterprise license.

Competition for Order Flow

Fees related to Nasdaq Basic are constrained by competition among exchanges and other entities seeking to attract order flow. Order flow is the ''life blood'' of the exchanges. Broker-dealers currently have numerous alternative venues for their order flow, including thirteen self-regulatory organization (''SRO'') markets, as well as internalizing broker-dealers (''BDs'') and various forms of alternative trading systems (''ATSs''), including dark pools and electronic communication networks (''ECNs''). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated Trade Reporting Facilities (''TRFs'') compete to attract internalized transaction reports. The existence of fierce competition for order flow implies a high degree of price sensitivity on the part of BDs, which may readily reduce costs by directing orders toward the lowest-cost trading venues.

The level of competition and contestability in the market for order flow is demonstrated by the numerous examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TracECN, BATS Trading and BATS/Direct Edge. A proliferation of dark pools and other ATSs operate profitably with fragmentary shares of consolidated market volume. For a variety of reasons, competition from new entrants, especially for order execution, has

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4) and (5).

[7] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[8] *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010).

[9] *See NetCoalition,* at 534–535.

[10] *Id.* at 537.

[11] *Id.* at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

increased dramatically over the last decade.

Each SRO, TRF, ATS, and BD that competes for order flow is permitted to produce proprietary data products. Many currently do or have announced plans to do so, including NYSE, NYSE Amex, NYSE Arca, BATS, and IEX. This is because Regulation NMS deregulated the market for proprietary data. While BDs had previously published their proprietary data individually, Regulation NMS encourages market data vendors and BDs to produce proprietary products cooperatively in a manner never before possible. Order routers and market data vendors can facilitate production of proprietary data products for single or multiple BDs. The potential sources of proprietary products are virtually limitless.

The markets for order flow and proprietary data are inextricably linked: a trading platform cannot generate market information unless it receives trade orders. As a result, the competition for order flow constrains the prices that platforms can charge for proprietary data products. Firms make decisions on how much and what types of data to consume based on the total cost of interacting with Nasdaq and other exchanges. Data fees are but one factor in a total platform analysis. If the cost of the product exceeds its expected value, the broker-dealer will choose not to buy it. A supracompetitive increase in the fees charged for either transactions or proprietary data has the potential to impair revenues from both products. In this manner, the competition for order flow will constrain prices for proprietary data products, including charges relating to Nasdaq Basic.

Substitute Products

The price of data derived from Nasdaq Basic is constrained by the existence of multiple substitutes offered by numerous entities, including both proprietary data offered by other SROs or other entities, and non-proprietary data disseminated by Securities Information Processors (''SIPs'').

The information provided through Nasdaq Basic is a subset of the best bid and offer and last sale data provided by the SIPs. The ''core'' data disseminated by the SIP consists of best-price quotations and last sale information from all markets in U.S.-listed equities; Nasdaq Basic provides best bid and offer and last sale information for all U.S. exchange-listed stocks based on trade reports from the Nasdaq Market Center and the FINRA/Nasdaq Trade Reporting Facility. Many customers that purchase SIP data do not also purchase Nasdaq Basic because they are closely related products. In cases where customers buy both products, they may shift the extent to which they purchase one or the other based on price changes. The SIP constrains the price of Nasdaq Basic because no purchaser would pay an excessive price for Nasdaq Basic when similar data is also available from the SIP.

Proprietary data sold by other exchanges also constrain the price of Nasdaq Basic. NYSE and BATS, like Nasdaq, sell proprietary non-core data that include best bid and offer and last sale data. Customers do not typically purchase proprietary best bid and offer and last sale data from multiple exchanges. Other proprietary data products constrain the price of Nasdaq Basic because no customer would pay an excessive price for Nasdaq Basic when substitute data is available from other proprietary sources.

Competition Among Broker-Dealers for Customers

The enterprise license at issue is sold for use by the customers of a broker-dealer. There is no legal or regulatory requirement that such customers have direct access to data feeds containing best bid and offer or last sale information through Nasdaq Basic. If the price of the enterprise license were to be set above competitive levels, the broker-dealer purchasing that license would be at a competitive disadvantage relative to broker-dealers purchasing an alternative product as well as broker-dealers not purchasing any comparable product at all. As such, the broker-dealer at a competitive disadvantage would either purchase a substitute or forego the product altogether. The competition among broker-dealers for customers thereby provides yet another check on the price for Nasdaq Basic.

In summary, the proposed rule change lowers the cost of Nasdaq Basic and broadens its availability to the investing public. Market forces constrain the Nasdaq Basic enterprise license through competition for order flow, competition from substitute products, and in the competition among broker-dealers for customers. For these reasons, the Exchange has provided a substantial basis demonstrating that the fee is equitable, fair, reasonable, and not unreasonably discriminatory, and therefore consistent with and in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2016–162 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2016–162. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2016–162, and should be submitted on or before December 29, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–29386 Filed 12–7–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79455; File No. SR–FINRA–2016–033]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change To Amend Rule 12400 of the Code of Arbitration Procedure for Customer Disputes and Rule 13400 of the Code of Arbitration Procedure for Industry Disputes Relating To Broadening Chairperson Eligibility in Arbitration

December 2, 2016.

I. Introduction

On August 18, 2016, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Rules 12400 of the Code of Arbitration Procedure for Customer Disputes (''Customer Code'') and Rule 13400 of the Code of Arbitration Procedure for Industry Disputes (''Industry Code'' and, together with the Customer Code, ''Codes'').[3] The proposed rule change would allow an attorney arbitrator to qualify for the chairperson roster if he or she completes chairperson training and serves as an arbitrator through award on at least one arbitration. The Codes currently require that an attorney must serve as arbitrator through award on at least two arbitrations in order to qualify for the chairperson roster.

The proposed rule change was published for comment in the **Federal Register** on September 6, 2016.[4] The public comment period closed on September 27, 2016. The Commission received five (5) comment letters on the proposed amendments.[5] On October 14, 2016, FINRA extended the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to December 5, 2016.[6] On November 22, 2016, FINRA responded to the comment letters received in response to the Notice.[7] This order approves the proposed rule change.

II. Description of the Proposed Rule Change[8]

Background

FINRA arbitrators possess the broad authority to ''interpret and determine the applicability of all provisions under the Code[s]. Such interpretations are final and binding upon the parties.''[9] To facilitate the fair administration of proceedings in the FINRA forum, arbitrators must possess sufficient qualifications and participate in appropriate training[10]—particularly where an arbitrator presides over the proceeding as chairperson, with the authority to, among other things, direct witness appearances, order the production of documents and information, and set deadlines in a given case.[11]

FINRA maintains a roster of non-public arbitrators,[12] public arbitrators,[13] and arbitrators who are eligible to serve as chairperson in each of its 71 hearing locations.[14] FINRA employs its computerized Neutral List Selection System to randomly generate lists of potential arbitrators for each proceeding from these rosters.[15] The parties then select their arbitrators through a process of striking and ranking the names on the list generated by the Neutral List Selection System.[16]

The Codes provide that arbitrators are eligible for the chairperson roster if they have completed chairperson training provided by FINRA and:

- Have a law degree and are a member of a bar of at least one jurisdiction, and have served as an arbitrator through award on at least two arbitrations administered by a self-regulatory organization in which hearings were held; or
- Have served as an arbitrator through award on at least three arbitrations administered by a self-regulatory organization in which hearings were held.[17]

Additionally, in customer disputes, chairpersons must be public arbitrators.[18]

In February 2015, the Commission approved a proposal by FINRA to amend its definition of ''public arbitrator,''[19] The amended definition

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* File No. SR–FINRA–2016–033.

[4] *See* Exchange Act Release No. 78729 (Aug. 30, 2016); 81 FR 61288 (Sept. 6, 2016) (''Notice'').

[5] *See* Letters from Steven B. Caruso, Esq., Maddox Hargett Caruso, P.C. (Aug. 31, 2016) (''Caruso Letter''); Ryan K. Bakhtiari, Aidikoff, Uhl and Bakhtiari (Sept. 9, 2016) (''Bakhtiari Letter''); Hugh Berkson, President, Public Investors Arbitration Bar Association (''PIABA'') (Sept. 23, 2016) (''PIABA Letter''); Nicole Iannarone, Asst. Clinical Professor, and Geoffrey R. Hafer, Student Intern, Investor Advocacy Clinic, Georgia State University College of Law (''GSU'') (Sept. 26, 2016) (''GSU Letter''); and David T. Bellaire, Esq., Executive Vice President and General Counsel, Financial Services Institute (''FSI'') (Sept. 27, 2016) (''FSI Letter''). The comment letters are available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA, at the Commission's Web site at *https://www.sec.gov/comments/sr-finra-2016-033/finra2016033.shtml,* and at the Commission's Public Reference Room.

[6] *See* Letter from Margo A. Hassan, Associate Chief Counsel, FINRA, to Lourdes Gonzalez, Assistant Chief Counsel—Sales Practices, Division of Trading and Markets, Securities and Exchange Commission, dated October 14, 2016.

[7] *See* Letter from Margo A. Hassan, Associate Chief Counsel, FINRA, to Brent J. Fields, Secretary, Securities and Exchange the Commission, dated November 22, 2016 (''FINRA Letter''). The FINRA Letter is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA, at the Commission's Web site at *https://www.sec.gov/comments/sr-finra-2016-033/finra2016033.shtml,* and at the Commission's Public Reference Room.

[8] The subsequent description of the proposed rule change is substantially excerpted from FINRA's description in the Notice. *See* Notice, 81 FR at 61288–61289.

[9] *See* FINRA Rules 12409 (Jurisdiction of Panel and Authority to Interpret the Code) and 13413 (Jurisdiction of Panel and Authority to Interpret the Code).

[10] *See* Notice, 81 FR 61289.

[11] *See* FINRA Office of Dispute Resolution Arbitrator's Guide (Oct. 2016), at page 31, available at *http://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf.*

[12] For the definition of ''non-public arbitrator,'' *see* FINRA Rules 12100(p) and 13100(p).

[13] For the definition of ''public arbitrator,'' *see* FINRA Rules 12100(u) and 13100(u).

[14] *See* FINRA Rules 12400(b) and 13400(b).

[15] *See* FINRA Rules 12400(a) and 13400(a).

[16] *Id.*

[17] *See* FINRA Rules 12400(c) and 13400(c).

[18] *See* FINRA Rule 12400(c).

[19] *See* Exchange Act Release No. 74383 (Feb. 26, 2015), 80 FR 11695 (Mar. 4, 2015) (Order Approving

took effect in June 2015,[20] resulting in the reclassification of approximately 13.8 percent of public arbitrators as non-public arbitrators, and the rendering of 2.6 percent of its public arbitrator roster as temporarily disqualified or ineligible for service.[21] Many of the arbitrators who were reclassified or disqualified had been chair-qualified prior to the amendment.[22] Currently, FINRA's rosters contain approximately 6,750 arbitrators, of which 3,060 are currently classified as public. Of those classified as public arbitrators, approximately 1,000 are deemed chair-qualified.[23]

FINRA contends that forum users have complained about the diminished availability of public chairpersons after the amendment to the public arbitrator definition. FINRA also states that forum users have complained of scheduling difficulties and additional costs associated with traveling chairpersons (*i.e.,* public chairpersons that FINRA asks to travel to other hearing locations to expand the roster of available public chairpersons for a given location), as well as out-of-town arbitrators' lack of familiarity with local venue customs and procedures.[24] Moreover, FINRA states that it has had limited success in enrolling new public chairpersons, and that the need for public chairpersons could potentially surpass the availability of public chairpersons who meet the qualifications under the existing Codes.[25]

Proposed Rule Change

FINRA is proposing to amend the eligibility requirements under the Codes for arbitrators who seek to qualify as chairpersons. The amendment would allow an attorney arbitrator to qualify for the chairperson roster if he or she completes chairperson training and serves as an arbitrator through award on at least one arbitration administered by a self-regulatory organization where hearings are held, instead of two arbitrations (as is currently required). FINRA is also proposing to replace the bullets in Rules 12400 and 13400 with numbers for ease of citation.

FINRA states that reducing the case experience requirement for would-be arbitrators from two arbitrations to one arbitration could add more than 270 attorney arbitrators across 59 of its 71 hearing locations, potentially resulting in a nearly 30 percent increase in the number of arbitrators who might be eligible to serve as public chairpersons once they take chairperson training.[26] FINRA also believes that the proposed rule change would increase the availability of local chairpersons for forum users, lowering instances in which chairpersons must travel, and ameliorating parties' concerns regarding out-of-town arbitrators.[27]

III. Summary of Comments and FINRA's Response

The Commission received five (5) comment letters on the proposed rule change,[28] and a response letter from FINRA.[29] Three commenters supported the amendment,[30] and two generally supported the amendment while advocating for further action.[31] FINRA's response to commenters' concerns and suggestions are incorporated below.

Comment Letters in Support of the Proposal

As noted above, three commenters supported FINRA's proposed amendments to the Codes. One commenter stated that the proposal would ''be a fair, equitable and reasonable approach that would facilitate the increased appointment of local chairpersons to arbitration panels and, at the same time, would reduce the necessity for the appointment of out-of-state chairpersons.'' [32] A second commenter supported the proposed amendment on the ground that it ''would significantly increase the available number of arbitrators included on the Chair roster and represents an important step towards increasing the probability of drawing local chairpersons in suburban or remote hearing locations.'' [33] A third commenter supported the proposal based on its belief that the requirement of a law degree and participation in one arbitration through award are reasonable criteria for a public chair.[34]

Supportive Comment Letters Recommending Modifications to the Proposal

Two comment letters recommended modifications to the proposal, while generally expressing support for the proposal. One commenter stated that investors would ''benefit from a larger pool of qualified public chairpersons'' and generally supported the proposed rule as ''a positive step in regards to increasing the number of arbitrators in proposed chair pools[.]'' [35] Another commenter stated that it ''applaud[s] FINRA's decision to expand the public arbitrator chair pool[.]'' [36] However, both commenters raised additional concerns and suggestions for the proposed amendment.

• *Enhancing Transparency of the Arbitrator Selection Process*

One commenter advocated for greater transparency regarding arbitrators' backgrounds and qualifications, as well as greater transparency in the arbitrator selection process generally in order to improve investor confidence in FINRA arbitrators.[37] According to this commenter, FINRA's current disclosure system, which provides information regarding arbitrators' education, employment history and potential conflicts, is insufficient to eliminate the appearance of impropriety and bias.[38]

In response, FINRA stated that it produces a disclosure report reflecting the prior employment, educational history, and previous arbitration awards for every potential arbitrator during the appointment process.[39] FINRA also requires arbitrators to either certify the accuracy of the information in the disclosure report or update the report when they are appointed to a case.[40] In addition, FINRA reminds arbitrators on a quarterly basis to review their disclosure reports and revise them as needed. Moreover, FINRA stated that it is revising its disclosure reporting system to alert parties of the last time the arbitrator certified the accuracy of the information contained therein.[41]

• *Use of Out-of-Town Arbitrators and Recruitment Initiatives*

One commenter stated that the overall reduction in the number of eligible chairpersons has reduced the pool of local chairpersons, and caused FINRA to ask non-local chairpersons to travel to

Filing No. SR–FINRA–2014–028) (in part narrowing the public arbitrator definition by adding disqualifications relating to, among other things, affiliations with the securities industry concerning an arbitrator's family member or place of employment).

[20] *See* Notice, 81 FR 61288.

[21] *See id.*

[22] *See id.*

[23] *See id.*

[24] *See id.*

[25] *See id.*

[26] *See id.* at 61289.

[27] *See id.*

[28] *See supra* note 5.

[29] *See supra* note 7.

[30] *See* Caruso Letter, Bakhtiari Letter, and FSI Letter.

[31] *See* PIABA Letter and GSU Letter.

[32] *See* Caruso Letter.

[33] *See* Bakhtiari Letter.

[34] *See* FSI Letter.

[35] *See* PIABA Letter.

[36] *See* GSU Letter.

[37] *See* PIABA Letter.

[38] *Id.*

[39] *See* FINRA Letter.

[40] *Id.*

[41] *Id.*

multiple hearing locations.[42] This commenter believes that the use of non-local arbitrators has resulted in inconvenience, delay, and additional costs to parties, and has led to a decrease in customer awards because of non-local arbitrators' purported bias in favor of the industry.[43] For these reasons, the commenter suggested that, to the extent possible, FINRA should eliminate the use of non-local arbitrators and increase the size of regional pools—especially where out-of-state arbitrators regularly appear on public and chair-qualified ranking lists.[44]

In its response, FINRA stated that it uses arbitrators in neighboring hearing locations ''to ensure an effective ratio of available arbitrators to open cases in each location[.]'' [45] For example, ''as an interim measure, FINRA took steps to bolster the pool of arbitrators in smaller hearing locations that were impacted by the amended public arbitrator definition by asking chairs from larger hearing locations . . . if they would be willing to serve[.]'' [46] FINRA also stated, however, that it agrees that it should increase the size of its public arbitrator pool, and stated that it has been ''actively recruiting new arbitrators, paying particular attention to locations with the greatest need.'' [47]

• *Additional Chairperson Training and Mentorship*

One commenter expressed the concern that the proposed rule change might sacrifice chairperson quality at the expense of chairperson quantity, as ''quality pools are paramount to a fair and equitable arbitration proceeding, as well as the public investors' confidence in the overall arbitration process.'' [48] The commenter therefore recommended, in part, that FINRA adopt a ''Chairperson Mentor program'' to increase the quality of chair-qualified arbitrators.[49]

Another commenter similarly asserted that, by expanding chairperson eligibility, the proposed rule change would reduce arbitrators' exposure to live proceedings prior to serving as a chair.[50] To address this reduction in experience, the commenter proposed that FINRA ''include in the Office of Dispute Resolution Chairperson Training a module or section that specifically addresses the procedural and substantive issues that regularly arise in live arbitration proceedings.'' [51] Alternatively, the commenter proposed that FINRA require arbitrators to observe a live or mock proceeding before becoming eligible to serve as a public chair.[52]

In response, FINRA stated that, earlier this year, it implemented a chairperson mentorship program to facilitate interaction between new chairpersons and experienced chairpersons.[53] In addition, in November 2016, FINRA provided arbitrators access to online workshops that address issues chairpersons regularly encounter.[54] Moreover, FINRA stated that it regularly invites qualified arbitrators to complete chairperson training.[55]

• *Simplifying the Arbitrator Application Process*

One commenter expressed concern that the arbitrator application process is ''burdensome and intimidating and surely drives away many potential arbitrators which further weakens the number and quality of arbitrators available in the FINRA system.'' [56] Accordingly, PIABA suggested that FINRA simplify the arbitrator application process.[57]

FINRA responded that, in 2017, it plans to replace the ''time-consuming'' ''Securities Disputes Experience'' section of the arbitrator application with a section that allows applicants to explain their securities disputes expertise and skills in narrative form.[58] FINRA believes that this change will simplify the arbitrator application process.[59]

• *Revisiting the ''Public Arbitrator'' Definition*

One commenter cited the 2015 amendments to the definition of ''Public Arbitrator'' as a significant contributor to the reduction in the chairperson roster overall and disproportionately for claimants with smaller claims.[60] For instance, GSU stated that there are only 40 chair-qualified arbitrators in its primary hearing location, Atlanta.[61] The commenter thus recommended that FINRA revisit the 2015 amendments to the public arbitrator definition as a means for increasing the chairperson roster.

In response, FINRA stated that it had revisited the 2015 amendments to the arbitrator definitions and determined not to change the public arbitrator definition, as FINRA deemed it important for public arbitrators to have no significant affiliation with the financial industry.[62] However, FINRA noted that a gap exists between the public and non-public arbitrator definitions, which excludes otherwise qualified individuals from service as arbitrators—often because of family or co-workers' affiliations.[63] According to FINRA, in September 2016, its Board of Governors authorized FINRA to file with the Commission proposed amendments to Rules 12100 and 13100 of the Codes to revise the non-public arbitrator definition.[64] These amendments would define a non-public arbitrator as a person who is otherwise qualified to serve as an arbitrator, and is disqualified from classification as a public arbitrator.[65] By closing this gap, FINRA asserted that it could expand its roster of available arbitrators.[66]

IV. Discussion and Commission Findings

The Commission has carefully considered the proposal, the comments received, and FINRA's response to the comments. Based on its review of the record, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities association.[67] In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act,[68] which requires, among other things, that FINRA's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

As discussed above, the proposal would amend Rules 12400 and 13400 of the Codes to allow an attorney arbitrator to qualify for the chairperson roster if he or she completes chairperson training and serves as an arbitrator through award on at least one arbitration administered by a self-regulatory

[42] *See* PIABA Letter.
[43] *See id.*
[44] *See id.*
[45] *See* FINRA Letter.
[46] *Id.*
[47] *Id.*
[48] *See* PIABA Letter.
[49] *Id.*
[50] *See* GSU Letter.
[51] *Id.*
[52] *Id.*
[53] *See* FINRA Letter.
[54] *Id.*
[55] *Id.*
[56] *See* PIABA Letter.
[57] *Id.*
[58] *See* FINRA Letter.
[59] *Id.*
[60] *See* GSU Letter.
[61] *Id.*
[62] *See* FINRA Letter.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] In approving the proposed rule change, the Commission has also considered its impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).
[68] 15 U.S.C. 78o–3(b)(6).

organization where hearings are held, instead of two arbitrations (as is currently required). It would also replace the bullets in Rules 12400 and 13400 with numbers for ease of citation.

The Commission has considered the five (5) comment letters received on the proposed rule change,[69] along with FINRA's response to the comments.[70] The Commission acknowledges the supportive commenters' positions that the proposal would ''be a fair, equitable and reasonable approach that would facilitate the increased appointment of local chairpersons to arbitration panels,'' [71] that it ''would significantly increase the available number of arbitrators included on the Chair roster and represents an important step towards increasing the probability of drawing local chairpersons in suburban or remote hearing locations,'' [72] and that the requirement of a law degree and participation in one arbitration through award are reasonable criteria for a public chair.[73] However, the Commission also acknowledges commenters' concerns and recommended modifications to the proposal.[74] These concerns and modifications are discussed below.

• *Enhancing Transparency of the Arbitrator Selection Process*

The Commission acknowledges the commenter's concern that FINRA's current disclosure system does not always eliminate the appearance of impropriety and bias in the FINRA arbitration forum, and agrees that transparency in the arbitrator selection process improves investor confidence in FINRA arbitrators.[75] However, the Commission believes that FINRA's disclosure reporting system provides parties with a basis on which to identify potential arbitrator conflicts and biases. Moreover, the Commission believes that by reminding arbitrators to update their disclosure reports, and notifying parties of the last date an arbitrator certified the accuracy of the disclosure report, FINRA will further help ensure that parties have up-to-date information on which to base their arbitrator selections.

• *Use of Out-of-Town Arbitrators and Recruitment Initiatives*

The Commission acknowledges the commenter's concerns regarding the inconvenience, delay, and additional costs caused by the use of non-local arbitrators.[76] However, given the reported insufficient levels of local chairpersons in certain hearing locations,[77] the Commission does not believe it is feasible or practical to eliminate the use of non-local arbitrators, as the commenter suggested.[78] Instead, the Commission acknowledges the necessity of FINRA's policy of asking public chairs from larger, geographically proximate hearing locations to serve as chairpersons in regions with insufficient levels of local qualified chairpersons. The Commission additionally supports FINRA's increased arbitrator recruitment efforts, and anticipates that such efforts will eventually result in a broader, more diverse pool of arbitrator candidates.

• *Additional Chairperson Training and Mentorship*

With regard to commenters' concerns that the proposed amendment might decrease the quality and experience of arbitrator chairpersons at the expense of increasing the quantity of chairpersons, the Commission acknowledges their recommendation that a mentor program or additional trainings should be provided to chairpersons.[79] The Commission generally believes that FINRA's implementation of a chairperson mentorship program, as well as its increased provision of and focus on arbitrator trainings should effectively address the commenters' concerns.

• *Simplifying the Arbitrator Application Process*

The Commission acknowledges the concern expressed regarding FINRA's purportedly burdensome and intimidating arbitrator application process, and the potential deterrent effect the process might have on would-be arbitrator applicants.[80] However, the Commission believes that a rigorous application process is necessary to verify the qualifications of arbitrator candidates. Furthermore, the Commission expects that FINRA's use of a narrative application section where applicants can explain their securities disputes expertise and skills will simplify the arbitrator application process without degrading the value of the elicited information, thereby addressing the commenter's concern.

• *Revisiting the ''Public Arbitrator'' Definition*

The Commission acknowledges the commenter's suggestion that FINRA reconsider the 2015 amendments to the public arbitrator definition in an effort to combat the resulting reduction in the chairperson roster.[81] However, at the time the Commission approved the 2015 amendments to the public arbitrator definition, the Commission determined that the approach proposed by FINRA was appropriate and designed to protect investors and the public interest, consistent with Section 15A(b)(6) of the Exchange Act and the rules and regulations thereunder.[82] Accordingly, the Commission also gives due regard to FINRA's decision not to amend the definition of public arbitrator at this time.[83] Nevertheless, the Commission will give appropriate consideration to any proposed amendments to FINRA Rules 12100 and 13100 to revise the non-public arbitrator definition to eliminate any gaps in the Codes' arbitrator classifications that could expand its roster of available arbitrators.

Taking into consideration the comments and FINRA's responses, the Commission finds that the proposal is consistent with the Exchange Act. Specifically, the Commission believes that the proposal will help protect investors and the public interest by, among other things, broadening the roster of available arbitrator chairpersons, while preserving the quality of arbitrators who would serve as chairpersons. Furthermore, the Commission believes that FINRA's responses, as discussed in more detail above, appropriately addressed commenters' concerns and adequately explained FINRA's reasons for declining to modify its proposal. Accordingly, the Commission believes that the approach proposed by FINRA is appropriate and designed to protect investors and the public interest, consistent with Section 15A(b)(6) of the Exchange Act and the rules and regulations thereunder.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[84] that the proposed rule change (SR–FINRA–2016–033) be, and hereby is, approved.

[69] *See supra* note 5.
[70] *See supra* note 7.
[71] *See* Caruso Letter.
[72] *See* Bakhtiari Letter.
[73] *See* FSI Letter.
[74] *See* PIABA Letter and GSU Letter.
[75] *See* PIABA Letter.
[76] *Id.*
[77] *See* FINRA Letter.
[78] *See* PIABA Letter.
[79] *See* PIABA Letter and GSU Letter.
[80] *See* PIABA Letter.
[81] *See* GSU Letter.
[82] *See* 80 FR 11695 at 11704–11705.
[83] *See* FINRA Letter.
[84] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[85]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–29385 Filed 12–7–16; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #14997 and #14998]

Minnesota Disaster #MN–00059

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of Minnesota (FEMA–4290–DR), dated 11/29/2016.

Incident: Severe Storms and Flooding.

Incident Period: 09/21/2016 through 09/24/2016.

Effective Date: 11/29/2016.

Physical Loan Application Deadline Date: 01/30/2017.

Economic Injury (EIDL) Loan Application Deadline Date: 08/29/2017.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 11/29/2016, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans): Blue Earth, Freeborn, Hennepin, Le Sueur, Rice, Steele, Waseca.

Contiguous Counties (Economic Injury Loans Only):

Minnesota: Anoka, Brown, Carver, Dakota, Dodge, Faribault, Goodhue, Martin, Mower, Nicollet, Ramsey, Scott, Sherburne, Sibley, Watonwan, Wright.

Iowa: Winnebago, Worth.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	3.125
Homeowners Without Credit Available Elsewhere	1.563
Businesses With Credit Available Elsewhere	6.250
Businesses Without Credit Available Elsewhere	4.000
Non-Profit Organizations With Credit Available Elsewhere	2.625
NON-Profit Organizations Without Credit Available Elsewhere	2.625
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
NON-Profit Organizations Without Credit Available Elsewhere	2.625

The number assigned to this disaster for physical damage is 14997B and for economic injury is 149980.

(Catalog of Federal Domestic Assistance Number 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2016–29382 Filed 12–7–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Surrender of License of Small Business Investment Company

Pursuant to the authority granted to the United States Small Business Administration under the Small Business Investment Act of 1958, as amended, under Section 309 of the Act and Section 107.1900 of the Small Business Administration Rules and Regulations (13 CFR 107.1900) to function as a small business investment company under the Small Business Investment Company License No. 04/04–0304 issued to White Oak SBIC Fund, L.P., said license is hereby declared null and void.

United States Small Business Administration.

Mark Walsh,

Associate Administrator for Investment and Innovation.

[FR Doc. 2016–29381 Filed 12–7–16; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice: 9808]

Culturally Significant Objects Imported for Exhibition Determinations: ''Shakespeare in Prague: Imagining the Bard in the Heart of Europe'' Exhibition

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Shakespeare in Prague: Imagining the Bard in the Heart of Europe,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit objects at the Columbus Museum of Art, Columbus, Ohio, from on or about February 10, 2017, until on or about May 21, 2017, at the University of the Incarnate Word, San Antonio, Texas, from on or about July 10, 2017, until on or about September 30, 2017, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the imported objects, contact the Office of Public Diplomacy and Public Affairs in the Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, SA–5, Suite 5H03, Washington, DC 20522–0505.

Mark Taplin,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2016–29401 Filed 12–7–16; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Type Certificates 3A2 and A–772

AGENCY: Federal Aviation Administration (FAA), DOT.

[85] 17 CFR 200.30–3(a)(12).

ACTION: Request for information on holder of Type Certificates (TCs) prior to FAA declaring TCs abandoned.

SUMMARY: This notice requests that the current holder(s) (or their heirs) of TCs 3A2 and A–772 come forward and identify themselves; otherwise, the FAA will declare the TCs as abandoned. This notice is issued in accordance with § 302 of the FAA Modernization and Reform Act of 2012,[1] partially codified as Title 49 of the United States Code (49 U.S.C.) § 44704(a)(5).

DATES: We must receive all correspondence by June 6, 2017.

FOR FURTHER INFORMATION CONTACT: Send all correspondence on this issue via certified mail to: Federal Aviation Administration, Anchorage Aircraft Certification Office, 222 W 7th Avenue, MS 14, Anchorage, AK 99513. ATTN: Della Swartz, ACE–115N. All letters must be signed. You may also contact Ms. Swartz by phone at (907) 271–2672 or electronically at: *della.swartz@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA has received a third party request for the release of data for TCs 3A2 and A–772 under the provisions of Freedom of Information Act (FOIA) 5 U.S.C. 552. The FAA cannot release the requested data under FOIA without the permission of the TC holders. The TC holders last listed on the certificate records are Airlift International, Inc., in Miami, FL for TC 3A2 and Flying Tiger Line, Inc., in Burbank, CA for TC A–772. The FAA has been unsuccessful in contacting the holders of record by telephone, email, and/or certified mail. There has been no activity with the TC holders for more than three years.

Information Requested

If you are the owners, or heirs, or a transferee of these TCs or have any knowledge regarding who may now hold TCs 3A2 or A–772, please contact Della Swartz using a method described in the **FOR FURTHER INFORMATION CONTACT**of this notice. If you are the owner of TCs 3A2 or A–772, you must provide a notarized copy of your Government issued identification (ID) with a letter and background establishing your ownership of the TCs and/or relationship as the heir to the deceased holder of the TC (if that is the case).

Conclusion

If we do not receive any response by June 6, 2017, we will consider TCs 3A2 and A–772 abandoned and we will proceed with the release of the requested data.

Kelly Broadway,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–29432 Filed 12–7–16; 8:45 am]

BILLING CODE 4910–13–P

[1] Public Law 112–95.

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Rockingham County, New Hampshire

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Revised notice of intent.

SUMMARY: The FHWA is issuing this revised notice to advise the public that a Supplemental Draft Environmental Impact Statement (SDEIS) will be prepared for a proposed highway project in the Towns of Derry and Londonderry, in Rockingham County, New Hampshire.

FOR FURTHER INFORMATION CONTACT: Mr. Jamie Sikora, New Hampshire Division, Federal Highway Administration, 53 Pleasant Street, Suite 2200, Concord, New Hampshire 03301, Telephone: (603) 410–4870. Mr. Keith Cota, Chief Project Manager, New Hampshire Department of Transportation, 7 Hazen Drive, Concord, New Hampshire 03302–0483, Telephone: (603) 271–1615. Mr. David Caron, Town Administrator, Town of Derry, 14 Manning Street, Derry, New Hampshire 03038, Telephone: (603) 432–6100. Mr. Kevin Smith, Town Manager, Town of Londonderry, 268B Mammoth Road, Londonderry, New Hampshire 03053, Telephone: (603) 432–1100 x111.

SUPPLEMENTARY INFORMATION: FHWA, in cooperation with the Towns of Derry and Londonderry (the Towns) and the New Hampshire Department of Transportation (NHDOT), is advancing an updated environmental study for the I–93 Exit 4A Project. The purpose of the proposed project is to reduce congestion and improve safety along NH Route 102, from I–93 easterly through downtown Derry and to promote economic vitality in the Derry/Londonderry area.

Planning for the Project began in 1985 and a Notice of Intent was published in the **Federal Register** on June 12, 1998 (Vol. 63 No. 113). A Draft Environmental Impact Statement (DEIS) was completed in 2007 and a Notice of Availability published on August 3, 2007 (EIS No. 20070317). A Public Hearing on the DEIS was held on September 12, 2007. Project development was subsequently delayed for several years. In October 2015, the Governor's Office directed NHDOT to accelerate the Exit 4A Project, and the Project was incorporated in the state's Ten Year Transportation Improvement Plan for 2017–2026. Pursuant to 40 CFR 1502.9(c) and 23 CFR 771.129, SDEIS will provide an up-to-date assessment of the environmental effects of the proposed project and reasonable alternatives that considers updated information regarding traffic, socioeconomic projections, land development proposals in the project area, and changes in environmental resources and regulatory requirements. After completion of the SDEIS, FHWA will complete the environmental review process by issuing a Combined Final EIS (FEIS) and Record of Decision (ROD).

The Preferred Alternative identified in the 2007 DEIS consisted of a new diamond interchange on I–93 in the Town of Londonderry, approximately one mile north of Exit 4. The new diamond interchange would provide access to the east side of I–93. A 1-mile connector roadway would be built on new alignment from the interchange to Folsom Road, near the intersection of North High Street and Madden Road, in the Town of Derry. Folsom Road, and subsequently Tsienneto Road, would be upgraded, and the intersections would be improved. In addition to the Preferred Alternative, the SDEIS will evaluate the same range of alternatives assessed in the 2007 DEIS, which included alternative interchange locations, connector road alignments, upgrades to NH 102 and the No Build Alternative.

To provide an update on the status of the proposed project and environmental review process, a public information meeting was held in Derry, New Hampshire on September 26, 2016. Additionally, once the SDEIS is complete in 2017, the document will be distributed to government agencies, posted on the project Web site, and made available at multiple locations throughout the project area for public viewing. During the 45 day SDEIS public comment period, a public hearing will be held providing the public with an opportunity to review and comment on the SDEIS.

Comments and suggestions are invited from all interested parties to ensure that the full range of issues related to this proposed action are addressed and all significant issues are identified. Comments or questions concerning this proposed action should be directed to the FHWA or NHDOT at the addresses provided above or submitted via the

project Web site at *http://i93exit4a.com/*.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: November 30, 2016.

Patrick A. Bauer,

Division Administrator, Federal Highway Administration, Concord, New Hampshire.

[FR Doc. 2016–29413 Filed 12–7–16; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2011–0368; FMCSA–2011–0381; FMCSA–2013–0192; FMCSA–2013–0193]

Qualification of Drivers; Exemption Applications; Diabetes

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions of 99 individuals from its prohibition in the Federal Motor Carrier Safety Regulations (FMCSRs) against persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions enable these individuals with ITDM to continue to operate CMVs in interstate commerce.

DATES: Each group of renewed exemptions was effective on the dates stated in the discussions below and will expire on the dates stated in the discussions below.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8 a.m. to 5:30 p.m., e.t., Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

1. Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

II. Background

On March 16, 2016, FMCSA published a notice announcing its decision to renew exemptions for 99 individuals from the insulin-treated diabetes mellitus prohibition in 49 CFR 391.41(b)(3) to operate a CMV in interstate commerce and requested comments from the public (80 FR 14210). The public comment period ended on April 15, 2016, and no comments were received. As stated in the previous notice, FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would achieve a level of safety equivalent to or greater than the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3). The physical qualification standard for drivers regarding diabetes found in 49 CFR 391.41(b)(3) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control.

III. Discussion of Comments

FMCSA received no comments in this preceding.

IV. Conclusion

Based upon its evaluation of the 99 renewal exemption applications and that no comments were received, FMCSA confirms its decision to exempt the following drivers from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce in 49 CFR 391.64(3):

As of March 5, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 41 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (78 FR 79062; 79 FR 12567):

David E. Ames (IL)
Michael R. Boland (IL)
Christopher D. Burks (MA)
Larry D. Burton (IL)
Anthony D. Chrisley (CA)
Henry Collins (MO)
John B. Conway Jr. (NC)
James V. Davidson Jr. (UT)
Michael A. De La Torree (CA)
Corrado DePalma (NJ)
Douglas E. Emey (IN)
William C. Flom (IA)
Brian A. Griep (IA)
George E. Hagey (IL)
Ronnie Harrington (MS)
Andrew P. Hines (OH)
Arlyn D. Holtrop (IA)
Stephan P. Hyre (OH)
Aaron C. Kaplan (CA)
Sigmund E. Keller (NY)
Derl T. Martin (MO)
Waymond E. Mayfield (MO)
Senad Mehmedovic (KY)
Ronald E. Mullard (AL)
Justin C. Orr (CA)
Kevin L. Otto (OH)
Larry H. Painter (PA)
Robert K. Patterson (IA)
Albert M. Purdy (PA)
Adam Razny (MO)
Thomas F. Scanlon (NJ)
Harrison G. Simmons (MO)
Scott A. Stout (FL)
Walter D. Strang, IV (CT)
Mark A. Torres (MA)
Eric A. Vernon (IA)
Marvin L. Vonk (IA)
Kelly J. Walstad (MN)
John R. Wappes (OH)
Ray C. Williams (CT)
Rickey A. Wulf (IA)

The drivers were included in Docket No. FMCSA–2013–0193. Their exemptions are effective as of March 5, 2016 and will expire on March 5, 2018.

As of March 7, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 45 individuals, have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce (77 FR 3549; 77 FR 13685; 78 FR 78479; 79 FR 13086):

Chad E. Anger (WI)
Willie V. Apodaca (NM)
Edward Blake (GA)
Dorin D. Blodgett (IN)
Jerry A. Campbell (OH)
Brian M. Chase (VA)
Phillip Covel (NE)
Nicholas P. Dube (RI)
James W. Dusing (MN)
Manuel Elizondo (TX)
Michael K. Farris (IN)
Menino Fernandes (IL)

Craig J. Gadley, Sr. (NY)
Daniel C. Grove Jr. (PA)
Mary F. Guilfoy (IN)
Jeffrey M. Halida (WI)
James M. Hatcher (MS)
Matthew E. Hay (TX)
Edward S. Ionescu (IL)
Jeffrey P. James (AR)
Tracy N. Jenkins (DE)
Gregory A. King (NC)
Matthew R. Linehan (NY)
Cory A. Meadows (OH)
Ashun R. Merritt (GA)
Herbert A. Morton (CA)
Colby A. Nutter (VA)
Jayrome B. Rimolde (MN)
Gale Roland (PA)
Larry A. Sanders (MD)
John L. Scherette (WA)
Kelly T. Scholl (MN)
James P. Shurkus (NH)
Gregory G. Sisco (IA)
Travers L. Stephens (GA)
Brittany K. Tomasko (CA)
Joel L. Topping (NV)
Daren Warren (NY)
Alan T. Whalen (NY)
Thomas L. Whitley (IN)
Randall S. Williams (PA)
Charles J. Wirth (WI)
Tomme J. Wirth (IA)
Joshua C. Wyse (OH)
Rowland P. Yee (HI)

The drivers were included in Docket Nos. FMCSA–2011–0368; FMCSA–2013–0192. Their exemptions are effective as of March 7, 2016 and will expire on March 7, 2018.

As of March 23, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 13 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (77 FR 5870; 77 FR 17116):

Roger L. Arcand, Jr. (MA)
Marsha M. Colberg (WA)
Robert D. Crissinger (MN)
Scott W. Forsyth, Jr. (CO)
Fritz D. Gregory (UT)
Anthony P. Kesselring (FL)
Don R. Kivi (ND)
Vincent Ligotti (NY)
Michael R. Miller (PA)
Jack L. Phippen (WI)
Richard A. Purk (CA0)
Bryan E. Quick (VA)
Jack A. Tidey (AR)

The drivers were included in Docket No. FMCSA–2011–0381. Their exemptions are effective as of March 23, 2016 and will expire on March 23, 2018.

In accordance with 49 U.S.C. 31315, each exemption will be valid for two years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: November 25, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–29410 Filed 12–7–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2009–0289; FMCSA–2009–0290; FMCSA–2011–0300; FMCSA–2013–0190; FMCSA–2013–0191]

Qualification of Drivers; Exemption Applications; Diabetes

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions of 107 individuals from its prohibition in the Federal Motor Carrier Safety Regulations (FMCSRs) against persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions enable these individuals with ITDM to continue to operate CMVs in interstate commerce.

DATES: Each group of renewed exemptions was effective on the dates stated in the discussions below and will expire on the dates stated in the discussions below.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8 a.m. to 5:30 p.m., e.t., Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov*, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

II. Background

On December 30, 2015, FMCSA published a notice announcing its decision to renew exemptions for 107 individuals from the insulin-treated diabetes mellitus prohibition in 49 CFR 391.41(b)(3) to operate a CMV in interstate commerce and requested comments from the public (80 FR 81667). The public comment period ended on January 29, 2016 and no comments were received.

As stated in the previous notice, FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would achieve a level of safety equivalent to or greater than the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

The physical qualification standard for drivers regarding diabetes found in 49 CFR 391.41(b)(3) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control.

III. Discussion of Comments

FMCSA received no comments in this preceding.

IV. Conclusion

Based upon its evaluation of the 107 renewal exemption applications and that no comments were received, FMCSA announces its decision to exempt the following drivers from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce in 49 CFR 391.64(3):

As of January 5, 2016, the following 20 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs

in interstate commerce (76 FR 71112; 77 FR 532; 80 FR 81667):

Mark A. Aspden (MA)
Rodney C. Backus (NY)
Gary L. Breitenbach (SC)
Gerald R. Curran (PA)
Matthew G. Denisov (NC)
Shawn K. Fleming (PA)
Steven W. Gerling (IA)
Jackie D. Greenlee (MO)
Gregory L. Horton (GA)
Justin W. Jackson (OK)
David T. Kylander (MO)
Kevin A. Perdue (MD)
Michael E. Pleak (IN)
Sarah M. Powell (NM)
James G. Rahn (IA)
Christopher C. Stephenson (KS)
Ward A. Stone (WI)
Todd J. Timmerman (WI)
Richard L. White (MS)
Paul A. Wright (NY)

The drivers were included in Docket No. FMCSA–2011–0300. Their exemptions are effective as of January 5, 2016 and will expire on January 5, 2018.

As of January 11, 2016, the following 24 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce (74 FR 55890; 75 FR 1449; 80 FR 81667):

Eric M. Butz (OH)
Rita A. Cefaratti (CT)
Gerald F. Crowley (NY)
Scott J. Denham (MN)
Larry E. Dickerson (GA)
Lance W. Essex (OH)
David E. Ginter (PA)
William H. Goebel (IA)
Joseph L. Gray III (PA)
Ryan R. Harris (IA)
Carroll J. Hartsell (WV)
Keith M. Huels (AZ)
Daniel R. Jackson (PA)
Curtis W. Keelin, Jr. (WY)
Patrick J. Krueger (WI)
Tammy Lynn F. Manuel (SC)
Francisco J. Martinez (MA)
Andrew W. Myer (NE)
Chad A. Nelson (UT)
David W. Olson (AZ)
Mark E. Pascoe (WI)
Terry L. Riddell (IN)
Roger L. Summerfield (WI)
Jimmy P. Wright (TX)

The drivers were included in Docket No. FMCSA–2009–0289. Their exemptions are effective as of January 11, 2016 and will expire on January 11, 2018.

As of January 23, 2016, the following 13 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce (78 FR 65034; 79 FR 3917; 80 FR 81667):

Clair H. Gilmore (WA)
Michael Kollos (MN)
Daniel T. Lindahl (WI)
James F. McSweeney (NH)
Eric W. Miller (IN)
William J. Rodgers (PA)
Mark A. Rosenau (MN)
Daniel B. Shaw (FL)
John C. Thomas (IN)
Richard Wasko (FL)
Douglas E. Wilhoit (PA)
Richard A. Wilk (OH)
Thomas A. Young (TX)

The drivers were included in Docket No. FMCSA–2013–0190. Their exemptions are effective as of January 23, 2016 and will expire on January 23, 2018.

As of January 28, 2016, the following 25 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce (74 FR 65836; 75 FR 4622; 80 FR 81667):

Bob A. Bauer (WI)
Michael P. Berger (ND)
William D. Blosch (GA)
Victor M. Brunner (WI)
Tom L. Cooley (KS)
Wallace E. Crouse, Jr. (MA)
Robert G. Dohman, Jr. (ND)
Danny E. Edmondson (GA)
Andrew C. Everett (AZ)
Wendell G. Fordham (GA)
Eugene G. Friedman (NJ)
Donald W. Hansen (ND)
Joseph S. Hernandez (NM)
Jordan T. Johnston (IN)
Jere W. Kirkpatrick (OH)
Kyle A. Leach (NE)
Robert J. Lewis, Jr. (VT)
Stacy R. Oberholzer (PA)
Michael S. Ogle (GA)
Walter L. Patrick (TN)
Clifford A. Peters (IL)
Richard L. Piercefield, Sr. (MI)
Kevin A. Roginski (PA)
Bruce M. Stockton (MO)
Todd R. Vickers (MD)

The drivers were included in Docket No. FMCSA–2009–0290. Their exemptions are effective as of January 28, 2016 and will expire on January 28, 2018.

As of January 29, 2016, the following 25 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce (78 FR 68139; 79 FR 4807; 80 FR 81667):

Dylan J. Bryan (IL)
Robert A. Collins (NJ)
Fred J. Combs (OH)
Edward C. DeFrancesco (CT)
Terrance J. Dusharm (MN)
Jonathan Eggers (MN)
Gilbert N. Fugate (IN)
Scott C. Garbiel (ME)
Charles D. Grant (GA)
William F. Hamann (KY)
Jerry J. Klosterman (OH)
Joseph E. Kolb (NY)
Matthew D. Lee (VA)
Craig A. Lemponen (OH)
Matthew P. Ludwig (NY)
Keith B. Masters (NH)
Eli J. Meekhof (MI)
Jeffrey A. Olson (IA)
Marvin H. Patterson III (SC)
Brandon C. Rhinehart (MD)
Donald R. Sine, Jr. (WV)
Dennis E. Taunton (ID)
Phillip A. Trent (VA)
Deborah D. Watson (MI)
Ronnie C. Webb (MT)

The drivers were included in Docket No. FMCSA–2013–0191. Their exemptions are effective as of January 29, 2016 and will expire on January 29, 2018.

In accordance with 49 U.S.C. 31315, each exemption will be valid for two years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: November 25, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–29409 Filed 12–7–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2016–0028; Notice 2]

Volkswagen Group of America, Inc., Grant of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Grant of petition.

SUMMARY: Volkswagen Group of America, Inc. (Volkswagen), has determined that certain model year (MY) 2016 Volkswagen Beetle Convertible passenger cars do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 110, *Tire Selection and Rims and Motor Home/*

Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 kilograms (10,000 pounds) or Less. Volkswagen filed a defect report dated February 23, 2016. Volkswagen then petitioned NHTSA on March 15, 2016, for a decision that the subject noncompliance is inconsequential to motor vehicle safety.

ADDRESSES: For further information on this decision please contact Kerrin Bressant, Office of Vehicle Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366–1110.

SUPPLEMENTARY INFORMATION:

I. Overview

Volkswagen Group of America, Inc. (Volkswagen), has determined that certain model year (MY) 2016 Volkswagen Beetle Convertible passenger cars do not fully comply with paragraph S4.3(d) of Federal Motor Vehicle Safety Standard (FMVSS) No. 110, *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 kilograms (10,000 pounds) or Less.* Volkswagen filed a report dated February 23, 2016, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* Volkswagen also petitioned NHTSA on March 15, 2016, under 49 CFR part 556 for a decision that the subject noncompliance is inconsequential to motor vehicle safety.

Pursuant to 49 U.S.C. 30118(d) and 30120(h) and the rule implementing those provisions at 49 CFR part 556, Volkswagen has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

The notice of receipt of Volkswagen's petition was published, with a 30-day public comment period, on June 14, 2016 in the **Federal Register** (81 FR 38772). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) Web site at: *http://www.regulations.gov/.* Then follow the online search instructions to locate docket number ''NHTSA–2016–0028.''

II. Vehicles Involved

Affected are approximately 325 MY 2016 Volkswagen Beetle Convertible passenger vehicles that were manufactured between June 18, 2015, and November 9, 2015.

III. Noncompliance

Volkswagen stated that the subject vehicles have a Tire Placard Label that is misprinted with an incorrect tire size as compared to the tires the vehicle was equipped with and therefore does not fully conform to paragraph S4.3(d) of FMVSS No. 110.

IV. Rule Text

Paragraph S4.3(d) of FMVSS No. 110 requires, in pertinent part:

S4.3 Placard. Each vehicle, except for a trailer or incomplete vehicle, shall show the information specified in S4.3 (a) through (g), and may show, at the manufacturer's option, the information specified in S4.3 (h) through (i), on a placard permanently affixed to the driver's side B-pillar . . .

(d) Tire size designation, indicated by the headings ''size'' or ''original tire size'' or ''original size,'' and ''spare tire'' or ''spare,'' for the tires installed at the time of the first purchase for purposes other than resale. For full size spare tires, the statement ''see above'' may, at the manufacturer's option replace the tire size designation. If no spare tire is provided, the word ''none'' must replace the tire size designation.

V. Summary of Volkswagen's Petition

Volkswagen described the subject noncompliance and stated its belief that the noncompliance is inconsequential to motor vehicle safety for the following reasons:

(1) Volkswagen stated that the condition described (tire placard with an incorrect label size on it) would not adversely affect the tire and loading capability of the vehicle.

(2) Volkswagen stated that the loading and combined weight information was printed correctly on both versions of the Tire Placard Label.

NHTSA's Decision:

NHTSA's Analysis: The intent of FMVSS No. 110 is to ensure that vehicles are equipped with tires appropriate to handle maximum vehicle loads and prevent overloading. Utilizing the ETRTO Tire and Rim Association Manual of 2016, NHTSA has confirmed that the incorrectly listed size tires would still have a load capacity sufficient to support the listed weight limitation of occupants and cargo which is printed on the Vehicle Placard label. Both the installed original equipment manufacturer (OEM) tires on the vehicle and the installation of the incorrect sized tires listed on the subject vehicle's vehicle placard (tire and loading information label) when inflated to the label's recommended cold inflation pressure are appropriate to handle the vehicle maximum loads. Consequently, the subject noncompliance should not cause any unsafe conditions associated with the incorrect tire size listed on the Vehicle Placard label. Therefore, NHTSA agrees with Volkswagen that the incorrect tire size listed on the Vehicle Placard label does not have any adverse safety implications.

NHTSA's Decision: In consideration of the foregoing, NHTSA finds that Volkswagen has met its burden of persuasion that the subject FMVSS No. 110 noncompliance in the affected vehicles is inconsequential to motor vehicle safety. Accordingly, Volkswagen's petition is hereby granted and Volkswagen is consequently exempted from the obligation of providing notification of, and a free remedy for, that noncompliance under 49 U.S.C. 30118 and 30120.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, this decision only applies to the subject vehicles that Volkswagen no longer controlled at the time it determined that the noncompliance existed. However, the granting of this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after Volkswagen notified them that the subject noncompliance existed.

Authority: 49 U.S.C. 30118, 30120: Delegations of authority at 49 CFR 1.95 and 501.8.

Jeffrey M. Giuseppe,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2016–29375 Filed 12–7–16; 8:45 am]

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Part II

Department of Transportation

Federal Motor Carrier Safety Administration

49 CFR Parts 380, 383, and 384
Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 380, 383, and 384

[FMCSA–2007–27748]

RIN 2126–AB66

Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Final rule.

SUMMARY: FMCSA establishes new minimum training standards for certain individuals applying for their commercial driver's license (CDL) for the first time; an upgrade of their CDL (*e.g.,* a Class B CDL holder seeking a Class A CDL); or a hazardous materials (H), passenger (P), or school bus (S) endorsement for the first time. These individuals are subject to the entry-level driver training (ELDT) requirements and must complete a prescribed program of instruction provided by an entity that is listed on FMCSA's Training Provider Registry (TPR). FMCSA will submit training certification information to State driver licensing agencies (SDLAs), who may only administer CDL skills tests to applicants for the Class A and B CDL, and/or the P or S endorsements, or knowledge test for the H endorsement, after verifying the certification information is present in the driver's record.

DATES: This final rule is effective February 6, 2017. The compliance date for this rule is February 7, 2020. Comments sent to the Office of Management and Budget (OMB) on the collection of information must be received by OMB on or before January 9, 2017.

Petitions for Reconsideration of this final rule must be submitted to the FMCSA Administrator no later than January 9, 2017.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Clemente, Driver and Carrier Operations (MC–PSD) Division, FMCSA, 1200 New Jersey Ave. SE., Washington, DC 20590–0001, by telephone at 202–366–4325, or by email at *MCPSD@dot.gov*. If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

For comments on the Privacy Analysis in this Rulemaking, contact FMCSA's Privacy Officer: Shannon DiMartino, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590–0001 or by telephone at 202–366–1577.

SUPPLEMENTARY INFORMATION: This final rule responds to a Congressional mandate imposed under the Moving Ahead for Progress in the 21st Century Act (MAP–21). The rule is based in part on consensus recommendations from the Agency's Entry-Level Driver Training Advisory Committee (ELDTAC), a negotiated rulemaking committee that held a series of meetings between February and May 2015.

This Final Rule is organized as follows:

I. Rulemaking Documents

A. Availability of Rulemaking Documents

For access to docket FMCSA–2007–27748 to read background documents and comments received, go to *http://www.regulations.gov* at any time, or to Docket Services at U.S. Department of Transportation, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

B. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments on the Privacy Impact Assessment (PIA) from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov*, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy*.

II. Executive Summary

A. Purpose and Summary of the Entry-Level Driver Training Rule

FMCSA believes this final rule enhances the safety of commercial motor vehicle (CMV) operations on our Nation's highways by establishing a minimum standard for ELDT and increasing the number of drivers who receive ELDT. It replaces existing mandatory training requirements for entry-level operators of CMVs in interstate and intrastate operations required to possess a CDL. The minimum training standards established in today's rule are for certain individuals applying for a CDL for the first time, an upgrade of their CDL[1] (*e.g.,* a Class B CDL holder seeking a Class A CDL), or a hazardous materials, passenger, or school bus endorsement for the first time. These individuals are subject to the ELDT requirements and must complete a prescribed program of instruction provided by an entity listed on FMCSA's Training Provider Registry (TPR).

FMCSA's legal authority for this rulemaking is derived from the Motor Carrier Act of 1935, the Motor Carrier Safety Act of 1984, the Commercial Motor Vehicle Safety Act of 1986 (CMVSA), and MAP–21.

B. Summary of Major Provisions

The rule primarily revises 49 CFR part 380, Special Training Requirements. It requires an individual who must complete certain CDL skills test requirements, defined as an ''Entry-Level Driver,'' to receive mandatory training. The rule applies to persons who drive, or intend to drive, CMVs in either interstate or intrastate commerce. Military drivers, farmers, and firefighters who are generally excepted from the CDL requirements in part 383 are also excepted from this rule.

The rule establishes Class A and Class B CDL core curricula and training curricula including passenger (P); school bus (S); and hazardous materials (H) endorsements. The core and endorsement curricula generally are subdivided into theory (knowledge) and behind-the-wheel (BTW) (range and public road) segments. There is no minimum number of hours that driver-trainees must spend on the theory portions of any of the individual curricula. However, training providers must provide instruction in all elements of the applicable theory curriculum and driver-trainees must receive an overall score of at least 80 percent on the theory assessment.

The BTW curricula for the Class A and Class B CDL, comprised of range and public road segments, include discrete maneuvers which each driver-trainee must proficiently demonstrate to the satisfaction of the training instructor. There is no minimum number of hours that driver-trainees must spend on the BTW elements of the core or endorsement curricula. The training provider must not issue the training certificate unless the driver-trainee demonstrates proficiency in performing all required BTW skills. Providers must submit electronic notification to FMCSA that an individual completed the required training; the Agency will provide that information to the SDLAs through the Commercial Driver's License Information System (CDLIS).

This rule applies to entities that train entry-level drivers, also referred to herein as driver-trainees. Training providers must, at a minimum, provide instruction in a training curriculum that meets all the standards established in today's rule and must also meet other eligibility requirements in order to be listed on FMCSA's TPR. Training providers must also attest that they meet the specified requirements, and in the event of an FMCSA audit or investigation of the provider, must supply documentation to verify their compliance. The final rule also makes conforming changes to parts 383 and 384 of the FMCSRs.

The compliance date for this rule is three years after the effective date of the final rule. This three-year period provides the States with sufficient time to pass necessary implementing legislation and to modify their information systems to begin recording the CDL applicant's compliance with ELDT requirements. This phase-in period also allows time for CMV driver training entities to develop and begin offering training programs that meet the eligibility requirements for listing on the TPR.

C. Benefits and Costs

Entry-level drivers, motor carriers, training providers, SDLAs, and the Federal Government will incur costs for compliance and implementation. The costs of the final rule include tuition expenses, the opportunity cost of time while in training, compliance audit costs, and costs associated with the implementation and monitoring of the TPR. As shown in Table 1, FMCSA estimates that the 10-year cost of the final rule will total $3.66 billion on an undiscounted basis, $3.23 billion discounted at 3 percent, and $2.76 billion discounted at 7 percent (all in 2014 dollars). Values in Table 1 are rounded to the nearest million.

TABLE 1—TOTAL COST OF THE FINAL RULE

[In millions of 2014$]

Year	Undiscounted						Discounted	
	Entry-level drivers	Motor carriers	Training providers	SDLAs	Federal government	Total [a]	Discounted at 3%	Discounted at 7%
2020	$324	$20	$9	$56	$6	$415	$415	$415
2021	326	20	6	0	1	353	343	330
2022	328	20	7	0	1	356	336	311
2023	330	20	6	0	1	357	327	291
2024	331	20	7	0	1	359	319	274
2025	333	20	6	0	1	360	311	257
2026	335	20	7	0	1	363	304	242

[1] Group A vehicles include all large, combination vehicles, usually tractor/trailers. Group B vehicles include both large straight trucks and buses.

TABLE 1—TOTAL COST OF THE FINAL RULE—Continued

[In millions of 2014$]

Year	Undiscounted						Discounted	
	Entry-level drivers	Motor carriers	Training providers	SDLAs	Federal government	Total [a]	Discounted at 3%	Discounted at 7%
2027	337	20	6	0	1	364	296	227
2028	339	21	7	0	1	368	291	214
2029	341	21	6	0	1	369	283	201
Total	3,324	202	67	56	15	3,664	3,225	2,762
Annualized						366	367	368

Notes:
[a] Total cost values may not equal the sum of the components due to rounding (the totals shown in this column are the rounded sum of unrounded components).

The costs of this final rule specifically attributable to the S (school bus) endorsement training requirement were evaluated separately in the RIA, because, while Section 32304 of MAP–21 mandates training for entry-level drivers who wish to obtain a CDL or a P or H endorsement, the statute is silent with respect to the S endorsement. Inclusion of the S endorsement training requirement increases the total cost of the rule by only approximately 0.82 percent. On an annualized basis at a 7 percent discount rate, this equates to an increase in the total cost of the rule from $365 million to $368 million. Details of these comparative analyses of the costs of the rule and the reasons for this relatively small change in costs resulting from the inclusion of the S endorsement training requirement are presented in Section 3 of the RIA.

This final rule will result in benefits to CMV operators, the transportation industry, the traveling public, and the environment. FMCSA estimated benefits in two broad categories: Safety benefits and non-safety benefits. Training related to the performance of complex tasks may improve performance; in the context of the training required by this final rule, improvement in task performance constitutes adoption of safer driving practices that the Agency believes will reduce the frequency and severity of crashes, thereby resulting in safer roadways for all. The training related to fuel efficient driving practices that will be taught under the 'speed management' and 'space management' sections of the curriculum reduce fuel consumption and consequently lower environmental impacts associated with carbon dioxide emissions. As discussed in Section 4.1.1 of the RIA for today's rule, FMCSA does not believe that the training in fuel efficient driving practices addressed by this rule will contribute to measurably longer trip times, as the curricula focus on factors such as maintaining safe distances between vehicles and avoiding hard acceleration and braking, rather than reducing vehicle speed. The Agency therefore assumes in its analysis that these fuel efficient driving practices will not contribute to measurably longer trip times.

Safer driving and better-informed drivers will reduce maintenance and repair costs. Table 2 below presents the directly quantifiable benefits that FMCSA projects will result from this final rule (all in 2014 dollars, values rounded to the nearest million). Due to wide ranges of estimates in studies relevant to the quantified benefits of the rule and the lack of studies that specifically focus on the curricula prescribed by this rule,[2] the Agency presents benefits estimated under alternate benefit scenarios in Table 3 and Table 4. These alternate scenarios are derived from the low and high benefit cases (see sensitivity analyses in Sections 4.1.1 through 4.1.3 of the RIA) in which the fuel savings, CO_2 emissions reductions, and maintenance and repair cost savings are 50 percent lower (low benefits case) and 50 percent greater (high benefits case) than the central estimates that the Agency relied on in developing the values presented in Table 2. Further discussion of the low and high benefits cases is reserved to the RIA for the final rule.

TABLE 2—TOTAL QUANTIFIABLE BENEFITS OF THE FINAL RULE

[Central case, in millions of 2014$]

Year	Undiscounted				Discounted	
	Value of fuel savings	Value of CO_2 reduction [a]	Maintenance and repair cost savings	Total [b]	Discounted at 3%	Discounted at 7%
2020	$89	$15	$13	$117	$117	$117
2021	151	26	22	198	192	186
2022	186	31	26	243	229	214
2023	190	32	27	248	227	206
2024	194	32	27	253	225	197
2025	197	33	27	257	222	188
2026	202	34	28	263	220	181
2027	205	34	28	266	217	172
2028	207	35	28	270	214	165

[2] As described in Sections 4.1.1 through 4.1.3 of the RIA, the Agency identified a variety of relevant studies related to each of the quantified benefits. With particular respect to the estimated fuel and CO_2 savings the Agency was unable to identify any studies that perfectly align with the curricula of this rule.

TABLE 2—TOTAL QUANTIFIABLE BENEFITS OF THE FINAL RULE—Continued

[Central case, in millions of 2014$]

Year	Undiscounted				Discounted	
	Value of fuel savings	Value of CO_2 reduction [a]	Maintenance and repair cost savings	Total [b]	Discounted at 3%	Discounted at 7%
2029	211	35	28	274	210	157
Total	1,830	306	253	2,389	2,073	1,783
Annualized				239	236	237

Notes:

[a] The monetized benefits associated with reduced CO_2 emissions are discounted at the 3% discount rate in both the ''discounted at 3%'' and ''discounted at 7%'' columns in this table. This is in keeping with the guidance of the Interagency Working Group that developed the OMB guidance on monetizing CO_2 reductions, and is consistent with past DOT and EPA practices. Further details on the monetization of CO_2 reductions are presented in Section 4.1.2 of the RIA.

[b] Total benefit values may not equal the sum of the components due to rounding (the totals shown in this column are the rounded sum of unrounded components).

TABLE 3—TOTAL QUANTIFIABLE BENEFITS OF THE FINAL RULE

[Low benefits case, in millions of 2014$]

Year	Undiscounted				Discounted	
	Value of fuel savings	Value of CO_2 reduction [a]	Maintenance and repair cost savings	Total [b]	Discounted at 3%	Discounted at 7%
2020	$44	$8	$6	$58	$58	$58
2021	75	13	11	99	96	93
2022	93	16	13	121	114	107
2023	95	16	13	124	114	103
2024	97	16	13	127	112	99
2025	99	17	14	129	111	94
2026	101	17	14	131	110	90
2027	102	17	14	133	108	86
2028	104	17	14	135	107	82
2029	106	17	14	137	105	78
Total	915	153	127	1,195	1,036	891
Annualized				119	118	119

Notes:

[a] The monetized benefits associated with reduced CO_2 emissions are discounted at the 3% discount rate in both the ''discounted at 3%'' and ''discounted at 7%'' columns in this table. This is in keeping with the guidance of the Interagency Working Group that developed the OMB guidance on monetizing CO_2 reductions, and is consistent with past DOT and EPA practices. Further details on the monetization of CO_2 reductions are presented in Section 4.1.2 of the RIA.

[b] Total benefit values may not equal the sum of the components due to rounding (the totals shown in this column are the rounded sum of unrounded components).

TABLE 4—TOTAL QUANTIFIABLE BENEFITS OF THE FINAL RULE

[High benefits case, in millions of 2014$]

Year	Undiscounted				Discounted	
	Value of fuel savings	Value of CO_2 reduction [a]	Maintenance and repair cost savings	Total [b]	Discounted at 3%	Discounted at 7%
2020	$133	$23	$19	$175	$175	$175
2021	226	38	32	295	287	278
2022	278	47	38	363	343	321
2023	285	48	39	371	340	308
2024	291	49	40	379	337	295
2025	296	50	40	385	332	282
2026	302	50	41	393	329	271
2027	307	51	41	399	324	258
2028	311	52	41	405	320	246
2029	316	52	42	410	314	235
Total	2,745	459	372	3,576	3,100	2,668

TABLE 4—TOTAL QUANTIFIABLE BENEFITS OF THE FINAL RULE—Continued

[High benefits case, in millions of 2014$]

Year	Undiscounted				Discounted	
	Value of fuel savings	Value of CO_2 reduction [a]	Maintenance and repair cost savings	Total [b]	Discounted at 3%	Discounted at 7%
Annualized				358	353	355

Notes:

[a] The monetized benefits associated with reduced CO_2 emissions are discounted at the 3% discount rate in both the ''discounted at 3%'' and ''discounted at 7%'' columns in this table. This is in keeping with the guidance of the Interagency Working Group that developed the OMB guidance on monetizing CO_2 reductions, and is consistent with past DOT and EPA practices. Further details on the monetization of CO_2 reductions are presented in Section 4.1.2 of the RIA.

[b] Total benefit values may not equal the sum of the components due to rounding (the totals shown in this column are the rounded sum of unrounded components).

While FMCSA believes that this final rule will at minimum achieve cost-neutrality, the net of quantified costs and benefits (presented in Table 5 below) results in an annualized net cost of $131 million at a 7 percent discount rate. This estimate is based only on *quantifiable* costs and benefits (central case) attributable to this rule. Safety benefits are assessed separately via a threshold analysis discussed in detail in Section 4.2 of the RIA.

TABLE 5—NET COST OF THE FINAL RULE (CENTRAL CASE), ABSENT QUANTIFIABLE SAFETY BENEFITS

[In millions of 2014$]

Year	3% Discount rate	7% Discount rate
2020	$298	$298
2021	151	144
2022	107	97
2023	100	85
2024	94	77
2025	89	69
2026	84	61
2027	79	55
2028	77	49
2029	73	44
Total	1,152	979
Annualized	131	131

The lack of data directly linking training to improvements in safety outcomes, such as reduced crash frequency or severity, posed a challenge to the Agency. Discussion regarding the efforts undertaken by FMCSA and its partners in the negotiated rulemaking process to estimate such a quantitative link is presented in Section 4.2 of the RIA. In the NPRM, the Agency again requested any additional data on the safety benefits of requiring ELDT, but did not receive any information that could be used to reliably quantify safety benefits associated with pre-CDL driver training.

In the absence of a clear link between training and safety, FMCSA followed the guidance of the Office of Management and Budget (OMB) in its Circular A–4 to perform a threshold analysis to determine the degree of safety benefits that will need to occur as a consequence of this final rule in order for the rule to achieve cost-neutrality.[3] As presented and discussed in detail in Section 4.2 of the RIA, the central estimate of this analysis is that a 3.61 percent improvement in safety performance (that is, a 3.61 percent reduction in the frequency of crashes involving those entry-level drivers who would receive additional pre-CDL training as a result of this final rule during the period for which the benefits of training are estimated to remain intact) is necessary to offset the $131 million (annualized at 7 percent) net cost of this final rule.[4] Note that under the low and high benefits cases presented in Table 3 and Table 4, the net cost of this final rule ranges from $13 million to $250 million (annualized at 7 percent), suggesting the improvement in safety performance necessary to offset the rule's costs may be as low as 0.36 percent and as high as 6.89 percent (see Section 4.2 of the RIA for the final rule for further detail).

Table 6 below presents the projected number of crash reductions involving entry-level drivers that must occur under the central case in each of the 10 years following this final rule's implementation and in the aggregate, in order to offset the net cost ($131 million annualized at 7 percent). It is the sum of the monetized value of *all columns* of Table 6—not the sum of the monetized value of any individual column—that results in cost-neutrality.

[3] Office of Management and Budget. Circular A–4. *Regulatory Analysis.* September 17, 2003. Available at: *https://www.whitehouse.gov/omb/circulars_a004_a-4/* (accessed July 25, 2016).

[4] Some commenters to the RIA that was performed for the NPRM for this rule incorrectly interpreted the breakeven percentage reduction in crashes estimated here as being relative to *all* CMV crashes *industry-wide,* rather than being relative to only to the much smaller sub-set of crashes involving entry-level drivers that are affected by the rule. Note that with respect to the magnitude of the reduction in the frequency of all crashes involving large trucks and buses that the annual average crash reductions presented in Table 6 represent, the Agency notes that there were an estimated total 3,649 fatal, 93,000 injury, and 379,000 PDO crashes in 2014 (see U.S. Department of Transportation, Federal Motor Carrier Safety Administration (FMCSA), *2016 Pocket Guide to Large Truck and Bus Statistics,* May 2016, pages 33 and 34, available at: *http://ntl.bts.gov/lib/59000/59100/59189/2016_Pocket_Guide_to_Large_Truck_and_Bus_Statistics.pdf* (accessed July 1, 2016)). Therefore, viewed in this manner, based on the annual average number of crash reductions necessary for this final rule to achieve cost-neutrality (shown in the second row from the bottom of Table 6), this equates to a reduction of only 0.14% of fatal, 0.11% of injury, and 0.11% of PDO crashes, respectively (relative to calendar year 2014). These percentage reductions are calculated as follows: Fatal = 5 ÷ 3,649; Injury = 102 ÷ 93,000; PDO = 432 ÷ 379,000. It should be re-emphasized, however, that this view of the data taken by some of the commenters is *incorrect,* and that the breakeven percentage reduction in crashes estimated here is relative to only the much smaller sub-set of crashes involving entry-level drivers that are affected by the rule.

TABLE 6—CRASH REDUCTIONS INVOLVING ENTRY-LEVEL DRIVERS, BY TYPE, NECESSARY TO ACHIEVE COST-NEUTRALITY
[For the Central Case]

Year	Number of fatal crashes	Number of injury crashes	Number of property damage only (PDO) crashes
2020	3	54	231
2021	4	91	386
2022	5	109	463
2023	5	109	463
2024	5	109	463
2025	5	109	463
2026	5	109	463
2027	5	109	463
2028	5	109	463
2029	5	109	463
Annual Average [a]	5	102	432
Total [b]	49	1,016	4,319

Notes:
[a] Rounded to the nearest whole number.
[b] The individual values shown may not sum to the totals shown due to rounding.

III. Abbreviations and Acronyms

Full name	Abbreviation or acronym
Advocates for Highway and Auto Safety	Advocates
Advance Notice of Proposed Rulemaking	ANPRM
American Association for Justice	AAJ
American Association of Motor Vehicle Administrators	AAMVA
American Bus Association	ABA
American Public Power Association	APPA
American Transportation Research Institute	ATRI
American Trucking Associations	ATA
Americans with Disabilities Act	ADA
Anti-lock Braking Systems	ABS
Assessing the Adequacy of Commercial Motor Vehicle Driver Training	Adequacy Report
Associated General Contractors	AGC
Association American of Railroads	AAR
Behind the wheel	BTW
California Department of Motor Vehicles	CA DMV
Clean Air Act	CAA
Code of Federal Regulations	CFR
Commercial Driver's License	CDL
Commercial Driver's License Information System	CDLIS
Commercial Learner's Permit	CLP
Commercial Motor Vehicle	CMV
Commercial Motor Vehicle Safety Act of 1986	CMVSA
Commercial Vehicle Safety Alliance	CVSA
Commercial Vehicle Training Association	CVTA
Delaware Department of Education	DDE
Delaware Department of Motor Vehicles	DE DMV
Delaware Motor Transport Association	DMTA
Delaware Technical Community College	DTCC
Director, Office of Carrier, Driver, and Vehicle Safety Standards	Director
Driver and Vehicle Services Division of the Minnesota Department of Public Safety	Minnesota
Driver Holdings, LLC	Driver Holdings
Edison Electrical Institute	EEI
Entry-Level Driver Training	ELDT
Entry-Level Driver Training Advisory Committee	ELDTAC
Executive Order	E.O.
Federal Motor Carrier Safety Administration	FMCSA
Federal Motor Carrier Safety Regulations	FMCSRs
Gross Vehicle Weight Rating	GVWR
Hazardous Materials	HM
Hazardous Materials Endorsement	H
Hazardous Materials Safety Permit	HMSP
Hours of Service	HOS
International Union of Operating Engineers	IUOE
Iowa Department of Transportation	Iowa

Full name	Abbreviation or acronym
Iowa Motor Truck Association	IMTA
Minnesota Chauffeured Limousine Association	MCLA
Model Motorcoach Curriculum	MMC
Motor Carrier Safety Act of 1984	MCSA
Motor Carrier Safety Advisory Committee	MCSAC
Moving Ahead for Progress in the 21st Century Act	MAP–21
National Association of Publicly Funded Truck Driving Schools	NAPFTDS
National Association of Small Trucking Companies	NASTC
National Association of State Directors of Pupil Transportation Services	NASDPTS
National Council of Farmer Cooperatives	NCFC
National Environmental Policy Act	NEPA
National Feed and Grain Association	NFGA
National Governors' Association	NGA
National Ground Water Association	NGWA
National Highway Traffic Safety Administration	NHTSA
National Limousine Association	NLA
National Motor Freight Traffic Association	NMFTA
National Propane Gas Association	NPGA
National School Transportation Association	NSTA
Natural Rural Electric Cooperative Association	NRECA
New York Association for Pupil Transportation	NYAPT
New York Department of Motor Vehicles	NY DMV
North Dakota Motor Carriers Association	NDMCA
Notice of Proposed Rulemaking	NPRM
Office of Management and Budget	OMB
Oregon Department of Transportation	ODOT
Out-of-service	OOS
Owner-Operator Independent Drivers Association, Inc.	OOIDA
Petroleum Marketers Association of America	PMAA
Pipeline and Hazardous Materials Safety Administration	PHMSA
Privacy Impact Assessment	PIA
Professional Truck Driver Institute	PTDI
Property Damage Only	PDO
Regulatory Impact Analysis	RIA
State Driver Licensing Agency	SDLA
State of Michigan, Bureau of Driver and Vehicle Licensing Programs, Department of State	Michigan
State of Utah, Department of Public Safety	Utah
State of Washington Department of Licensing	Washington
Training Provider Registry	TPR
United Motorcoach Association	UMA
United Parcel Service	UPS
United States Code	U.S.C.
United States Court of Appeals for the District of Columbia Circuit	D.C. Circuit
United States Department of Education	ED
United States Department of Transportation	DOT
Virage Simulation	Virage
Virginia Department of Motor Vehicles	Virginia
Virginia Trucking Association	VTA
Werner Enterprises	Werner
West Virginia Trucking Association	WVTA

IV. Legal Basis for the Rulemaking

This rule is based on the authority of the Motor Carrier Act of 1935, the Motor Carrier Safety Act of 1984, and the Commercial Motor Vehicle Safety Act of 1986 (CMVSA), as described below. It also implements section 32304 of MAP–21, requiring the establishment of minimum driver training standards for certain individuals required to hold a CDL. The NPRM preceding this final rule reflected the recommendations of FMCSA's ELDTAC, comprised of 25 industry stakeholders and FMCSA, convened through a negotiated rulemaking in 2015, as discussed below. Today's rule retains a number of those recommendations.

The Motor Carrier Act of 1935, codified at 49 U.S.C. 31502(b), provides that ''The Secretary of Transportation may prescribe requirements for—(1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and (2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation.'' This rule improves the ''safety of operation'' of entry-level ''employees'' who operate CMVs, as defined in 49 CFR 383.5, by enhancing the training they receive before obtaining or upgrading a CDL.

The Motor Carrier Safety Act of 1984 (MCSA), codified at 49 U.S.C. 31136(a), provides concurrent authority to regulate drivers, motor carriers, and vehicle equipment. It requires the Secretary of Transportation to prescribe regulations for CMV safety to ensure that (1) CMVs are maintained, equipped, loaded, and operated safely; (2) responsibilities imposed on CMV drivers do not impair their ability to operate the vehicles safely; (3) drivers' physical condition is adequate to operate the vehicles safely; (4) the operation of CMVs does not have a deleterious effect on drivers' physical

condition; and (5) CMV drivers are not coerced by a motor carrier, shipper, receiver, or transportation intermediary to operate a CMV in violation of regulations promulgated under this section, or chapter 51 or chapter 313 of this title (49 U.S.C. 31136(a)). This rule is based specifically on 49 U.S.C. 31136(a)(1), requiring regulations to ensure that CMVs are ''operated safely,'' and secondarily on section 31136(a)(2), requiring that regulations ensure that ''the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely.'' The rule enhances the training of entry-level drivers to further ensure that they operate CMVs safely and meet the operational responsibilities imposed on them.

This rule does not directly address medical standards for drivers (section 31136(a)(3)) or possible physical effects caused by driving CMVs (section 31136(a)(4)). However, to the extent that the various curricula in today's rule address FMCSA's medical requirements for CMV drivers, section 31136(a)(3), has been considered and addressed. FMCSA does not anticipate that drivers will be coerced (section 31136(a)(5)) as a result of this rulemaking. However, we note that the theory training curricula for Class A and B CDLs include a unit addressing the right of an employee to question the safety practices of an employer without incurring the risk of losing a job or being subject to reprisal simply for stating a safety concern. Driver-trainees will also be instructed in procedures for reporting to FMCSA incidents of coercion from motor carriers, shippers, receivers, or transportation intermediaries.

CMVSA provides, among other things, that the Secretary of Transportation shall prescribe regulations on minimum standards for testing and ensuring the fitness of an individual operating a commercial motor vehicle (CMV) (49 U.S.C. 31305(a)). The requirement of today's rule that States test only those entry-level CDL applicants who have completed the requisite training falls within the ''minimum standards for testing'' authorized by the CMVSA. The training requirement itself, as described below, was created by section 32304 of MAP–21.

MAP–21 requires DOT to regulate ELDT (Pub. L. 112–141, section 32304, 126 Stat. 405, 791 (July 6, 2012)). MAP–21 modified 49 U.S.C. 31305 by adding paragraph (c), which requires FMCSA to issue ELDT regulations. The regulations must address the knowledge and skills necessary for safe operation of a CMV that must be acquired before obtaining a CDL for the first time or upgrading from one class of CDL to another. MAP–21 also requires that training apply to CMV operators seeking passenger or hazardous materials endorsements (49 U.S.C. 31305(c)(1) and (2)). Although the statute specifically requires that the regulations address both classroom and behind the wheel (BTW) instruction, MAP–21 otherwise allows FMCSA broad discretion to define the training methodology, standards, and curriculum necessary to satisfy the ELDT mandate.

MAP–21 clearly establishes the scope of operations to be covered by this rule by requiring that ELDT regulations apply to individuals operating CMVs in both interstate and intrastate commerce. The ELDT requirements are codified in section 31305 of Title 49 of the U.S. Code, and the definition of a CMV in section 31301(4) therefore applies to ELDT. The definition of ''commerce'' in section 31301(2) covers both interstate commerce (paragraph A) and intrastate commerce (paragraph B). ELDT, as a CDL-related mandate, therefore applies to both interstate and intrastate commerce.

The final rule includes a school bus (S) endorsement curriculum, as proposed in the NPRM. Although MAP–21 did not specifically mandate training for this endorsement, the current FMCSRs require that an applicant for the S endorsement must pass the knowledge and skills test for a passenger vehicle (P) endorsement (49 CFR 383.123(a)(1)). FMCSA believes that because Congress recognized the importance of entry-level training in the operation of passenger vehicles by including the P endorsement within the scope of the MAP–21 mandate, the inclusion of the S endorsement training curriculum in the final rule is consistent with that mandate.

Before prescribing any regulations, FMCSA must consider their ''costs and benefits'' (49 U.S.C. 31136(c)(2)(A) and 31502(d)). Those factors are addressed in the Regulatory Impact Analysis (RIA) associated with this rulemaking and are summarized above.

V. Background

Regulatory History

On March 7, 2016, FMCSA published a notice of proposed rulemaking (NPRM), Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators, in the **Federal Register** (81 FR 11944). FMCSA received 338 submissions during the NPRM public comment period. FMCSA and its predecessor agency, the Federal Highway Administration, Office of Motor Carriers, have previously addressed the issue of CMV driver training. The regulatory and legal history of these efforts is summarized in the table below.

TIMELINE OF REGULATORY AND JUDICIAL ACTIONS RELATED TO ENTRY-LEVEL DRIVER TRAINING

Title	Type of action	Citation, date	Synopsis
Model Curriculum for Training Tractor-Trailer Drivers.	Federal Highway Administration (FHWA) Recommendations.	1985	The Model Curriculum provided suggestions and recommendations for training providers covering curriculum, facilities, vehicles, instructor qualifications hiring practices, graduation requirements, and student placement.
Commercial Motor Vehicles: Training for All Entry Level Drivers.	ANPRM by FHWA.	June 21, 1993; 58 FR 33874.	The ANPRM asked 13 questions pertaining to the adequacy of training standards, curriculum requirements, the requirements for obtaining a CDL, the definition of ''entry-level driver'' training, training pass rates, and costs.
Assessing the Adequacy of Commercial Motor Vehicle Training.	FHWA Report	1995	It concluded, among other things, that effective ELDT needs to include BTW instruction.
Relief from Unlawfully Withheld Agency Action, In re Citizens for Reliable and Safe Highways.	Court Action	November 2002	Sought an order directing the DOT to promulgate various regulations, including one establishing ELDT.
Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators.	FMCSA's NPRM	August 15, 2003; 68 FR 48863.	FMCSA proposed standards for mandatory training requirements for entry-level operators of commercial motor vehicles (CMVs) who are required to hold or obtain a commercial driver's license (CDL).

TIMELINE OF REGULATORY AND JUDICIAL ACTIONS RELATED TO ENTRY-LEVEL DRIVER TRAINING—Continued

Title	Type of action	Citation, date	Synopsis
	FMCSA's Final Rule.	May 21, 2004; 69 FR 29384.	The final rule included the four training elements proposed in the NPRM: driver medical qualification and drug and alcohol testing; driver hours of service limits; driver wellness; and whistleblower protections.
Advocates for Highway and Auto Safety v. Federal Motor Carrier Safety Administration.	Court Action	429 F.3d 1136 (D.C. Cir., December 2, 2005).	The Court held that the 2004 final rule was arbitrary and capricious because FMCSA ignored the finding of the Adequacy Report that BTW training was necessary and remanded the rule to the Agency for further consideration. The Court did not vacate the 2004 final rule.
Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators.	FMCSA's NPRM	December 26, 2007; 72 FR 73226.	FMCSA proposed regulations requiring both classroom and BTW training from an accredited institution or program.
Moving Ahead for Progress in the 21st Century Act (MAP–21).	Congressional Action.	July 6, 2012; Public Law No. 112–141, § 32304, 126 Stat. 405, 791.	MAP–21 requires DOT to regulate ELDT.
Minimum Training Requirements for Entry-Level Commercial Motor VehicleOperators.	FMCSA's Withdrawal Notice.	September 19, 2013; 78 FR 57585.	Based on a number of considerations, FMCSA withdrew its December 26, 2007, NPRM that proposed new ELDT standards for individuals applying for a commercial driver's license to operate CMVs in interstate commerce.
ELDT Negotiated Rulemaking	FMCSA's Public Notices.	August 19, 2014; 79 FR 49044.	FMCSA formally announced that it was considering addressing the rulemaking mandated by MAP–21 through a negotiated rulemaking.
		December 10, 2014; 79 FR 73274.	FMCSA also stated its intention to finish the negotiated rulemaking process in the first half of 2015, followed by publication of an NPRM the same year and a final ELDT rule in 2016.
		February 12, 2015; 80 FR 7814.	The Agency published a Federal Register notice listing the ELDTAC members as required by the Negotiated Rulemaking Act.
	Public Meetings	February–May 2015.	The ELDTAC met for a series of six two-day meetings to produce a consensus agreement, which formed the basis for the NPRM.
In Re Advocates for Highway and Auto Safety, the International Brotherhood of Teamsters; and Citizens for Reliable and Safe Highways vs. Anthony Foxx, Secretary of the United States Department of Transportation, et al.	Court Action	September 18, 2014; No. 14–1183, D.C. Circuit (2014).	FMCSA and DOT are sued in a mandamus action requesting that the D.C. Circuit order the Agency to publish a proposed rule on ELDT in 60 days and a final rule within 120 days of the Court's order.
		March 10, 2015	The court ordered that the petition for writ of mandamus be held in abeyance pending a further order of the court to permit the DOT to issue final regulations pursuant to MAP–21.
Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators.	FMCSA's NPRM	March 7, 2016; 81 FR 11944.	Based on the consensus findings of the Entry-Level Driver Advisory Committee, FMCSA proposed new training standards for certain individuals applying for their initial CDL; an upgrade of their CDL (e.g., a Class B CDL holder seeking a Class A CDL); or a hazardous materials, passenger, or school bus endorsement; and a ''refresher'' training curriculum.

VI. March 7, 2016, Proposed Rule

MAP–21 mandated that the FMCSA issue regulations to establish minimum entry-level training requirements for interstate and intrastate applicants obtaining a CDL for the first time, CDL holders seeking license upgrades, and those seeking passenger (P) or hazardous materials (H) endorsements. In response to that statutory mandate, the Agency published an NPRM, ''Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators,'' on March 7, 2016. In the NPRM, FMCSA proposed the ELDTAC's consensus recommendations ''to the maximum extent possible consistent with its legal obligations'' as required under the Negotiated Rulemaking Act (5 U.S.C. 563(a)(7)).

The proposed regulations addressed the knowledge and/or skills training required for entry-level CMV drivers. Additionally, the NPRM outlined new eligibility standards that training providers must meet to deliver ELDT. Finally, while not specifically required by MAP–21, the NPRM reflected the ELDTAC's consensus that training should also be required for applicants seeking a school bus (S) endorsement and for CDL holders disqualified for safety-related CMV driving violations (refresher training).

The proposed rule generally applied to those individuals who obtain a CDL (or a CDL upgrade or endorsement) on or after the compliance date of the final rule and did not otherwise amend substantive CDL requirements in 49 CFR parts 383 and 384. The NPRM identified specific categories of drivers excluded from the rule, based on current exceptions in part 383.

The proposed rule also applied to entities that train CDL applicants. Such providers would, at a minimum, provide instruction in accordance with a training curriculum that meets all FMCSA standards as set forth in the NPRM. Under the NPRM, training providers would attest to their compliance with the eligibility requirements set forth in proposed subpart G of part 380. These proposed requirements addressed the following areas: Course administration; instructional personnel qualifications; training vehicles; training facilities (*e.g.,* classroom and range); curricula; and

proficiency assessment of driver-trainees. Training providers meeting these proposed requirements would be eligible for listing on FMCSA's Training Provider Registry (TPR) and would also be required to meet the criteria for continued listing on the TPR. The NPRM proposed that training providers would, at FMCSA's request, be required to supply specified documentary evidence to verify their compliance with the TPR eligibility requirements.

The NPRM described factors that would justify FMCSA's removal of a training entity from the TPR, setting forth procedures the Agency would follow before removing an entity from the TPR. The NPRM also proposed procedures that training providers would follow in order to challenge a proposed removal and to apply for reinstatement to the TPR following involuntary removal.

The NPRM proposed that training providers would electronically notify the TPR by the close of the next business day after driver-trainees completed training. The submission of this documentation would ensure that each individual received the required training from a provider listed on the TPR prior to taking the State-administered CDL skills test for the Class A or B CDL and/or the passenger or school bus endorsement, or the knowledge test for the hazardous materials endorsement.

The NPRM proposed core curricula for Class A CDL and Class B CDL applicants; curricula for the P, S, and H endorsements; and a ''refresher'' training curriculum. The proposed core curricula for Class A and Class B CDL training programs, as well as the P and S curricula, were subdivided into theory and BTW (range and public road) components. The H endorsement training curriculum was proposed as theory-only training because there is no CDL skills test currently required for those seeking an H endorsement. The NPRM did not propose that any minimum number of hours be spent by driver-trainees in completing the theory portions of any of the individual curricula, though training providers must cover all elements of the applicable curriculum and trainees must achieve an overall score of at least 80 percent on the written theory assessment.

The NPRM proposed that a minimum number of BTW hours be required for the Class A and Class B curricula. Class A applicants would be required to complete at least 30 hours of BTW training, while Class B applicants would need to complete a minimum of 15 hours BTW. The NPRM did not propose that driver-trainees spend any minimum number of hours to complete the BTW portion of the P or S curriculum. The preamble to the proposed rule stated that, for BTW training, ''[a]ll required driving maneuvers must be performed to the satisfaction of the instructor . . .'' As proposed, a CDL holder disqualified from operating a CMV due to safety-related violations would need to complete refresher training requirements before applying for reinstatement of his/her CDL. Similar to the other proposed curricula, the refresher curriculum included both theory and BTW components; however, the NPRM did not propose that a minimum number of hours be required to complete any portion of the refresher curriculum. The Agency proposed that SDLAs issue limited CDL privileges for persons seeking to become reinstated, solely for the purpose of allowing the driver to complete the BTW portion of the refresher curriculum.

The proposed compliance date for this rule was three years after the effective date of the final rule. The Agency believed the three-year phase-in period would give the States enough time to (1) pass implementing legislation and/or regulations as necessary; (2) modify their information systems to begin recording the training provider's certification information into CDLIS and onto the driver's CDL record; and (3) begin making that information available to other States through CDLIS. The three-year phase-in period would also allow ample time for the CMV driver training industry to develop and begin offering training programs that meet the requirements for listing on the TPR.

VII. Discussion of Comments and Responses on the NPRM

There were 338 submissions on the proposed rule, 190 of which provided substantive comments. In addition to private citizens, the following types of entities commented on the proposed rule: Academic institutions, agriculture industry, motor carriers, CMV driver trainers, electric utilities, professional associations, owner/operators, safety advocacy groups, State DMVs and other governmental entities, school bus operations, and trade associations.

Commenters generally supporting the proposed rule endorsed setting minimum standards, which they said would improve road safety and reduce crashes involving CMVs. While a number of commenters asserted that over the long term, entry-level driver training would result in greater highway safety and efficiencies and savings for the industry, none of those comments included quantitative data to support that assertion.

Commenters generally opposing the NPRM made several arguments. The most frequent assertions were that an entry-level driver training program would exacerbate a commercial driver shortage (especially for school bus drivers), that an ELDT rule was unnecessary because carrier-based or other existing training regimens already work, that FMCSA had no data to support the proposed requirements, and that FMCSA exaggerated savings or underestimated costs of the ELDT proposal.

1. Applicability of the ELDT Requirements

The ELDT requirements proposed in the NPRM pertain to drivers who meet the definition of ''entry-level driver'' in § 380.605 and who intend to drive CMVs in interstate and/or intrastate commerce. As proposed, drivers holding a valid Class A or Class B CDL or a P, S, or H endorsement issued before the compliance date of the final rule would not be subject to ELDT requirements. Under the NPRM, the following categories of drivers, who are currently excepted or may, at the State's discretion, be excepted from CDL requirements, would also be excepted from the ELDT requirements: (1) Drivers excepted from the CDL requirements under § 383.3(c), (d), and (h), which includes individuals who operate CMVs for military purposes, farmers, firefighters, emergency response vehicle drivers and drivers removing snow and ice, and drivers of ''covered farm vehicles''; (2) drivers applying for a restricted CDL under § 383.3 (e) through (g); and (3) veterans with military experience who meet the requirements and conditions of § 383.77.

Comments: FMCSA received numerous comments from various industry segments requesting exceptions from the ELDT final rule. Comments filed jointly by the American Public Power Association (APPA), the Edison Electrical Institute (EEI), and the National Rural Electric Cooperative Association (NRECA) requested that FMCSA exclude electric utility drivers from the ELDT requirements. These commenters stated that driving represents a small proportion of a utility worker's daily responsibilities and that electric utility drivers have excellent safety records.

The Association of American Railroads (AAR) commented that several of the proposed training standards should not apply to railroad employees required to hold a CDL. For example, AAR stated that FMCSA

should not require railroad employees who hold CDLs for their duties to demonstrate skills such as alley dock backing or other skills that are not necessary for the performance of their specific job functions. The Brotherhood of Railroad Signalmen also requested an exception for railroad employees who hold CDLs. An individual commenter requested that truck repair technicians be able to obtain a ''special'' CDL because they normally travel only short distances to repair facilities.

FMCSA received a large number of comments from the custom harvester industry requesting an exception from the ELDT rule. The commenters generally cited the following arguments in support of their request. First, custom harvesters hire and train seasonal CDL drivers, most of whom do not already have a CDL. Consequently, the custom harvester typically provides training to enable the driver to obtain a CDL. Because many entry-level drivers in the custom harvester industry cannot afford training costs and other CDL-related expenses, the employer must directly pay for, or absorb the cost of, providing CDL-related training. Custom harvester employers therefore believed that the ELDT training requirements would impose additional costs on them.

Second, the custom harvester industry argued that because the CMV testing and licensing standards in certain foreign jurisdictions do not meet the CDL testing standards established in part 383, a temporary worker who holds an H2–A visa must obtain a non-domiciled CDL. Non-domiciled CDLs are valid only for the length of the holder's work visa, which is normally six to eleven months. Commenters felt it was unfair for them to incur the cost of training drivers who obtain a CDL that is valid only for the length of their employment in the United States, and for whom they usually have to pay transportation expenses to and from the United States.

Third, custom harvester industry commenters asserted that they have a strong driver safety record in the United States. The National Council of Farmer Cooperatives (NCFC) noted that agricultural services ''present a lower risk relative to other types of commercial vehicle operations due to the nature of agricultural production and the way trucks and application equipment are used.'' NCFC specifically cited less traffic congestion in rural areas and fewer total miles driven than the ''general commercial trucking industry.'' NCFC requested that FMCSA therefore grant recognition for ''existing training programs, previous driving experience, and current industry practices for non-accredited entry-level driver classroom and behind-the-wheel training requirements for farm-related industries.''

The Oregon Department of Transportation (ODOT) supported the proposed exception for holders of valid CDLs issued before the compliance date of the final rule, as provided in § 380.603(b), but noted that the language ''except as otherwise specifically provided'' is very unclear.

FMCSA Response: The ELDT requirements established in today's rule are aligned with the existing CDL requirements in part 383. The final rule does not create any new exceptions. Therefore, any individual who is currently excepted from taking a skills test in order to obtain a Class A or Class B CDL or a P or S endorsement would not be subject to the final rule.

FMCSA acknowledges the concerns raised by the custom harvest industry and others who believe that the specialized nature of their industries makes mandated ELDT unnecessary or unduly burdensome. In response, FMCSA emphasizes that any entity or employer currently providing training would be eligible for listing on the TPR, as long as the applicable minimum curricula and instructor requirements set forth in today's rule are met. Additional costs for such providers would include online registration for the TPR, which the Agency estimates will be minimal (see RIA for discussion of these costs). In addition, as noted in the NPRM and elsewhere in this preamble, today's rule does not impose any new Federal accreditation requirements on either classroom or BTW training providers.

Further, the fact that CDL applicants in a specific industry expect to perform job functions that are more limited than the scope of the required curricula, or who may be expected to travel relatively short distances in the course of their employment, is not a valid basis for exception from ELDT requirements. Entry-level drivers obtaining a Class A or B CDL or a P, S, or H endorsement for the first time are presumed competent to safely operate the type of CMV for which they have received a license. Accordingly, CDL holders should be capable of operating the vehicle in appropriate settings and circumstances, which may go beyond the specific purpose or employment for which they initially obtained the CDL or endorsement. Regardless of an applicant's intentions at the time he or she obtains a CDL or endorsement, the individual is in fact credentialed to operate a range of CMVs falling within the CDL class of license or endorsement received. Therefore, based on the current CDL program, it is reasonable for FMCSA to require these individuals to receive training commensurate with the CMV driving credentials they hold.

Additionally, FMCSA notes that it would be virtually impossible to implement and enforce exemptions from the ELDT requirements in today's rule based either on the driver's industry or anticipated use of a CMV for which a CDL or endorsement is required.

The Agency also notes that the training requirements established in today's rule are generally imposed on a one-time-only basis. This also holds true for non-domiciled CDL holders; once they complete training for the non-domiciled CDL class or endorsement, they would not be required to repeat that same training upon their return to the United States in subsequent years. Therefore, H2–A workers in the custom harvest industry would need to complete the applicable ELDT requirements only once. In addition, because the final rule permits driver-trainees to obtain theory and BTW training from separate providers, absent a conflicting State requirement, foreign workers can complete the theory portion of the training online in order to reduce ELDT related costs.

Finally, as proposed, the ELDT requirements do not apply to individuals holding a valid CDL or a P, S, or H endorsement issued before the compliance date of the final rule. Due to other changes in the final rule discussed below, FMCSA deletes the language ''except as otherwise specifically provided'' from § 380.603(b).

2. ELDT Requirements for CDL Applicants Obtaining a CLP Before the Compliance Date of the Final Rule

As proposed, § 380.603(c)(1) required that individuals who obtain a CLP before the compliance date of the final rule would not be subject to ELDT requirements if they obtain a CDL within 360 days of obtaining a CLP. Therefore, under the NPRM, CLP holders who fail to obtain a CDL within the 360-day time frame would be required to complete ELDT before taking the required State-administered skills test.

Comments: The New York Department of Motor Vehicles (NY DMV) commented that ''360 days is too limited and problematic'' because the States regulate how long a driver may wait from expiration of the original CLP before renewing that CLP. Because a CLP holder does not necessarily renew the CLP exactly on the date of expiration, the period of time from the

original CLP issuance date to the expiration date of the renewed CLP may be longer than 360 days. The ODOT asked that the 360-day limit be changed to one year. The Virginia Department of Motor Vehicles (Virginia), noting that ''a CLP (original and renewal) could potentially be issued for a period of 390 plus days based on Virginia's 30-day grace period,'' requested that the period be for the full duration of the CLP instead of 360 days.

FMCSA Response: The Agency based the proposed 360-day time period on current CLP requirements, which state that the CLP must be valid for no more than 180 days from the date of issuance; States may renew the CLP for an additional 180 days without requiring the applicant to retake applicable knowledge tests (§ 383.25(c)). However, the comments illustrate that, in practice, the requirements related to CLP renewal vary among the States, thereby resulting in an amount of time between the date of initial CLP issuance and the expiration date of the renewed CLP that may be longer than 360 days. Accordingly, FMCSA revises the language in § 380.603(c)(1) to state that individuals who obtain a CLP before the compliance date of the final rule are not subject to ELDT requirements as long as they obtain a CDL before the expiration date of the CLP or renewed CLP. Any CLP holder who fails to obtain the CDL within that period would be subject to the ELDT requirements established in the final rule. The Agency believes this approach provides sufficient flexibility for the States.

In addition, under revised § 380.603(c)(1), CLPs with endorsements are included within the scope of this exception. Accordingly, any applicant who obtains a P or S endorsement on his or her CLP before the compliance date of the final rule is not required to complete the P or S endorsement training curriculum if the applicant receives the endorsement before the initial or renewed CLP expires.

This requirement would not apply to individuals seeking the H endorsement, who are not required to take a skills test, and therefore do not need to obtain a CLP. Unlike the P and S endorsements, the H endorsement is not linked to any specific class or type of vehicle. Accordingly, applicants for the H endorsement will already hold a Class A or B CDL, or will be concurrently obtaining a Class A or B CDL at the time they apply for the H endorsement, or intend to transport hazardous materials in a vehicle for which a Class A or B CDL is not required (*e.g.,* a pick-up truck).

3. ELDT Requirements for CDL Applicants Obtaining a CLP After the Compliance Date of the Final Rule

The NPRM proposed that individuals obtaining a CLP on or after the compliance date of the final rule must comply with applicable ELDT requirements. The Agency received no comments on this requirement and it is retained, as proposed, in § 380.603(c)(2).

4. ELDT Requirements for Driver-Trainees Who Obtain ELDT After the Compliance Date of the Final Rule

The NPRM proposed that, except for driver-trainees seeking the H endorsement, driver-trainees must complete the theory and skills portion of the training within 360 days (§ 383.71(a)(4)).

Comments: AAMVA requested ''clarification on whether satisfactory completion before the 360 day expiration is based on the date of completion of the [theory] portion of the curriculum, the completion of the behind-the-wheel portion of the training, successful completion of the skills test, or the issuance of the CDL.''

FMCSA Response: The proposed requirement that theory and BTW training be taken within a defined period of time reflects the ELDTAC's concern that, given the integrated nature of the training, waiting too long to complete both portions of the curriculum may diminish the overall value of the training experience. The Agency retains that concept in the final rule. However, for clarity and consistency, we changed the applicable time period from 360 days to one year and moved the provision from part 383 to part 380. Accordingly, under new § 380.603(c)(3), on or after the compliance date of the final rule, individuals who take ELDT related to the Class A or Class B CDL, or the S and/or P endorsement, must complete both portions of the training (theory and BTW) within one year of completing the first portion. As discussed below, today's rule does not require that theory and BTW training be taken in a particular sequence.

5. Impact of the NPRM on ELDT Requirements Imposed by the States

The NPRM proposed minimum training standards for entry-level CMV drivers, minimum qualification requirements for individuals providing theory and/or BTW instruction, and minimum eligibility requirements for training providers.

Comments: Several comments addressed differences between the NPRM and existing State requirements related to ELDT. The State of Washington Department of Licensing (Washington) commented that its minimum commercial driver training requirements, adopted in 2009, include more required hours for entry-level drivers than the NPRM, and urged FMCSA ''to adopt requirements with greater hours that are more comparable to our state's requirements.'' The New York Association for Pupil Transportation (NYAPT) commented that ''FMCSA should consider ways to grandfather existing State programs that meet or exceed the proposed high training standards to continue in place, particularly within the school bus industry.''

The State of Michigan, Bureau of Driver and Vehicle Licensing Programs, Department of State (Michigan), recommended that the final rule require that theory/classroom training be coordinated with BTW training, adding that ''[i]f not required by the rule, States should be allowed to require such coordination.'' Michigan also noted that, because ''some States do not presently allow the use of online training courses for driver education,'' the final rule should not require that States accept online training.

A commenter representing the Driver and Vehicle Services Division of the Minnesota Department of Public Safety (Minnesota) noted that ''Minnesota's licensed CDL behind-the-wheel instructor qualifications refer to hours of experience, by a showing of 3,000 hours within the last five years operating the class of vehicle for which instruction will be provided.'' Also discussing the NPRM's requirements for BTW instructors, Virginia requested that ''the proposed language be revised to indicate these are minimum requirements so that States have flexibility in requiring additional criteria.''

FMCSA Response: Today's rule implements MAP–21's mandate that FMCSA establish minimum entry-level training requirements for individuals who operate CMVs in intrastate and interstate commerce for which a specified class of CDL or endorsement is required. The rule amends the current entry-level driver training requirements in 49 CFR part 380, the training section of the CDL regulations. The CDL program does not have preemptive effect. In order to remain eligible to receive certain Federal aid highway funds pursuant to 49 U.S.C. 31314, States must adopt regulations that comply substantially with the requirements of the CDL program. Today's rule generally does not replace or otherwise supersede State-based

ELDT requirements that exceed these minimum Federal standards when an entry-level driver obtains training in that State. The Agency believes that Congress, by expressly requiring that the Secretary establish *minimum* training requirements for entry-level CMV drivers, intended this result.

In order to comply with the requirements of today's rule, entry-level drivers must obtain BTW and/or theory training from a provider listed on the TPR. Under the final rule, the BTW portion of the required training must be completed before the applicant can take the State-administered skills test, except for H endorsement applicants, who must complete the H endorsement theory curriculum before taking the State-administered knowledge test.

The question of which, if any, additional State-based ELDT-related requirements apply to the applicant will be determined by where he or she obtains their BTW and/or theory training for the Class A or Class B CDL and/or the P, S, or H endorsements.

The Agency anticipates that most driver-trainees will obtain ELDT in their State of domicile. Under the final rule, driver-trainees who obtain BTW and/or theory training in their State of domicile are subject to any additional ELDT requirements that State imposes on CDL applicants.

For example, if a State requires that entry-level drivers complete a CDL training program with a prescribed minimum number of BTW hours, a driver-trainee who is domiciled there and obtains BTW training there, must comply with that requirement in order to take the State-administered the skills test. Similarly, driver-trainees who take theory training in their State of domicile would be required to comply with any State-based requirements applicable to theory training. Therefore, if a driver-trainee's State of domicile prohibits online CDL-related theory training, the individual would be required to obtain theory training in a classroom or other ''live'' setting permitted by the State. In these examples, the applicant's State of domicile is both the training State and the licensing State.

However, the final rule does not prohibit driver-trainees from obtaining training outside their State of domicile, if they so choose. Under § 383.79, which currently permits a non-domicile State to administer CDL skills testing to an applicant who has taken training in that State, but is to be licensed in his or her State of domicile, requires the applicant's licensing State to accept the results of that skills testing. This could occur, for example, if the applicant's prospective employer provided the training in a State other than the applicant's State of domicile. Under today's rule, any ELDT requirements that may exist in the licensing State (*i.e.,* the applicant's State of domicile) would not be applicable to the driver-trainee who obtained skills training outside that State, even if the he or she returns to the licensing State to take the skills test (as permitted under § 383.79). Consequently, an applicant's State of domicile must issue a CDL to him or her, even if the BTW training requirements imposed by the training State do not conform with those in the State of domicile, as long as the applicant obtained the training from a provider listed on the TPR.

Driver-trainees who elect to obtain theory training outside their State of domicile would also be subject to any additional theory training requirements imposed on CDL applicants by the training State. Accordingly, driver-trainees, when selecting a training provider, will need to understand the specific State-based ELDT requirements (if any) where they intend to obtain either type of training. FMCSA notes that the final rule does not require that driver-trainees obtain theory training prior to taking the State-administered knowledge test (except for H endorsement applicants), nor does it require that driver-trainees obtain theory training in the same State where they intend to take the State-administered knowledge test for any CDL license class or endorsement covered by the rule.

The minimum standards in today's rule also apply to ELDT providers and instructors. Training providers must meet and continue to comply with eligibility requirements, set forth in §§ 380.703 and 719 of the final rule, including utilizing qualified theory and BTW instructors. In order to be eligible for listing on the TPR, training providers must also comply with applicable State requirements in each State where in-person training is conducted, and must utilize theory and/or BTW instructors who comply with applicable qualification requirements in each State where in-person training is conducted. The Agency notes that, just as States may impose additional requirements on entry-level drivers who obtain training in their State, the final rule also permits States to impose requirements beyond the training or instructor/provider qualification standards adopted today.

For example, States are free to require that ELDT instructors in their State have more years of experience operating the class of vehicle for which instruction will be provided than the two-year minimum established in the final rule. States would also be free to add ELDT instructor qualifications, such as a required level of vocational or academic education (neither of which is required by today's final rule); or to impose additional bases for disqualification of training instructors. In these situations, training providers must comply with the additional requirements imposed in their respective States in order to meet the TPR eligibility requirement set forth in § 380.703(a)(5)(i).

In today's rule, the only exception to this requirement is for training providers who provide theory training exclusively online. While online content must be prepared and delivered by instructors meeting the qualification requirements of the final rule, the provider is not required to utilize instructors complying with State-based theory instructor qualifications. As explained below in the discussion of the definition of ''theory instructor,'' online providers cannot reasonably be expected to require that their theory instructors comply with multiple, and potentially conflicting, qualification requirements in any State where the online training might be taken.

As our discussion of these hypothetical examples illustrates, the purpose of this final rule is to establish a floor, not a ceiling, by requiring, at a minimum, that entry-level CMV drivers demonstrate proficiency in the applicable theory and BTW curricula established today. The Agency believes that, to the extent practicable, and consistent with Congressional intent, the final rule allows States the flexibility to impose additional ELDT requirements on driver-trainees who obtain training in their State and on training providers and instructors who deliver training in their State. That said, we are aware that questions concerning the relationship between Federal and State ELDT requirements will inevitably arise, and the Agency will provide additional post-rule guidance to address those issues, as necessary.

6. Application of ELDT Requirements to CMV Drivers Operating in Intrastate and Interstate Commerce

As proposed, ELDT requirements apply to all entry-level drivers operating CMVs in intrastate and interstate commerce, subject to the limited exceptions noted above.

Comments: The State of South Dakota suggested a less burdensome option requiring training only for drivers who will be operating CMVs in interstate commerce. South Dakota stated the training would be a burden, and in some cases would prevent children from getting to school, citizens from receiving

fuel for heat, grain elevator/co-op businesses from providing services to farmers, and public transit services (especially in rural areas) from finding drivers.

FMCSA Response: The Agency does not believe that today's rule will unduly burden intrastate commerce. In any event, FMCSA has no legal authority to exclude intrastate CMV drivers from the final rule. As noted in the Legal Basis for the Rulemaking, MAP–21 requires that ELDT regulations, as a CDL-related mandate, apply to prospective CDL holders operating in either intrastate or interstate commerce. Accordingly, the scope of operations covered by the final rule is unchanged from the NPRM.

7. Definition of Training Provider

The NPRM defined ''training provider'' as ''an entity that is listed on the FMCSA TPR, as required by subpart G of this part.'' In the preamble, the Agency noted that training providers could be training schools, educational institutions, motor carriers providing ''in-house'' training to current or prospective employees, local governments, or school districts.

Comments: The National Motor Freight Traffic Association (NMFTA) acknowledged the preamble's reference to the fact that motor carriers offering in-house training to entry-level drivers could be eligible for listing on the TPR. NMFTA noted, however, that the NPRM did not ''expressly acknowledge the right of motor carriers to continue offering training under the new regulatory scheme'' and requested that the Agency do so in the final rule. The Associated General Contractors also requested that the rule ''be expanded to include a listing of the types of entities that can offer training programs and include in-house providers.''

FMCSA Response: FMCSA intends that any entity meeting the eligibility requirements established in subpart G of today's rule can be listed on the TPR and thus be qualified to provide ELDT that would satisfy the rule's requirements. In order to clarify our intent, in the final rule, we amend the definition of ''training provider'' in § 380.605 to specifically identify types of entities that may be eligible for listing on the TPR. The Agency included, as examples, training schools, educational institutions, rural electric cooperatives, motor carriers, State/local governments, school districts, joint labor management programs, owner-operators, and individuals, in this definition. In addition, FMCSA notes that eligible providers may provide training either on a ''for-hire'' or ''not-for-hire'' basis. Examples include motor carriers who provide ELDT at no cost to current or prospective employees, independent training schools charging tuition, and individuals who train family or friends (either at no cost or for a fee). We note that this list of entities which could potentially qualify for TPR listing is *not* exclusive. Our purpose in amending the definition of ''training provider'' in today's rule is to identify specific examples of potentially eligible entities. We emphasize, however, that *any* training provider meeting the eligibility requirements could be qualified to provide ELDT in accordance with the final rule, regardless of whether they fall within a category specifically identified in § 380.605. Additional descriptive information on the various types of training providers covered by the final rule are addressed in the TPR registration instructions accompanying this rule.

8. Definition of ''Range''

In the NPRM, FMCSA said a range was ''an area that must be free of obstructions, enables the driver to maneuver safely and free from interference from other vehicles and hazards, and has adequate sight lines.''

Comments: Several commenters asked whether the proposed definition of ''range'' would permit small and mid-sized entities to conduct BTW range training in their yards. One commenter noted that it is neither practical nor cost effective for smaller trucking companies to set up or rent a practice driving range. OOIDA supported the proposed definition because the flexibility to conduct range training in any suitable location meeting the definitional requirements is ''especially critical to small business truckers who would be able to utilize these areas for training.'' Vincennes University (VU) noted that the NPRM includes references to both ''range'' and ''driving range'' and asked whether the two terms are interchangeable.

FMCSA Response: In today's rule, FMCSA retains the definition of ''range'' as proposed in the NPRM. This definition gives training providers the flexibility to conduct BTW range training in *any* area that meets the three basic requirements outlined in the NPRM. Accordingly, this approach does not require that any training provider maintain its own designated range for BTW training. As discussed in the NPRM, the ELDTAC took into account the impact of the rule on smaller training providers by proposing a definition of ''range'' that does not require any training provider to maintain or rent a private facility or space in which to conduct BTW range training. Under this definition, range training could be conducted in public areas, such as a mall or office building parking lot during ''off'' hours. It is up to the training provider to ensure that the required elements, such as sufficient space in which to safely maneuver the CMV, are met. However, if a training provider chooses to conduct range training in a publicly accessible area, all CLP requirements apply. Finally, in order to avoid confusion, the Agency deletes the term ''driving range'' from the regulatory text of the final rule. The relevant term, as defined in § 380.605, is ''range.''

9. Can BTW-range and BTW-public road training be obtained from separate training providers?

As proposed, training in the theory and BTW portions of the curricula may be delivered by different training providers, as long as each provider is listed on the TPR. The NPRM was silent on whether the range and public road portions of the Class A and B curricula could be delivered by different providers.

Comments: An individual commenter asked whether the range and public road portion of the BTW training could be obtained from different training providers. The commenter stated that this approach would be helpful to ''some BTW providers who will struggle to secure a range that meets FMCSA requirements, but could easily deliver the public road portion of the training.''

FMCSA Response: While today's rule does permit BTW (range and public road) and theory training to be obtained from separate training providers, FMCSA believes it is necessary that driver-trainees receive both the range and public road portions of BTW training from the same provider. FMCSA clarifies this requirement in the final rule. The reason is that meaningful instruction in the range and public road portions of BTW training requires that the provider be able to assess the driver-trainee's skill proficiency in the two settings and to adjust the amount of time or emphasis spent on the range or public road maneuvers accordingly. This integrated approach to BTW instruction permits the training provider to obtain a complete picture of the individual driver-trainee's abilities when operating CMVs for which a Class A or Class B CDL is required.

Further, in the case of BTW training for the S and P endorsements, the range and public road portions are not set out separately as they are for the Class A and B CDL core curricula. Instead, they are combined into a single BTW (range and public road) curriculum, effectively

requiring that the BTW training be obtained from one provider.

Finally, as noted above in the discussion of the definition of ''range,'' training providers are not required to maintain or rent a private range in order to conduct BTW training. Publicly accessible areas can be used for this purpose, as long as the area affords sufficient space in which the required range maneuvers can be performed safely and other basic requirements are met.

10. Small Training Entities

The NPRM proposed that training providers who train, or expect to train, three or fewer entry-level drivers per year be exempt from two requirements applicable to all other providers. First, in order to qualify as a theory instructor, small training entities would not be required to have previously audited or instructed that portion of the theory curriculum they intend to instruct. Second, small entities would not be required to provide written training materials for any of the curricula. The purpose of these exemptions was to lessen the administrative burden on small training entities.

Comments: The Delaware DMV commented that exemptions for small training entities should be removed, noting that ''[t]he size of the provider should not be taken into account if the goal is to sanction a consistent [training program] for all entry level commercial motor vehicle operators.'' Another commenter objected to the exemption related to written training materials, stating that ''all driver-trainees should be treated the same.'' The Delaware DMV pointed out that, for many providers, the number of entry-level drivers trained in the course of a year fluctuates and may be difficult to predict. Since small training entities would have to identify their status on the Training Provider Identification Report form, the commenter noted that it would be cumbersome for providers to amend the form every time they fell above or below the three driver limit.

IUOE observed that ''[s]ince written materials are integral components of high quality training, this exemption from providing written materials to trainees is contrary to the goals of this rulemaking.'' IUOE also noted that the use of written training materials ''is an obvious prerequisite to taking a test in a written or electronic format to demonstrate mastery of the information.''

FMCSA Response: After consideration of comments, FMCSA concludes that the two small training entity exemptions proposed in the NPRM, as described above, are inconsistent with a uniform Federal minimum ELDT standard. The Agency agrees with commenters who questioned the benefit and efficacy of these relatively minor distinctions between small training entities and other training providers. We therefore remove the exemptions from the final rule. Accordingly, all training providers subject to this rule, regardless of size, must meet the same eligibility criteria and other requirements established in subpart G.

The Agency does not anticipate that removal of the two exemptions will result in undue hardship on small training entities. For example, the AAMVA CDL manual or other existing training materials could be used to satisfy the requirement that written training materials be provided. We also note that, because the rule permits driver-trainees to obtain theory and BTW instruction from separate training providers, small entities can opt not to offer theory instruction if they so choose.

Further, as discussed below in the Explanation of Changes from the NPRM, FMCSA deletes from the definition of ''theory instructor'' in the final rule the proposed alternate theory instructor qualification requiring that instructors must have previously audited or instructed that portion of the theory curriculum they intend to instruct. Accordingly, the proposed small entity exemption to that requirement is also deleted.

Finally, FMCSA notes that the NPRM requested comments regarding any specific changes to the proposal that would lessen its regulatory impact on small business entities. The Agency did not receive any comments in response to that request.

11. Required Minimum Number of BTW Hours

FMCSA proposed a minimum number of required BTW hours for the range and public road portions of the Class A and Class B CDL curricula: Class A CDL driver-trainees would be required to receive a minimum of 30 hours of BTW training, with a minimum of 10 hours spent on a range, and either 10 hours spent driving on a public road or 10 public road trips (each no less than 50 minutes in duration). The remaining 10 hours of required BTW training could occur on either the range, public road, or some combination of the two, depending on the instructor's assessment of the individual driver-trainee's needs. Additionally, the NPRM proposed that all required driving maneuvers must be performed to the satisfaction of the instructor. In the NPRM, the definitions of ''BTW range training'' and ''BTW public road training'' each included a requirement that the training occur when a ''driver-trainee has actual control of the power unit during a driving lesson'' conducted on a range or public road.

As proposed, Class B CDL trainees would receive a minimum of 15 hours of BTW (range and public road) training, with a minimum of seven hours of public road driving. Again, the instructor would determine how the remaining eight hours are spent, as long as all the BTW elements of the range curriculum are covered.

FMCSA did not propose a minimum number of BTW hours for either the P or the S endorsement curricula.

The Agency requested comment on various aspects of this approach, including whether there should be a required minimum number of BTW hours for the Class A and Class B curricula and, if so, what the minimum number of BTW hours should be. In addition, we requested comment on whether any minimum number of BTW hours should be required for the P and S endorsements. The Agency also asked what alternatives to a required minimum number of BTW hours, such as a requirement expressed in terms of outcomes rather than specifying the means to those ends, would be appropriate to ensure an adequate level of BTW training for Classes A and B.

Comments in support of minimum BTW hours: The Agency received numerous comments in response to its questions. Some commenters thought that the number of proposed minimum BTW hours was too low. Jeff Frank, a CMV driver training instructor, commented that ''[t]he proposed 15 hours for Class B and 30 hours for Class A of behind the wheel time fall short of a quality standard.'' Mr. Frank stated that ''doubling the proposed hours would improve skill sets in most beginners.'' The American Association for Justice believes that ''[w]hen considering the average amount of time a CMV driver can do within a week, it is clear that these requirements are inadequate.'' Washington commented that the NPRM ''does not include enough required hours for an entry-level driver'' and encouraged FMCSA to increase the number of required BTW hours. The Utah Department of Public Safety (Utah) stated that ''a lengthier requirement for BTW training seems more appropriate.'' The National Ground Water Association (NGWA) proposed that ''30 hours is the minimum that should be required, regardless of class of license (A or B).'' IUOE commented that the proposed

minimum BTW hours is below the level of BTW training currently required by ''the more prominent providers and certifiers,'' as well as a number of States.

OOIDA commented that it ''would like to see significantly more robust training requirements than currently proposed; however the required 30 hours BTW training is a necessary first step.'' Similarly, although Delaware Technical Community College (DTCC) is ''satisfied with the consensus reached by the ELDTAC for 30 hours of BTW time for Class A,'' it supports a ''stronger BTW requirement.'' Specifically, DTCC proposed increasing the BTW hours for Class B from 15, as proposed, to 20, with a minimum of 10 hours of public road driving. The Delaware Motor Transport Association (DMTA) also supported increasing the minimum number of BTW hours for the Class B CDL from 15 to 20.

Other commenters, including the American Bus Association (ABA), United Motorcoach Association (UMA), Advocates for Auto and Highway Safety (Advocates), San Juan College, the National Association of State Directors of Pupil Transportation Services (NASDPTS), VU, VA DMV, and the Commercial Vehicle Training Association (CVTA), supported the minimum number of required BTW hours for Class A and/or Class B as proposed. NASDPTS commented that ''[t]he [Class B] proposal is consistent with best practices and the high regard for safety exhibited within the nation's student transportation community.'' Advocates, a member of the ELDTAC, characterized the required minimum number of BTW hours as ''a common sense and essential component of the performance-based standard adopted by the ELDTAC.'' Advocates also noted that this approach ''reflects the consensus determination of the ELDTAC about the lowest level of BTW training that is necessary under the training curriculum.'' The ABA, also a member of the ELDTAC, commented that the BTW hours issue was discussed extensively during the Committee's deliberations and that ''[t]he minimum was based on the experience of current training providers' ability to deliver a basic program and ensure that all of the material was covered.''

The State of Michigan supported a required minimum number of BTW hours from which driver-trainees should not be permitted to ''opt out,'' but had no position on what the number of hours should be. The Iowa DOT also supported the ''concept of minimum hours of BTW training,'' but said that driver-trainees demonstrating proficiency should be able to ''opt out'' of the requirement. Minnesota commented that ''[r]equired minimum hours is needed,'' but questioned how compliance with an hours requirement would be documented. Schneider National (Schneider) agreed with FMCSA's proposal of 30 BTW hours for a Class A license, but recommended that hours spent on a public road specifically include practicing entry and exit of the interstate. [5] IUOE supported ''mandatory use of a 'Master Trip Sheet,' combined with a minimum number of BTW training [hours], as the most effective means to ensure that training providers furnish high quality training and that they thoroughly assess the skills of the trainees.'' Minnesota commented that ''[i]f minimum hours are not specified, then the potential for fraud within the training programs will be a concern.''

Several commenters supported adding a required number of minimum BTW hours to the P and S curricula. AAMVA recommended that FMCSA analyze the minimum number of hours required to complete the curricula ''and use that number to set the baseline for the BTW requirement for the S and P endorsements . . .'' The Iowa DOT supported a ''limited amount of BTW training'' for the S and P endorsements. San Juan College stated that ''[e]ntry-level Class C bus drivers should not be able to obtain a CDL without BTW hours that are required of other initial CDL applicants.''

Comments opposed to minimum BTW hours: A number of commenters opposed any minimum number of required BTW hours. Those opposing an hours-based requirement included ATA, the Iowa Motor Truck Association (IMTA), American Truck Dealers (ATD), Driver Holdings LLC, Werner, C.R. England, Petroleum Marketers Association of America (PMAA), Virginia Trucking Association (VTA), SNAC International, the National Propane Gas Association (NPGA), UPS, the North Dakota Motor Carriers Association (NDMCA), and the National Feed and Grain Association (NFGA). Most of those opposing the requirement alleged that the minimum BTW hours requirement is arbitrary, given the lack of any scientific evidence or data showing that an hours-based training requirement results in fewer crashes. Some commenters also cited the lack of flexibility inherent in a minimum hours requirement. Many of these commenters instead supported an ''alternative'' approach in which a driver-trainee's successful completion of the Class A and B BTW curricula is determined solely by his or her demonstrated proficiency (discussed below). National Association for Pupil Transportation (NAPT) commented that ''[s]etting arbitrary, one-size-fits-all hours of training as a standard would be overly restrictive in a world where actual performance should matter more.'' VTA asserted that the minimum BTW hours requirement ''will require additional equipment and trainers which will increase costs for training providers, who will have to pass those costs onto students.'' Other commenters, including PMAA, ATD and NFGA, were concerned that the BTW hours requirement would discourage entry-level drivers from obtaining a CDL. NFGA also noted that the requirement could ''dissuade employers from providing opportunities for CDL training.''

ATA, a member of the ELDTAC, viewed the proposed BTW hours requirement as unnecessary and not supported by any research indicating ''a relationship between the number of hours spent in training and a reduction in crashes.'' Noting that ''what little data is available does not support a minimum hours-based approach,'' ATA cited the American Transportation Research Institute's (ATRI) 2008 analysis of the effect of CDL driver training on safety performance. According to ATA, the ATRI study concluded that ''no relationship is evident between total training program contact hours and driver safety events when other factors such as age and length of employment are held constant.''

In its comments, C.R. England summarized a study it conducted among 2,929 of its drivers ''to test whether an hours-based program that requires 30 BTW hours or more, results in better performance than a performance-based program that requires fewer than 30 BTW hours.'' In analyzing this data, C.R. England found, among other things, that ''drivers from the shorter programs have fewer crashes and less severe crashes,'' thus showing ''a negative correlation between increased required hours and negative safety outcomes.'' C.R. England therefore recommended that, ''[g]iven the gaping lack of evidence to support the BTW requirement and the arbitrary selection of the number of required hours,'' FMCSA drop the requirement from the final rule.

ATA and other commenters also stated that the BTW hours requirement contravenes Executive Orders 12866 and 13563, both of which express a preference for establishing performance

[5] FMCSA added this topic to the Theory and BTW (public road) portions of the Class A and B core curricula. *See,* Appendix A and B to Part 380.

objectives rather than requiring regulated entities to adopt specific means of compliance. ATA asserted that, during the ELDTAC negotiations, ''it became clear that several parties would refuse to yield to the majority of members who preferred a performance-based standard to be instituted at least until such time as actual data from real-world experience demonstrates the need for a minimum hours requirement.''

Two commenters opposed a minimum BTW hours requirement for the P and S endorsements. NASDPTS commented that ''[g]iven the unparalleled high level of safety already provided by school bus transportation, we do not see any safety need or justification for further extending the specific BTW hours requirement to include the passenger and school bus curricula . . .'' San Juan College stated that for P and S endorsement applicants taking their State-administered skills test in a bus, ''no additional BTW should be required.''

Comments regarding alternatives to a minimum hours requirement: Most commenters who proposed alternatives to a required minimum number of BTW hours identified a competency or proficiency-based approach as a preferable means of ensuring an adequate level of BTW training for the Class A and B curricula. For example, the West Virginia Trucking Association (WVTA) commented that ''[m]any prospective drivers may demonstrate complete proficiency and competence behind-the-wheel before reaching the minimum hours requirement, while the possibility exists that by achieving this hour threshold, a prospective driver may erroneously convey competency and possession of the skills needed to safely operate a commercial vehicle.'' WVTA concluded that the final rule should ''focus on competency and performance outcomes rather than the number of hours logged.'' UPS commented that ''specific hours and curricular requirements are no substitute for performance-based skills testing,'' also noting that experienced drivers ''will not benefit from some portion of a mandatory training regime targeted at less-experienced drivers.'' The Iowa DOT commented that ''[a]n appropriate alternative would be establishing a method of allowing a driver to 'pass out' of the BTW requirement.''

Several commenters, including ATA, Werner and C.R. England, favored the use of a ''Master Trip Sheet'' to document the repeated successful demonstration of required skills as an alternative to the BTW hours requirement. Commenters identified a Master Trip Sheet as a document used to record a driver-trainee's successful, repetitive demonstration of required maneuvers. ATA commented that the Master Trip Sheet ''represents a clear performance objective—the demonstration of competence—. . . preferable to an arbitrarily assigned number of hours.''

Additionally, ATA stated that FMCSA, by failing to quantify or qualify the Master Trip Sheet alternative to the minimum BTW hours requirement adopted by the ELDTAC, did not comply with the requirements of OMB Circular A–4. According to ATA, had the Agency followed the directives of Circular A–4 and conducted a detailed analysis on the Master Trip Sheet solution offered by ELDTAC members, ''a performance-based BTW requirement would have prevailed because, as demonstrated by ELDTAC, it is feasible, and produces a more favorable cost benefit analysis.''

IUOE also supported the mandatory use of a Master Trip Sheet, but stressed that it should be combined with a minimum BTW hours requirement, which would be ''the most effective means to ensure that training providers furnish high quality training and that they thoroughly assess the skills of the trainees.''

On the other hand, NASDPTS stated it is ''unaware of any practical, measurable and universally acceptable means of employing an outcomes-based approach in lieu of a required number of BTW hours.'' Minnesota stated that if ''performance standards'' are adopted in lieu of a minimum BTW hours requirement, ''[t]his would defeat the purpose of requiring comprehensive entry-level driver training and will add another skewing variable to the purposed baseline of measuring the effectiveness of training in reducing crashes by tracking it through CDLIS.'' CVTA thought FMCSA's question regarding possible alternatives to a minimum BTW hours requirement was misleading, ''as the FMCSA seems to suggest that a performance or outcomes approach has not been selected. Clearly it has.''

FMCSA Response: For the reasons discussed below, this final rule does not require any minimum number of BTW hours for the completion of the Class A and B curricula, as proposed in the NPRM. In today's final rule, the proficient completion of the BTW portions of the Class A and B curricula is based solely on the training instructor's assessment of each driver-trainee's individual performance of the required BTW elements of the range and public road training. The final rule retains the definitions of ''BTW range training'' and ''BTW public road training,'' as proposed, so that successful completion of the training requires that, unless otherwise noted, all elements of the BTW curricula be proficiently demonstrated while the driver-trainee has actual control of the power unit during a driving lesson on a range or public road. Consistent with the NPRM, the final rule does not require a minimum number of BTW hours for either the P or S endorsement curriculum.

FMCSA carefully considered all comments submitted in response to the questions noted above. Clearly, as evidenced by the volume and breadth of comments received on the proposed BTW hours requirement, this issue is significant for a variety of stakeholders affected by today's rule. And, as we noted in the NPRM, ''the issue of a 'performance-based' approach to BTW training versus an approach requiring that a minimum number of hours be spent in BTW training was the most thoroughly debated issue within the ELDTAC'' (81 FR 11944, 11956 (March 7, 2016)). The Agency's conclusion that the final rule should not, at this time, impose a mandatory minimum number of BTW hours for the Class A and Class B training, is primarily due to the fact that, despite the best efforts of FMCSA and the ELDTAC, we were not able to obtain sufficient quantitative data linking mandatory minimum BTW training hours with positive safety outcomes, such as crash reduction, following publication of the NPRM.

Consistent with the Agency's objective to produce data-driven regulations that balance motor carrier safety with efficiency, FMCSA has long recognized the value of quantitative correlative evidence supporting ELDT. For example, in withdrawing the 2007 NPRM to establish minimum training requirements for entry-level CMV operators, which proposed a required minimum number of BTW hours, FMCSA noted the need ''to gather supporting information on the effectiveness of ELDT'' (78 FR 57585, 57587 (September 19, 2013)). Indeed, at the ELDTAC's initial meeting on February 26, 2015, the Agency presented on the topic of data gathering and economic analysis as a rule development priority, and a Cost-Benefit Analysis/Data Needs Work Group was established within the ELDTAC.[6] In the March 2016 NPRM,

[6] ELDTAC Meeting Minutes, February 26–27, 2015. For more information concerning the Cost-Benefit Analysis/Data Needs Work Group's efforts to compile data related to the efficacy of entry-level

FMCSA again requested ''any additional data on the safety benefits of requiring EDLT . . . (*e.g.,* demonstrated crash reduction as a result of training)'' (81 FR 11944, 11953 (March 7, 2016)). Unfortunately, the Agency did not receive any data that could be used in a quantitative analysis to support the rulemaking.[7]

As several commenters who opposed the minimum hours requirement noted, Executive Order 12866, as supplemented by Executive Order 13563, requires that Federal agencies propose or adopt regulations that ''to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt''.[8] In light of this Executive Order, and bearing in mind the Agency's obligation to identify and use ''the least burdensome tools for achieving regulatory ends,'' [9] FMCSA has determined not impose a mandatory minimum BTW hours requirement in today's rule. In the Agency's judgment, a training standard in which BTW proficiency is achieved according to the instructor's assessment of individual performance of required range and public road maneuvers is a more flexible, and thus less burdensome, option than mandatory minimum hours because it recognizes that driver-trainees will complete BTW training at a pace that reflects their varying levels of individual ability. FMCSA emphasizes, however, that instructors must cover all elements of the curricula and document the driver-trainee's demonstration of proficiency in the required BTW skills, as proposed.

In order to fulfill the statutory mandate set forth in MAP–21, the Agency established the ELDTAC and, as required under the Negotiated Rulemaking Act, relied on the Committee's consensus findings to the maximum extent possible as the basis for the NPRM. In the hope that the final rule development process would yield reliable data to support mandatory minimum BTW hours, FMCSA, as a member of the ELDTAC, supported the requirement in combination with an outcomes-based approach, as reflected in the Committee's Consensus Agreement.

FMCSA believes it was appropriate to propose minimum BTW hours for the Class A and B curricula, based on the ELDTAC's estimation of the time an average driver-trainee would need to demonstrate BTW proficiency. However, as some commenters noted, that approach could potentially result in the unintended consequence of effectively penalizing high-performing trainees who may be capable of achieving BTW proficiency in less time than the proposed required minimum. Based on the ELDTAC discussions, the Agency does not believe the proportion of high-performing trainees capable of completing the BTW curricula in significantly less time than the proposed minimums represents a substantial percentage of entry-level drivers. However, it is important to avoid, if possible, imposing unnecessary training costs on that population.

FMCSA acknowledges the numerous comments supporting minimum BTW hours as a ''common sense'' and intuitively effective means of ensuring that entry-level drivers receive adequate training to safely operate CMVs. As noted below, the Agency will continue to evaluate the impact of minimum BTW hours on CMV safety. Because the final rule does not include a minimum hours requirement as proposed, many of the comments that raised concerns regarding that approach are now moot. Accordingly, FMCSA does not specifically respond to comments suggesting that the requirement would discourage prospective applicants from obtaining a CDL, dissuade motor carrier employers from providing ELDT, or require training providers to obtain additional equipment.

The Agency's adoption of a proficiency-based BTW training standard in lieu of minimum hours notwithstanding, FMCSA believes that the ELDTAC process was highly constructive, and we greatly appreciate the time, effort and expertise put forth by ELDTAC members. The Committee's collective expertise allowed us to propose detailed minimum ELDT curricula and training instructor qualifications, which are largely retained in the final rule.

Our decision not to include the minimum BTW hours as part of the Class A and B curricula should not necessarily be construed as the Agency's last word on this subject. In order to gather data which will allow FMCSA to perform a thorough post-rule evaluation, we require in today's rule that all individual training certifications submitted to the TPR by training providers include the total number of BTW hours spent by each driver-trainee in achieving proficiency, as determined by the training instructor. Collecting this information will allow the Agency to compare the CMV driving records of drivers who received varying amounts of BTW training, and to draw conclusions regarding the extent to which hours of BTW training correlate to safer driving outcomes. This data will also assist in the Agency's oversight of training providers.

The Agency will thus continue to assess whether minimum BTW hours requirements are necessary to improve CMV safety, and, if so, at what levels. Should FMCSA ultimately decide, on the basis of post-rule quantitative data, to revisit the issue of mandatory minimum BTW hours for entry-level driver training, we will do so through notice-and-comment rulemaking. We note, however, that today's rule does not prohibit States or training providers from requiring a minimum number of BTW hours, as many CMV driver training programs currently do.

While the final rule does not impose mandatory minimum BTW hours, FMCSA nevertheless expects that, based on the extensive experience of CMV driver training organizations represented on the ELDTAC,[10] most

driver training, see the Work Group's meeting minutes posted on the ELDTAC's Web site, at *eldtac.dot.gov*.

[7] FMCSA specifically addresses the ATRI and C.R. England studies, referenced in comments, in the RIA. For the reasons discussed therein, the Agency does not rely on either of those studies to draw conclusions regarding the correlation between training hours and safety outcomes. Further, we note that the ATRI conclusions on which ATA and other commenters rely are described by ATRI as ''preliminary results.'' ATRI concludes its analysis with the observation that its findings ''indicate the need for further research on driver training and driver safety, beginning with additional data collection and analysis as part of the present study.''

[8] Executive Order 12866, section 1(b)(8) (October 4, 1993); Executive Order 13563, section 1(b)(4) (January 21, 2011).

[9] Executive Order 13563, section 1(a).

[10] Members of the ELDTAC included a variety of CMV driver training experts, including the Professional Truck Drivers Institute (PTDI), a non-profit organization that develops uniform skill performance, curriculum and performance standards for the trucking industry; the National Association of Publicly Funded Truck Driving Schools (NAPFTDS), a non-profit organization whose membership includes more than 100 publicly funded schools that operate truck driver training programs; and the Commercial Vehicle Training Association (CVTA), a national trade association representing the proprietary truck driving schools in the U.S. and Canada, with member school locations in 41 states graduating approximately 50,000 entry-level drivers per year. In addition to FMCSA, the remaining members of the ELDTAC are: FMCSA, Advocates for Highway and Auto Safety, American Association of Motor Vehicle Administrators, American Bus Association, Paraprofessional and School-Related Personnel, American Federation of Teachers (AFL–CIO), Amalgamated Transit Union (AFL–CIO), American Trucking Associations, Citizens for Reliable and Safe Highways, Commercial Vehicle Safety Alliance, Commercial Vehicle Training Association, Great West Casualty Company, Greyhound Lines, Inc., International Brotherhood of Teamsters, Massachusetts Registry of Motor Vehicle Division, Massachusetts Department of Transportation, National Association of Publicly Funded Truck Driving Schools, National Association of Small Trucking Companies, National Association of State

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driver-trainees will still spend approximately 30 and 15 hours BTW demonstrating proficiency in the required Class A and Class B curricula elements, respectively. The 30 BTW hours for Class A and the 15 BTW hours for Class B are based on the ELDTAC's informed estimation of the minimum amount of time the average driver-trainee would need to repetitively and proficiently demonstrate all of the required BTW skills set forth in the curricula. As described by the ABA, a member of the ELDTAC, in its comments, ''[t]he minimum [required BTW hours] was based on the experience of current training providers' ability to deliver a basic program and ensure that all of the material was covered.'' Similarly, Advocates, also a member of the ELDTAC, commented that the minimum BTW hours requirement ''reflects the consensus determination of the ELDTAC about the lowest level of BTW training that is necessary under the training curriculum . . .'' Accordingly, the Agency is retaining 30- and 15-hours for the Class A and B curricula, respectively, as the basis for estimating the costs of the final rule, as discussed in the RIA.

In the Agency's judgment, the extensive CMV driver training expertise represented on the ELDTAC is a credible basis for FMCSA's assessment of the cost of compliance with the BTW portions of the Class A and Class B curricula. FMCSA expects, however, that some trainees will demonstrate BTW proficiency in less than 30 or 15 hours and that others will require more time to achieve a proficient level of performance of the required BTW elements of those curricula. Accordingly, actual costs of compliance for these trainees will be lower or higher than the costs estimated in the RIA, but the Agency currently has no data on which to determine variations in cost for trainees who achieve BTW proficiency in either less time or more time than the average student.

Under today's rule, BTW proficiency is determined solely by the instructor's evaluation of how well the driver-trainee performs the fundamental vehicle control skills and driving procedures set forth in the curricula. In the final rule, FMCSA clarifies this point in the introduction to the Class A and B curricula. As a number of commenters observed, a proficiency-based standard based entirely on individual skill levels and learning abilities, rather than a mandatory minimum number of hours spent on either a range or public road, will permit skilled trainees to demonstrate proficiency more efficiently than adherence to a minimum training time. Accordingly, since the final rule does not require minimum BTW hours, there is no need to permit highly proficient trainees to ''opt out'' of that requirement, as several commenters requested.

Instructors will also determine how much or how little training is required for individual skills, as proposed in the NPRM. The final rule, therefore, emphasizes the individual trainee's attainment of performance goals as set forth in the curricula and evaluated by the instructor. As IOUE noted in its comments, since there is no requirement that training providers devote a specified amount of time to individual curriculum topics in the core BTW curricula, training programs will have ''the latitude to emphasize topics that present the greatest safety challenges'' in the operation of CMVs in various segments of the motor carrier industry.

Although today's rule adopts a minimum set of driving skills in which proficiency must be demonstrated, the Agency does not define ''proficiency''. The instructor, based on his/her professional judgment, must decide at what point the driver-trainee demonstrates the proficient performance of required skills and the instructor will determine the amount of time each driver-trainee needs to spend on the range and public road portions of the curricula. However, FMCSA believes that demonstrated proficiency requires some level of successful repetition of the required BTW curricula elements, as determined by the instructor. In other words, performing each required maneuver correctly one time does not mean that the trainee has demonstrated proficiency. In the Agency's view, a ''one and done'' approach is essentially the equivalent of the CDL skills tests. MAP–21 requires that FMCSA establish ELDT requirements addressing the knowledge and skills necessary for the safe operation of a CMV (49 U.S.C. 31305(c)(1)(A)). Since the CDL skills testing protocols in part 383 were in place years before Congress enacted the ELDT requirements in MAP–21, we conclude that Congress intended that the BTW training requirements be more extensive than a simple one-time demonstration of skills. In addition, as noted above, the ELDTAC's estimation of the 30 and 15 hours to successfully complete the BTW elements of the Class A and B curricula assumed some level of repetition of required skills.[11]

Further, the Agency notes that a number of commenters opposed to the BTW minimum hours requirement proposed a ''Master Trip Sheet'' as a preferable alternative. Trip sheets are a means to document the repeated successful demonstration of required skills. The Master Trip Sheet specifically considered by the ELDTAC, and endorsed by ATA [12] and other commenters, contained the individual BTW Class A curriculum elements; it also included space for the instructor to note that the driver-trainee correctly performed each BTW element, a total of five times, in order to demonstrate proficiency. (The ELDTAC assumed fewer repetitions would be necessary to demonstrate proficiency in Class B BTW skills).[13] The use of that Master Trip Sheet as a means of documenting proficiency therefore assumes that effective BTW training involves some degree of repetition, or practice, of the required skills. (The use of a Master Trip Sheet as a tool for documenting driver-trainees' proficiency under today's rule is discussed further below.)

Additionally, individual commenters also endorsed the value of the repeated demonstration of required skills. For example, Werner Enterprises noted that ''[a] requirement expressed in terms of consistent demonstration of applicable skills is more appropriate [than minimum BTW hours] and would serve as a better predictor of increased safety outcomes.'' Similarly, TCA stated that ''[t]ruck driving is a skill . . . through which repetition and practice will almost certainly increase a driver's awareness and performance when operating equipment on our highways.''

In the Agency's judgment, safe CMV driving, like many other skills, requires some level of repetition and practice. Repetition of required skills also increases the likelihood that driver-trainees will have the opportunity to demonstrate their proficiency under a wider array of road and weather conditions than a ''one time'' demonstration, particularly with regard to public road training. For example, the proficient entry and exit of an interstate

Directors of Pupil Transportation Services, National School Transportation Association, Owner-Operator Independent Drivers Association, Professional Truck Drivers Institute, Stevens Transport, Spoon Trucking, Truckload Carriers Association, Truck Safety Coalition, United Motorcoach Association, and Women in Trucking.

[11] ELDTAC Meeting Minutes, May 28–29, 2015, p. 17.

[12] See Final Regulatory Impact Analysis for FMCSA's response to ATA's assertion that, had the Agency conducted a detailed analysis of the ELDTAC Master Trip Sheet alternative, in accordance with the directives of OMB Circular A–4 ''a performance-based BTW requirement would have prevailed'' over the minimum hours requirement because it would have produced a more favorable cost benefit analysis.

[13] ELDTAC Meeting Minutes, May 28–29, 2015. p. 17.

or other controlled access highway could potentially be demonstrated in both wet and dry weather, which would provide the instructor with a more complete picture of the trainee's ability to successfully navigate real-world situations. The importance of training under conditions trainees will face as CMV drivers was noted in a December 2015 survey of long-haul truckers, conducted by the National Institute for Occupational Safety and Health (NIOSH). The NIOSH survey found that 38 percent of the respondents believed they did not receive adequate entry-level driver training to ''safely drive a truck *under all road and weather conditions*'' (emphasis added).[14] However, under the final rule, training instructors maintain the flexibility to determine the extent to which the successful repetitive performance of required skills demonstrates proficiency for individual driver-trainees on a case-by-case basis.

As proposed in the NPRM, instructors also maintain flexibility to select the specific means or method by which a driver-trainee's proficient performance of required BTW skills is recorded in order to comply with the documentation requirements in § 380.715(b). As noted above, instructors will also need to capture the total number of hours spent by each driver-trainee in completing BTW training, so that this information can be included in the training certifications submitted to the TPR, as required in § 380.717. Nothing in today's rule prohibits the use of Master Trip Sheets to document either the driver-trainee's proficient demonstration of BTW skills or the total number of hours spent in completing the BTW curriculum, as required in § 380.715(b).

The NPRM did not propose a minimum hours requirement for BTW training in either the P or the S endorsement curricula, and, for the reasons discussed above, the final rule does not include such requirements. However, the final rule does require that training providers who certify, through the TPR, the successful completion of the P and/or S BTW (range and public road) curricula, must indicate the total number hours spent by each driver-trainee in completing the BTW curriculum. FMCSA will use this information to assist us in a post-rule evaluation of whether, and to what extent, varying amounts of BTW training impact the safe operation of passenger-carrying CMVs and school busses.

12. Minimum Number of Theory Hours

The NPRM set forth minimum theory curricula requirements for the Class A and Class B CDLs and the P, S, and H endorsements. As proposed, the training provider must cover all curriculum topics and assess driver-trainees' understanding of the material in a written or electronic format. Driver-trainees must receive a minimum score of 80 percent on the theory assessment. FMCSA did not propose a minimum number of required hours for any of the theory curricula.

Comments: The VA DMV recommended a minimum number of hours for theory instruction in order to provide consistency across training programs. VA DMV also noted that ''not having a minimum period assigned to the theory training will make it difficult for FMCSA or SDLA auditors to ensure the necessary training is provided.''

FMCSA Response: Today's final rule does not impose any minimum number of required hours for completion of any of the theory curricula. The Agency believes that the final rule ensures an appropriate minimum standard for entry-level driver theory instruction by prescribing specific topics for each of the five theory curriculum, requiring the training provider to cover all topics, and requiring that driver-trainees demonstrate their understanding of the material by achieving on overall minimum score of 80 percent on the theory assessment. Each of these requirements is verifiable through an audit by FMCSA or its authorized representative.

Further, this approach retains flexibility for training providers and driver-trainees to cover the required topics at a pace that is comfortable for them. FMCSA also notes that, as with the other requirements established in the final rule, the individual topics of the theory curricula represent the minimum amount of knowledge necessary for ELDT. Today's rule permits States and individual training providers to require that driver-trainees complete additional theory topics.

13. Clock vs. Academic Hours

In the NPRM, FMCSA proposed allowing training providers flexibility by using either clock-hours or academic hours (*i.e.,* 50 minutes) depending on the type of entity that offers the training (*e.g.* motor carriers vs. community college). FMCSA requested comment on this proposal and asked whether there is a discernable difference between the two concepts.

Comments: The NSTA commented that, since there is a need for set-up and administrative time prior to actual training, ''the concept of academic hours is appropriate for all training providers,'' regardless of type. CVTA stated that, while ''training providers should be allowed to use whichever unit is best for their program,'' the ELDTAC Consensus Agreement ''clearly indicated that BTW should be measured in 50 minute hours.'' Accordingly, CVTA believes that in the final rule, BTW time should be based on academic hours, which is ''the predominant measurement of schools and training providers.''

Other commenters, including NAPT, ABA, Schneider, and the VA DMV, supported the NPRM's approach of allowing training providers to decide whether they would use clock or academic hours because the flexibility would accommodate the specific training being delivered. These commenters generally did not perceive a discernible difference between the two concepts.

The DMTA thought there was an obvious difference between the two concepts, but did not object to the use of academic hours ''so long as an equivalency is maintained so that the actual time spent at activities is equal to the clock hours required by FMCSA.'' Utah commented that if the Agency ''is going to allow the usage of credit hours, FMCSA needs to define how many practical hours should be considered a credit hour.''

An individual commenter noted that for every six academic hours, ''you have lost one hour of clock hour training time.'' Other commenters said that if academic hours are allowed, then the total hours should be increased to match the clock hours. The Delaware Department of Education (DDE) commented that, while trainers understand what an hour on the clock means, many would not know how to interpret an academic hour. Michigan commented that, in its experience, truck schools misuse terms such as ''academic hours'' and ''credit hours'' to ''grossly'' misrepresent actual training time. DTCC and NGWA also recommended that clock hours should be used as the standard training unit.

FMCSA Response: In today's final rule, the Agency uses the term ''clock hours'' (*i.e.,* 60 minutes) as the standard measurement of BTW training time. We note that the resolution of this issue remains relevant. Although the final rule does not mandate minimum BTW hours, training providers must document and report the actual number of hours that each driver-trainee spends

[14] G.X. Chen, et al., *Accident Analysis and Prevention,* NIOSH national survey of long-haul truck drivers: Injury and safety (2015), available at *http://dx.doi.org/10.1016/j.aap.2015.09.001* (accessed October 20, 2016).

in completing BTW training (under §§ 380.715 and 380.717, as revised).

Based on the commentary, FMCSA is concerned that exclusive use of the term ''academic hour,'' or permitting either term to be used at the training provider's discretion, would cause confusion and inconsistency in the documentation of BTW delivery, even if FMCSA attempted to convert ''academic hours'' to ''clock hours,'' or vice-versa, as some commenters suggested. FMCSA therefore believes that ''clock hour'' is a term that is easily understood by all training entities and consistent with a uniform minimum standard

14. Duplication Between CLP Knowledge Test and Theory Training

FMCSA requested comment on whether there is duplication between ELDT theory training and the CLP exam and, if so, whether such duplication should be minimized or eliminated.

Comments: FMCSA received a number of comments in response to this question. Most commenters, including OOIDA, Schneider, DTCC, NYAPT, Delaware Motor Transport Association, DDE, and Werner, asserted that, to the extent duplication exists, it serves to reinforce key concepts and should not be eliminated. Werner noted, however, that ''[a]ny duplication that does not have a demonstrable benefit to the driver-trainee or the general public should be minimized to the extent practical.'' The VA DMV commented that ''[r]eceiving the information in multiple mediums will assist in reinforcing the information with drivers and lead to better retention of the information.''

Michigan believes that, while the CLP exam and ELDT theory training cover the same subject matter, each serves a distinct purpose. ''The CLP exam measures for minimum competency for the purposes of allowing a driver to begin training. The theory training should build on that minimum competency and improve the entry-level driver's skills . . .'' CVTA also noted that, while the CLP exam and theory training address many of the same topics, ''. . . the theory portion should not be eliminated or minimized because it teaches many additional subjects, in greater depth than are covered on the Commercial Learner's Permit exam.''

NRECA did not find any duplication between theory training and the CLP exam. On the other hand, Driver Holdings LLC believed there is duplication and requested that it ''be eliminated from the ELDT theory training.'' Several individual CMV driving trainers also requested that duplication be minimized or eliminated. Farris Brothers, Inc. commented that, if driver-trainees complete ELDT theory training, a CLP should then be issued. Utah, noting that ''applicants who are completing the minimum training will have already completed the knowledge exam,'' asked whether driver-trainees' knowledge should, in effect, be tested twice, or would it be better to ''test the application of that knowledge through various skills tests.'' The Iowa DOT commented that ''[i]t would be reasonable through training to eliminate the need for knowledge tests at the SDLA . . . while allowing the SDLA to test randomly or when evidence exists to warrant a re-test.''

FMCSA Response: FMCSA agrees with commenters who suggest that, to the extent duplication between the CLP knowledge test and ELDT theory training exists, it should not be minimized or eliminated because some degree of repetition benefits driver-trainees by reinforcing the core concepts of safe CMV driving. Therefore, as proposed, all of the curricula in today's rule retain a theory training component.

As several commenters noted, the CLP knowledge test and ELDT theory training serve separate and distinct functions in CMV driver education. Theory training, as set forth in today's rule, is designed to provide driver-trainees with substantive understanding of the operating characteristics of the vehicles they intend to operate, safe driving practices, and the legal and medical requirements related to CMV driving. The CLP knowledge test is designed to assess whether CDL applicants have sufficient knowledge of basic concepts related to the safe operation of CMVs. FMCSA believes that the two approaches each represent important and distinct elements of CMV driver education.

15. Core Curricula—Class A and Class B CDLs

FMCSA proposed a Class A and B CDL core curriculum. The Class A curriculum addressed the knowledge and skills necessary to safely operate combination vehicles (Group A), while the Class B curriculum pertains to heavy straight vehicles (Group B). The proposed curricula set forth training topics specific to the underlying CDL class, all elements of which must be taught and assessed. The Agency requested comment on the scope and content of the proposed curricula.

Comments: The Agency received a number of comments regarding the content of the individual core curricula. Some commenters suggested adding topics to one or more of the curricula, while others believed that certain elements should be removed.

Schneider recommended that the Class A BTW-public road curriculum include a requirement to practice entry and exit of the interstate, noting that it ''often encounters newly licensed drivers who enter its finishing program without any experience operating a CMV on a highway or interstate.'' CM Air Brake and Electrical Training Services, LLC, commented that the ELDT rulemaking presents a unique opportunity to ''ensure that drivers have a sufficient understanding of air brake systems to actually recognize whether or not the brake systems on their vehicles are functioning properly.''

The AAR supported the NPRM's requirement that driver-trainees be trained in recognizing potential dangers and appropriate safety procedures for use at railroad grade crossings. AAR suggested that, in addition, driver-trainees should be instructed that railroads have personnel available at the posted Emergency Notification System (ENS) telephone numbers to receive notification of any information relating to an unsafe condition at the railroad-highway grade crossing, such as a warning system malfunction at the railroad-highway grade crossing, or a disabled vehicle or other obstruction blocking a railroad track at the railroad-highway grade crossing.

An individual commenter, noting that improperly inflated tires increase braking distances and contribute to punctures and blowouts, suggested that load-to-tire inflation tables be included in the ELDT curricula.

Truckers Against Trafficking (TAT) suggested adding an element to the Class A and B curricula addressing human trafficking in the trucking industry, focusing on ''the understanding and recognition of this crime, along with the action steps to be taken.'' Other commenters suggested adding the following training topics: (1) As part of trip planning—instruction, practice, and evaluation for map reading utilizing an atlas; (2) overview of the requirements of the ELDT regulation along with information on how to report a non-compliant school; (3) whistleblower protection regulations in 29 CFR part 1978 and the procedures for reporting to FMCSA incidents of coercion from motor carriers, shippers, receivers, or transportation intermediaries; (4) driver wellness and basic health maintenance that affect a driver's ability to safely operate a CMV; and (5) Federal rules pertaining to physical qualifications of CMV drivers, including medical certification and medical examination procedures.

The Agency also received comments suggesting that certain topics be removed from various curricula, primarily because the topic did not directly apply to the commenter's occupation or segment of the industry. For example, AAR said that railroad employees should not be required to demonstrate skills like alley dock backing or other skills similarly unrelated to their job functions. UPS commented that several proposed elements in the theory portion of the Class A curriculum, including photographing the scene and assessing weather and signage conditions post-crash, ''do not correspond to specific substantive safety requirements and are inconsistent with prudent operations.''

Minnesota suggested that the rule ''address training requirements for non-fifth wheel combinations in addition to the traditional tractor-trailer combinations,'' noting that if CDL holders are restricted to operating a non-fifth wheel combination, ''training curricula needs to be developed to address the needs of operating this type of class A combination vehicle safely.''

DDE commented that school bus drivers will typically have a Class B CDL with P and S endorsements. DDE noted that many elements of the Class B theory curriculum are not applicable to school buses, including coupling and uncoupling combination vehicles, hazardous materials regulations, stopping at weigh stations, awareness of surroundings including truck stops/rest areas, tire chain procedures, theory of cargo weight distribution, cargo securement, and hours of service.

Finally, several commenters, including Minnesota DPS, DTCC, and Century College, suggested that certain ''dangerous driving maneuvers'' or ''extreme driving conditions'' in the Class A and B BTW public road curricula, such as skid control and recovery, should be removed from the BTW portion of the curricula and retained as theory topics only. DTTC commented that ''[i]t would be impractical at best and dangerous at worst to mandate [skid control and recovery] as part of BTW training.''

FMCSA Response: In today's final rule, FMCSA revises the Class A and B CDL curricula to add topics that, as suggested by commenters, will improve the safe operation of CMVs, including proper entry and exit of ramps on the interstate and other controlled access highways and notification to railroad personnel of an unsafe condition at the railroad-highway grade crossing.

FMCSA adds specific cross references to applicable pre- and post-trip inspection sections of the FMCSRs (*i.e.,* §§ 392.7 and 396.11) to all of the theory curricula, which include for example: tires, wheels and rims, emergency equipment, and steering mechanisms.

Although brakes were identified as a key vehicle system in the ''Identification and diagnosis of malfunctions'' portion of the proposed Class A and B theory curricula, in the final rule the Agency expanded the term to include specific types of CMV braking systems, including ABS, hydraulic and air, as applicable. In response to the comment regarding non-fifth wheel combinations for Group A vehicles, we note that techniques for the proper coupling and uncoupling of combination vehicles are included in the Class A theory curriculum and that ''coupling devices'' are included within the scope of both pre-trip and post-trip inspections in §§ 392.7 and 396.11, respectively. In addition, FMCSA adds the words ''as applicable'' after ''coupling and uncoupling combination vehicle units'' in the Class A curriculum to indicate that more than one type of coupling device exists.

The Agency also made various conforming and organizational changes to the curricula for purposes of clarity and consistency, most of which are specifically noted below in the section-by-section explanation of changes from the NPRM.

The Agency notes that many of the suggested additions to the training curricula were proposed in the NPRM and remain in the final rule, including whistleblower protection in 29 CFR part 1978, reporting incidents of coercion to FMCSA, physical qualification of drivers, and driver wellness. While we did not include the reporting of non-compliant training providers as a topic in the curricula, instructions for doing so will be available on the ELDT Web site. FMCSA considers human trafficking, suggested by TAT as an additional topic for the training curricula, to be an extremely important issue. However, it is not directly related to safe CMV driving skills, and therefore was not included in the final rule. FMCSA notes that training providers are free to add any topics they consider relevant to the training experience, as long as the required elements of the ELDT curricula are taught and assessed in compliance with today's rule.

Additionally, FMCSA removed several elements from the ''Post-crash procedures'' portion of the Class A and B theory curricula that, as UPS noted, do not directly impact the safe operation of CMVs, including photographing the scene, obtaining witness information, assessing skid measurements, and assessing signage, road, and weather conditions. We also note that the NPRM inadvertently included ''tire chaining procedures'' in the BTW-public road portion of the Class B curriculum; the Agency removed that element in the final rule. Tire chaining procedures remain in the Class A and B theory curricula, as proposed.

Finally, FMCSA disagrees with commenters suggesting that certain training topics be deleted from the proposed curricula, or should not apply to certain CDL holders, because they are not relevant to a particular occupation or vehicle. Regardless of an applicant's intentions at the time he or she obtains a CDL or endorsement, the individual is in fact credentialed to operate a range of CMVs falling within the CDL class or endorsement received. For example, although an individual may intend to make a living as a school bus driver, if he or she holds a Class A or Class B license in addition to the S and P endorsements, that individual is considered qualified to operate any CMV falling within those classifications, including straight trucks. Accordingly, it is reasonable to require that these individuals receive training commensurate with the CMV driving credentials they hold.

In response to comments suggesting that certain driving skills, such as hazard perception and skid control and recovery, be removed from the Class A and Class B BTW public road curricula and retained as theory topics only, FMCSA notes that these skills are not necessarily intended to be performed by the driver-trainee. In the NPRM, the following BTW skills were specifically designated as ''appropriate for discussion during public road training or simulated, but *not necessarily performed*'' (emphasis added): Hazard perception, railroad (RR)-highway grade crossing, night operation, extreme driving conditions, emergency maneuvers/skid avoidance, and skid control and recovery (81 FR 11944, 11973 (March 7, 2016)).

These topics remain in the BTW public road curricula because they are appropriate for commentary instruction, in which the instructor discusses the proper techniques for responding to these conditions while the driver-trainee is behind-the-wheel of a CMV, even when such conditions may not actually be encountered during the training session. For example, an instructor could discuss adjustments to speed and following distance that need to be made during periods of heavy rain, even when actual driving conditions are dry. FMCSA believes that commentary instruction during public road training provides a valuable opportunity for

driver-trainees to reinforce safe driving behaviors in a contextual learning environment. The Agency therefore retains these topics in both the public road and theory portions of the curricula, as proposed. The final rule clarifies that instructors *must* provide commentary instruction for these elements of the BTW curricula. The final rule also states that driver-trainees are not required to demonstrate proficiency in these elements of the BTW curricula.

a. Night Driving/Operation

As proposed, Class A and B CDL trainees would be required to receive both theory and BTW (public road) instruction in night operation of a CMV in order to recognize and respond to the special problems that night driving presents. While training providers were strongly encouraged to offer driver-trainees actual night-driving experience where feasible, they would not be required to do so.

Comments: Comments were mixed on the need to require driver-trainees to operate CMVs at night. Truckers for a Cause stated that the final rule should require ''actual BTW instruction during times of darkness.'' One commenter suggested that the BTW hours requirement should be no less than 200 hours, 50 of which should be night driving hours.

On the other hand, several training providers supported the NPRM's approach of not making nighttime driving a requirement. Century College commented that ''[a]dding a night driving component would add instructional costs and insurance costs that would be prohibitive,'' noting that drivers could learn night driving operations from specific employers after obtaining a CDL.

FMCSA Response: In today's final rule, the BTW public road core curricula do not require driver-trainees to operate a CMV at night. Therefore, night driving must be discussed during public road training, but not necessarily performed. In order to ensure that this topic is sufficiently addressed during BTW public road training when actual night driving is *not* feasible, the training instructor would, for example, provide commentary instruction to convey how night driving conditions differ from daytime driving, such as the impact of nighttime glare on a driver's mirrors. As noted above, the final rule does not require driver trainees to demonstrate proficiency in BTW elements they are not required to perform, such as night driving.

b. Substitution of Simulators for BTW Training

As defined in the NPRM, BTW training means training provided by a qualified driver-instructor when driver-trainees have actual control of the power unit during a driving lesson conducted either on a range or public road. Therefore, as proposed, time spent on a driving simulation device would not substitute for actual ''hands on the wheel'' training on a range or public road. The NPRM did, however, include ''driving simulation devices'' within the scope of ''theory instruction,'' thus permitting simulator use to fulfill the proposed theory curricula requirements.

Comments: Virage Simulation (Virage) commented that three research studies demonstrated that backing skills learned on a driving simulator are equal to training in the truck. Virage stated that the ''continued lack of support by the FMCSA for substitution of BTW hours with simulation hours is somewhat perplexing in light of the express purpose of the ELDT NPRM to establish 'more extensive entry-level driver training.' '' Virage proposed that FMCSA allow simulator-based training for the substitution of up to 50 percent of the required BTW hours.

Schneider suggested allowing for 10 percent of the BTW training hours to be completed using driving simulation, noting that simulator use will allow the training provider to expose the driver-trainee to adverse conditions that are (1) not readily accessible in the training provider's region (*e.g.,* snow in the south or mountains in the Midwest); and/or (2) too dangerous to purposefully recreate on the open road for training purposes (*e.g.,* a tire blowout or severe wind). According to Schneider, allowing for simulated drive time will also have the additional benefits of reducing fuel cost and lowering emissions in the cost-benefit analysis for this rulemaking. ABA requested that FMCSA ''recognize the value of simulators, and provide additional flexibility for their use under this proposal.''

FMCSA Response: The final rule does not require that a minimum number of BTW training hours be completed. Accordingly, whether or not simulation devices can be used to fulfill part of the proposed BTW hours requirement is no longer an issue. However, in the Agency's judgment, there is simply no substitute for the time a driver-trainee actually spends behind the wheel and in direct control of a CMV during range and public road training. Today's rule therefore does not permit BTW training to be conducted by using a driving simulation device, and a driver-trainee may not use a simulation device to demonstrate proficiency. However, as discussed below, simulators may be used in theory training.

FMCSA agrees that simulators can provide valuable learning opportunities to entry-level drivers to improve driving techniques and introduce them to hazards and driving conditions they may expect to encounter in their driving career. The Agency has previously recognized the value of specified simulation technology for entry-level training of CMV drivers.[15] Accordingly, the final rule retains the definition of ''theory instruction'' proposed in the NPRM, which specifically includes ''driving simulation devices.'' Consequently, training providers may use simulation technology in meeting any of the theory curricula requirements for the Class A and B CDLs and the P, S, or H endorsements. For example, simulation devices can allow a driver to better understand how to react in potentially hazardous situations, which cannot be prudently demonstrated on a public road. Simulators are also useful in helping students understand how to effectively manage emergency situations, such as tire blowouts, skid avoidance or control, and collision avoidance.

16. Manual v. Automatic Transmission—Class A and B Curricula Requirements

As proposed in the theory portion of the Class A and B curricula, the topic ''shifting/operating transmissions'' is described as an introduction to ''basic shifting patterns and procedures,'' which will enable the trainee to perform basic shifting maneuvers, including executing ''up and down shifting techniques on multi-speed dual-range transmissions if appropriate.'' The description of the ''shifting/transmission'' topic in the BTW-public road curricula requires driver-trainees to ''demonstrate proficiency in proper techniques for performing safe and fuel-efficient shifting and making any necessary adjustments in the process.''

Noting that some carriers utilize only CMVs equipped with automatic transmissions, FMCSA invited comment on whether there should be an option to forego this element of the training for driver-trainees who intend to operate only automatic transmission-equipped CMVs. The NPRM also noted that, currently, drivers who take their CDL skills test in a CMV equipped with an

[15] Commercial Motor Vehicle Driving Simulator Validation Study (SimVal): Phase II (Report No. FMCSA–RRR–10–044, October 2010).

automatic transmission must have an indication on their CDL that the driver is restricted from operating a CMV with a manual transmission, 49 CFR 383.95(c)(1).

Comments: Most of the comments on this issue said driver-trainees should be trained in the type of CMV they intend to operate. Werner Enterprises (Werner) commented that FMCSA should permit operators of automatic transmission vehicles to forego the instruction on manual shift transmissions, noting that requiring manual transmission training for drivers who intend to operate CMVs equipped only with automatic transmissions ''will take valuable training time which could be better devoted to further developing other skill areas.'' According to Werner, approximately 70 percent of CMVs currently produced are equipped with automatic transmissions; both manufacturers and carriers agree that this trend towards automatic transmission CMVs is likely to continue. ATA, stating that it ''foresees broad adoption of automatic transmissions in the future,'' suggested that ''FMCSA should seriously consider giving training providers the flexibility to train drivers for the equipment they expect to drive.''

C.R. England also stated that the NPRM ''lacks flexibility because it does not allow reduced training hours for restricted licenses.'' Noting, for example, that ''if a driver intends to drive an automatic transmission vehicle and receive a restricted license, less training is required'' C.R. England suggested that ''required BTW time for a Class A or Class B license with a manual transmission restriction be reduced by ⅓.''

Schneider and the California Department of Motor Vehicles (CA DMV) both noted that, if driver-trainees opt to receive training only in an automatic transmission vehicle, the training provider would need to indicate that on the training certificate uploaded to the TPR and States must be able to accept and store that information on the electronic driving record.

NASDPTS noted that since almost all school buses are now equipped with automatic transmissions, there is no value in qualifying school bus drivers to operate manual transmission-equipped vehicles. DDE and NAPT also supported the option to forego the manual transmission element because school buses have automatic transmissions.

However, several commenters opposed permitting driver-trainees to obtain training only in an automatic transmission-equipped CMV. The Iowa DOT said ''the training should be inclusive and not specific to the transmission.'' In addition, the Iowa DOT thought the NPRM was unclear regarding the situation in which a driver changes jobs or the type of vehicle, asking whether a driver ''would have to take the training over again if they drive a manual transmission because they were trained in the 'automatic only' curriculum?''

FMCSA Response: FMCSA agrees that ELDT requirements should be flexible enough to accommodate a driver-trainee's choice to operate a CMV equipped with an automatic transmission. The final rule does not require that ELDT occur in a CMV equipped with a manual transmission. On further review of the ELDTAC meeting record, the Agency believes this flexibility was already intended. For example, during the development of the ''shifting/operating transmissions'' component of the theory portion of the Core A and B curricula, the words ''if appropriate'' were added to the topic description, so that it would read as follows: ''[t]his must include training each trainee to execute up and down shifting techniques on multi-speed dual-range transmissions, *if appropriate*'' (emphasis added).[16] A slightly revised version of the ''shifting/operating transmissions'' topic, which included the ''if appropriate'' modifier, appeared in the NPRM. FMCSA therefore infers that the ELDTAC recognized that training in this theory topic would necessarily vary according to the type of transmission the driver-trainee intends to operate.

The description of ''shifting/transmission'' as a component of the BTW-public road training for Class A, initially presented to the ELDTAC by the Core Curriculum Working Group at its third meeting on April 9–10, 2015, remained largely unchanged throughout the remainder of the ELDTAC's meetings.[17] The description, cited above, simply refers to the driver-trainee's ability to demonstrate proficiency in ''proper'' shifting techniques and to make ''necessary adjustments.'' There is no reference to either manual or automatic transmissions.[18] An identical description of the ''shifting/transmission topic'' was subsequently adopted as part of the Class B BTW-public road curriculum. Again, the Agency infers that the proposed definition was intentionally *not transmission-specific* in order to permit driver-trainees to receive BTW training in the type of CMV they intend to operate.

FMCSA's conclusion is further supported by the fact that, as several commenters noted, the prevalence of automatic transmission-equipped vehicles in the Group A and B classifications is currently significant and is widely expected to increase over time. In light of this clear trend toward automatic transmission-equipped CMVs, it defies logic to presume that the ELDTAC intended to require that all driver-trainees receive training on a manual transmission, regardless of whether they intend to operate a CMV so equipped, or would be required to do so in the course of their employment. The Agency regrets any confusion caused by posing the question of whether driver-trainees should be permitted to ''opt out'' of manual transmission training. Further, FMCSA notes that States, in administering the CDL skills test, ''must check the vehicle in which the applicant takes his or her test is representative of the vehicle group the applicant has certified that he or she operates or expects to operate'' (§ 383.73(b)(2)). Accordingly, the NPRM proposed, and the final rule requires, that training vehicles must be in the same group and type that the driver-trainee intends to operate for the CDL skills test (§ 380.711(b)).The Agency notes that, in addition to the manual transmission restriction discussed above, other restrictions currently apply to air brakes and non-fifth wheel connections (§ 383.95(a), (b) and (d)). In the final rule, the Agency adds ''as applicable'' to the brake-related topic descriptors in the Class A and B curricula and the coupling descriptor in the Class A curricula, to clarify that driver-trainees are free to select a training curriculum that is appropriate for the type of CMV they intend to operate.[19]

Because the final rule does not require that driver-trainees complete a minimum number of BTW training

[16] ''Proposed Core Curriculum'', ELDTAC Meeting, April 23–24, 2015, available at *www.FMCSA.dot.gov/advisory-committees/eldtac/meetings*.

[17] The words ''safe and fuel efficient'' were added to the BTW-public road description of the ''shifting/transmission'' topic and the word ''required'' was deleted at the ELDTAC meeting on May 14–15, 2015. *See* ELDTAC Meeting Minutes, May 14–15, 2015.

[18] Section 383.5 defines a manual transmission as ''a transmission utilizing a driver-operated clutch that is activated by a pedal or lever and a gear-shift mechanism operated by either hand or foot.''

[19] Existing regulations require that, if a CDL applicant fails the air brake component of the knowledge test, the State must indicate that restriction on the applicant's CLP (§ 383.95(a)(1)). In such cases, the applicant could complete BTW training only in a vehicle that is not equipped with any type of air brakes.

hours, the question of whether required minimums should be lowered if BTW training occurs in an automatic transmission-equipped vehicle is now moot. However, FMCSA does not believe there would have been any basis on which to reduce the proposed required BTW time when driver-trainees receive training in a specific type of CMV, such as an automatic-transmission equipped vehicle or a vehicle not equipped with air brakes. First, we note that the BTW hours requirements proposed in the NPRM reflected the *total* minimum amount of time it would take the average driver-trainee to proficiently perform the required skills; the ELDTAC did not ascribe any set number of hours to the performance of specific tasks. More importantly, as explained above, the Agency believes that, by keeping the curriculum topic descriptions broad, the ELDTAC intended to permit flexibility in the type of training delivered, based on the driver-trainee's choice of vehicle within a designated group. The ELDTAC agreed to assign a specified number of BTW hours for the Class A and B curricula *after* the curricula had been unanimously adopted by the full committee. FMCSA therefore concludes that, if the proposed BTW minimum hours requirements had been retained in the final rule, a reduction in the minimum number of BTW hours based on any specific vehicle type would not have been justified. The Agency therefore continues to assume that most driver-trainees will spend at least 30 and 15 hours to complete the Class A and Class B BTW curricula, respectively.

Contrary to the assertion of commenters who noted that, if a driver-trainee completes training in an automatic transmission-equipped vehicle, the training provider would need to indicate that on the trainee's ELDT certification the provider electronically submits to the TPR, there is no need to identify the specific transmission type in which the driver completed BTW training. As noted in the NPRM and in today's rule, each BTW curriculum requires only that the training be conducted in a vehicle representative of the applicable class or endorsement. As explained above, there is no ''automatic transmission only'' training designation. Driver-trainees will take BTW training in the type of CMV they intend to operate and, consequently, in which they expect to take the CDL skills test. The training certificate would simply indicate, for example, that the individual completed training applicable to a Class A or Class B CDL.

In response to the Iowa DOT's question concerning what, if any, ELDT requirements would apply to drivers who obtain ''automatic transmission only'' training and subsequently have that restriction removed from the CDL by taking a skills test in a manual transmission-equipped vehicle, the answer is that no further ELDT would be required. Again, FMCSA notes there is no ''automatic transmission only'' training designation. An applicant who takes the CDL skills test in a CMV subject to a restriction (*e.g.,* a CMV equipped with an automatic transmission), and who subsequently has that restriction removed following successful completion of a skills test in a non-restricted vehicle, is not required to obtain any further ELDT. In today's rule, FMCSA revises § 380.603 to clarify that the ELDT requirements do not apply to drivers who simply have a restriction removed from their CDL.

17. Class C CDL Curriculum

FMCSA did not propose a curriculum for Class C CDL training because a Group C vehicle must be designed to transport 16 or more passengers (including the driver) or any hazardous materials as defined in 49 CFR 383.5. As such, the driver of a Group C vehicle needs a P, S, or H endorsement. The NPRM proposed training curricula for each of these endorsements. In addition, because Group C vehicles weigh less than 26,001 pounds, the Agency does not believe it is necessary to prescribe BTW training comparable to the other classes of CDL.

Comments: Washington DOL commented that ''[s]ince a Class C driver must be getting a passenger, school bus or hazardous materials endorsement to obtain the CDL, Class C drivers should be required to meet the same minimum behind-the-wheel training requirements as Class B drivers to ensure public safety.'' The State of Michigan commented that it ''is satisfied that entry-level Class C drivers will receive sufficient training through endorsement training,'' but noted that ''if endorsement training is eliminated from the final rule then the issue of Class C training should be examined.'' The NYAPT commented that it is unclear whether the proposed regulations would apply to Class C CDL holders who drive smaller school buses, including ''Type A'' buses. NYAPT requested that FMCSA clarify that issue, stating that ''these drivers should be covered by the regulations given their responsibilities for transporting our children.''

FMCSA Response: FMCSA does not include a Class C CDL curriculum in today's final rule. As explained in the NPRM, the Agency believes that Class C license holders will receive the appropriate training required for any of the three endorsements applicable to a Class C license. For example, an applicant wishing to transport passengers in a Group C vehicle must complete the P endorsement training, which includes both theory and BTW components. Similarly, under today's rule, a driver, a driver of a ''Type A'' (*i.e.,* ''short'') school buses designed to carry ten or more passengers, would be required to complete the theory and BTW portions of both the P and S curricula.

We note that, under the final rule, applicants for the H endorsement are not required to obtain BTW training because there is no State-administered skills test for the H endorsement. As noted previously, applicants for the H endorsement will already have a Class A or B CDL, or will be concurrently obtaining a Class A or B CDL at the time they apply for the H endorsement, or intend to transport hazardous materials in a vehicle for which a Class A or Class B CDL is not required. Consequently, H endorsement applicants must complete the theory curriculum set forth in Appendix E of Part 380 before taking the State-administered knowledge test required to obtain that endorsement.

18. Passenger Endorsement Training

The NPRM included a curriculum to address the specific training needs of a CMV driver seeking a P endorsement. There was no minimum number of hours proposed for either the theory or BTW (range and public road) portions of the P endorsement training, but the training provider must cover all of the topics set forth in the curriculum. Additionally, the training must be conducted in a representative vehicle for the P endorsement.

Comments: Comments on this issue were generally supportive. The ABA commented that specialized training should be required before an endorsement is conferred because motor coach driving operations require a unique skill set. ABA urged adoption of the Model Motorcoach Curriculum (MMC) and encouraged the use of motorcoach/P endorsement training providers, stating that most truck driving schools are not able to address motorcoach driving skills. ABA believes the rule will increase the transparency of training provider course offerings and make it easier for individuals to find training providers. Overall, ABA believes this will likely result in an

increase in training providers for the motorcoach industry, as well as an increase in hiring opportunities for drivers. In addition to ABA, the UMA and bus safety groups supported the P curriculum.

The DDE commented that the theory curriculum for the P endorsement had additional items not applicable to school bus operations, *e.g.,* techniques of photographing an accident scene, skid measurements, baggage and cargo management, identifying prohibited and acceptable materials, hours of service, weigh station obligations, and CVSA out-of-service criteria. DDE stated it would not have trainers qualified to teach the additional material in the P endorsement curriculum. An individual commenter suggested that the reference to CVSA inspections be removed from the S and P curricula ''since the class A/B truck driver will have a better chance of being at a roadside [inspection] than a school bus driver.''

The AAR stated that certain elements of the P curriculum, including inspection of restrooms and handling of passenger baggage, should not be required for railroad employees who drive crew vehicles, as those vehicles ''are not equipped with restrooms and the drivers do not handle passenger baggage.''

The NYAPT had no objection to the curriculum content prescribed for attainment of the P endorsement, but expressed concern over the potential impact the rigorous training requirements will have on school bus driver recruitment and hiring.

Two commenters believed that limousine drivers should not be required to complete the proposed curriculum for the P endorsement training. Minnesota Chauffeured Limousine Association (MCLA) stated that the limousine industry ''already faces difficulty trying to obtain drivers because of the stipulations put on us by the insurance companies,'' predicting that ''with these new regulations, it will be almost impossible to hire drivers or promote drivers to achieve a passenger endorsement.'' The National Limousine Association (NLA) noted the positive safety record of the passenger-carrying motor vehicle industry, suggesting that the P endorsement training should not be required for smaller CMVs such as vans, shuttles, and mini-coaches. NLA is not aware of any ''pressing concerns in the pre-arranged passenger ground transportation industry that would necessitate additional new training requirements for those vehicles.''

In addition, NLA noted that the majority of its members own vehicle fleets comprised primarily of sedans. The organization expressed concern that ''[i]f the company has one CMV that does interstate work, then the company will be required to train all of its drivers since they may at some point be needed to drive the CMV.'' NLA therefore concluded that ''there should be some exemption [from P endorsement requirements] for very small operators.''

FMCSA Response: In today's final rule, FMCSA retains the passenger P endorsement curriculum largely as proposed. The Agency adds drawbridge safety procedures to the theory portion of the P curriculum and deletes several topics unrelated to safe operation of passenger-carrying CMVs. These changes are discussed below in the ''Section-by-Section Explanation of Changes from the NPRM.''

In response to ABA's suggestion that the Agency adopt the MMC, we note that the MMC is not necessarily intended for entry-level drivers. Rather, the MMC is a comprehensive training curriculum for motorcoaches, more likely to be used in ''finishing'' training for newly-hired drivers who have already obtained the P endorsement. In contrast, the P endorsement curriculum in today's rule focuses on the basic specific skills that a driver-trainee will need to master in order to safely operate a passenger-carrying CMV.

Part 383 currently requires that anyone seeking the S endorsement also pass the knowledge and skills tests for obtaining the P endorsement (§ 380.123(a)(1)). In response to comments that the proposed P curriculum included topics unrelated to the operation of a school bus, such as cargo management and weigh station obligations, we note that such topics are extremely relevant to common carrier motor coach operations, which are also covered by the P endorsement, and are thus retained in today's rule.

In the Agency's judgment, any CMV driver holding a P endorsement should be capable of safely operating representative passenger vehicles covered by that endorsement, regardless of whether or not the individual also holds the S endorsement and intends to drive only school buses. Similarly, Class B holders who operate railroad crew vehicles may not intend to operate other types of passenger vehicles, such as a motor coach, but holding a Class B CDL with a P endorsement permits them to do so, and they should be trained accordingly.

In addition, there is no justification for excepting drivers of ''smaller CMVs such as vans, shuttles, and mini-coaches,'' from the P endorsement curriculum requirements, as suggested by NLA. The fact remains that these smaller Group C vehicles are used to transport passengers. Therefore, it is important that drivers of these vehicles receive passenger endorsement-specific training which allows them to acquire the knowledge and skills necessary for their safe operation.

The Agency does not believe that the P curriculum requirements in today's rule will ''kill the passenger transportation business'' by making it too difficult to hire limousine drivers as MCLA asserted. To the contrary, better trained drivers may make it less difficult to obtain liability insurance. In addition, to the extent that limousine companies currently provide P endorsement training to employees or potential employees or wish to begin providing such training, they may be listed on the TPR if they meet the eligibility requirements set forth in §§ 380.703 and 380.719 of the final rule.

Finally, as noted below in the discussion of the S endorsement curriculum, FMCSA does not anticipate that the training requirements in today's rule will hinder school bus driver recruitment and hiring. The majority of jurisdictions currently impose school bus driver training requirements that meet or exceed the minimum standard established in the final rule. Under both the NPRM and the final rule, such training programs would be eligible for listing on the TPR. In order to make this clearer, we amend the definition of ''training provider'' in today's rule to specifically include local/State governments and school districts.

19. School Bus Endorsement Training

The NPRM included a curriculum to address the specific training needs of a CMV driver seeking an S endorsement. The NPRM did not propose a minimum number of required hours for either the theory or BTW (range and public road) portions of the S endorsement training, but the training provider must cover all of the topics in the curriculum. BTW training must also be conducted in a representative vehicle for the S endorsement.

Comments: Comments were mixed on the proposed S endorsement training. The NASDPTS believes the proposed curriculum is appropriate. Furthermore, NASDPTS is confident that training provided by most States and school districts throughout the nation is consistent with, and in many cases exceeds, the training outlined in the NPRM. The National School Transportation Association (NSTA) also endorsed the proposed curriculum, noting that it ensures that all entry-level drivers will receive the necessary amount of training on all vital elements

of safe student transportation. Other commenters also supported the proposed S endorsement curriculum, asserting that since many States already cover these topics in their mandated school bus driver training, the proposed curriculum is appropriate as a minimum national standard.

The DMTA supported S endorsement training, but stated that no BTW time should be mandated since the trainee would already have a Class B CDL or would need to meet the Class B training mandate (which includes a BTW requirement). Some commenters believed the proposed S endorsement training is unnecessary because school bus drivers in most States are currently subject to rigorous training requirements from their State Highway Patrols or Departments of Education. Consequently, they claim that school bus drivers are already among the best trained groups of CDL drivers and have the best safety record. The NYAPT expressed concern that ''the rigorous training programs and provider network in place will be supplanted by these new requirements and result in lower levels of quality and intensity of training.'' Accordingly, NYAPT requested that ''FMCSA consider ways to grand-parent existing programs that meet or exceed the proposed high training standards . . .''

NYAPT also commented that the new requirements could likely have an effect on the shortage of school bus drivers, stating that ''[t]his training regimen, however well intended, will make it more difficult for drivers to be brought on-line in school bus operations.'' A number of SDLAs, including the North Dakota Department of Transportation, the Iowa DOT, and the Delaware DMV, opposed the inclusion of the S endorsement training, also asserting that requiring entry-level training for school bus drivers would negatively impact the school districts in their States, which are currently struggling to hire drivers. Several commenters also noted that MAP–21 did not mandate S endorsement training.

FMCSA Response: FMCSA retains the S endorsement training in the final rule. As we acknowledged in the NPRM, while MAP–21 did not specifically require the adoption of S endorsement training requirements, the statute did include the P endorsement within the scope of required ELDT. In light of the fact that part 383 currently requires that anyone seeking to obtain an S endorsement also obtain a P endorsement, including the S endorsement training requirements in today's rule is entirely consistent with MAP–21. FMCSA believes that retaining the S curriculum in the final rule will improve safety by providing a more complete approach to training that involves the transportation of all CMV passengers, including school children.

FMCSA does not believe the final rule unduly burdens those jurisdictions that already maintain reasonable S training requirements. As noted above, States or localities currently requiring that school bus drivers obtain S training that meets or exceeds the minimum standard established by today's rule will be minimally impacted because the rule does not impose *additional* training requirements on those programs. Any provider who currently offers S endorsement training that is equivalent to, or more stringent than, the curriculum set forth in proposed § 380.621 (now appendix D to part 380) could be eligible for listing on the TPR, presuming all instructor qualifications and other requirements are met. Entities eligible for listing on the TPR include, for example, individual school districts, State agencies or departments, and third-parties that contract with States or localities. The Agency revises the definition of ''training provider'' in § 380.605 of the final rule to make this more clear. The Agency notes, however, that it is up to individual training providers to determine whether they meet the requirements of today's rule.

FMCSA disagrees with the DMTA's position that the S endorsement training curriculum should not include a BTW component. According to DMTA, S endorsement BTW training would be redundant since the driver-trainee would either already have a Class B CDL or would be required to obtain a Class B CDL and thus complete a curriculum that includes at least 15 hours of BTW training. First, we note that, even in the absence of a 15 hour minimum BTW requirement (which was not retained in the final rule), the school bus-specific BTW training requirements in today's rule do not duplicate the Class B curriculum requirements for BTW on either the range or public road. The range/public road component of the S endorsement curriculum describes six maneuvers, specific to the operation of a school bus, in which the driver-trainee must demonstrate proficiency, as determined by the instructor.

When a driver-trainee who has not previously held a CDL intends to concurrently obtain a Class B CDL, as well as the P and S endorsements, the trainee can elect to take the Class B BTW training in a school bus. In such situations, BTW instructors will ensure that the range and road maneuvers required as part of the S endorsement training will be addressed in addition to the maneuvers required by the Class B curriculum. It would be up to the instructor to determine the point at which the driver-trainee demonstrates the school bus-specific competencies. FMCSA also notes that, for driver-trainees who concurrently obtain training for the Class B CDL and the P and S endorsements from the same training provider, the provider would electronically submit certification to the TPR indicating that the individual completed each of the three curricula.

In addition, not all driver-trainees wishing to obtain the S endorsement will necessarily have or need to obtain a Class B CDL. Those who intend to drive ''Type A'' school buses below a GVWR of 26,001 pounds would not need to hold or obtain a Class B CDL in order to obtain the S endorsement. Similarly, a driver who previously obtained a Class B CDL by completing BTW training and taking the CDL skills test in a straight truck, and who subsequently wishes to add the S endorsement to his or her CDL in order to drive school buses, must complete the BTW requirements specific to the operation of a school bus.

Commenters who asserted that the S endorsement training would either cause or exacerbate a shortage of school bus drivers did not offer any specific information in support of their claims, other than to note that ''additional'' training requirements would make it more difficult to find qualified drivers. We do not find this generic argument a persuasive basis for either eliminating or reducing the S endorsement curriculum.

As previously discussed, for those States and localities that already require training in the safe operation of a school bus, today's rule will likely have marginal impact as long as those training programs, at a minimum, follow the S endorsement curriculum as set forth in Appendix D and become listed on the TPR. For those jurisdictions presently without mandated training that meets this minimum standard, today's rule ''raises the bar'' for safety by requiring that school bus drivers be adequately trained. In the Agency's judgment, that is the paramount consideration for any jurisdiction or entity responsible for transporting children.

20. Hazardous Materials Endorsement Training

FMCSA proposed training for individuals seeking an H endorsement. As noted above, the current requirements to obtain an H endorsement, set forth in § 383.121, do not include a State-administered skills

test, because the H endorsement is not linked to a specific vehicle group or type of vehicle. Accordingly, the proposed H endorsement curriculum did not include a BTW component. The NPRM did not require a minimum number of hours for completing the H theory curriculum.

The Agency sought comment on the scope and content of the proposed curriculum and on whether the Pipeline and Hazardous Materials Administration's (PHMSA) hazardous materials employee training regulations in 49 CFR 172.704 could be used or modified to satisfy the proposed H endorsement training requirements.

Comments: The State of Minnesota asked whether the H endorsement training would need to be completed prior to the applicant taking the State-administered H endorsement knowledge test. Minnesota noted that since the proposed H endorsement theory curriculum ''closely mirrors the information in the hazardous materials section of the AAMVA CDL manual,'' the proposed endorsement training may not be necessary. The NGPA also commented that the proposed H endorsement curriculum is ''superfluous'' because State governments already provide training guidance for the H endorsement knowledge test, which includes material that ''is analogous to the proposal''. Additionally, NGPA noted that propane motor carriers already have a ''profound incentive to provide appropriate training on hazardous material operations, including all elements detailed in the proposal.''

Schneider requested that FMCSA remove the requirement for H endorsement training or, in the alternative, demonstrate the benefit from training. Schneider noted that H endorsement applicants are already required to pass a knowledge test as a condition of obtaining the endorsement and that, under the proposed rule, ''the driver would also be required to pay to complete this course work.'' Accordingly, ''Schneider believes the driver would demonstrate the same level of knowledge with or without the ELDT training and, therefore, the benefit of this training is not likely to justify the costs.''

The PMAA supported ''provisions in the NPRM designed to establish an improved core curriculum for Hazardous Materials endorsements.''

OOIDA does not support substituting hazardous materials regulations (HMR) training in 49 CFR 172.704 to satisfy the H endorsement training in the proposed rule, noting that ''the ELDTAC hazardous materials curriculum recommendations were carefully developed by a clear consensus.'' On the other hand, the Iowa DOT commented that substituting PHMSA's HMR training for the H endorsement training proposed in the NPRM ''seems reasonable and would establish a more universal standard for HAZMAT training.''

FMCSA Response: As noted in our discussion of the legal basis for this rulemaking, MAP–21 requires that minimum ELDT standards address the specific training needs of a CMV operator seeking an H endorsement (49 U.S.C. 31305(c)(2)). The Agency therefore does not have the legal authority to remove the H endorsement training requirements from the final rule, and they are retained as proposed. Further, FMCSA concludes that PHMSA's hazardous materials training requirements in § 172.704 may not be used to satisfy the H endorsement curriculum requirements in today's rule because the PHMSA regulations do not address the CMV-related topics included in the H endorsement curriculum. Finally, motor carriers and other entities that currently provide H endorsement training that meets or exceeds the minimum standard established in the final rule could continue to do so, as long as they are listed on the TPR in accordance with the eligibility requirements set forth in §§ 380.703 and 380.719.

21. Refresher Training

FMCSA proposed refresher training for any CDL holder who is disqualified from operating a CMV under § 383.51(b) through (e). The NPRM proposed that a CDL holder be required to complete refresher training from a provider listed on the TPR prior to retaking the State-administered skills test to reinstate his or her Class A or Class B CDL. Under the NPRM, the State may not restore full CMV driving privileges until the disqualification period is completed and the State receives notification that the driver completed refresher training. FMCSA did not propose a minimum number of required hours for the refresher training, but required that the training provider cover all topics in the curriculum. As proposed, disqualified drivers taking refresher training would obtain a restricted CDL solely for the purpose of completing the BTW portion of the refresher training curriculum. The Agency specifically invited comment on the practical implications of implementing that proposed requirement. FMCSA also invited comment on whether a driver disqualified under § 383.52 (imminent hazard) should also be required to complete refresher training before his or her CDL is reinstated.

Comments: Several comments recognized the value of refresher training. Advocates, DMTA, and the electric trades (EEI/NRECA/APPA) supported the idea of refresher training for drivers disqualified under 49 CFR 383.51(b) through (e). The State of Michigan supports refresher training ''only for reinstatement of lapsed CDLs, major CDL violations, imminent hazard, § 383.51, and § 383.52.'' NYAPT believes that ''it is appropriate to require CDL holders who have been disqualified or put on suspension to engage in some form of corrective training before they are allowed to resume their licensed status.''

Several commenters noted that the term ''refresher training'' may also pertain to training for CMV drivers whose CDLs have lapsed for some period of time. San Juan College suggested that, in the final rule, the Agency change the term to 'Reinstatement Training' ''to differentiate the training required for ''highway-safety'' related issues from the current refresher training programs that are not related to a safety issue.'' Another commenter suggested that FMCSA make clear that refresher training is not a short cut to initially getting a license.

A number of comments opposed all or part of the refresher training proposal. The ODOT questioned FMCSA's stated premise for refresher training, noting that ''[t]rained, experienced drivers may make mistakes or poor decisions in their driving behavior, but that does not mean they have suddenly lost their ability to safely operate a CMV.'' The North Dakota DOT commented that the proposal ''will have a direct administrative impact on the State's workload and lend itself to confusion for the public.'' The CA DMV stated that its ''system would require significant program modification in order to prevent the issuance of a CDL when refresher training was not completed.'' The VA DMV commented that the refresher training requirement would burden drivers subject to a 60-day disqualification, ''since a driver who is convicted of two speeding tickets in a three year period would be required to obtain an ''R'' restriction on his CLP/CDL, complete theory and BTW training (with fees) and return to DMV to have the ''R'' restriction lifted.'' AAMVA noted that, while it ''appreciates the need for refresher training, the requirement for refresher training for all violations incorporated under § 383.51 would drastically increase the volume and demand for operators requiring

such training prior to operational authorization of a commercial vehicle.''

A number of commenters pointed out various logistical and implementation issues associated with the States' limited reinstatement of the CDL to permit driver-trainees to complete the BTW portion of the refresher training curriculum, as proposed in § 383.95(h). The State of Minnesota said that having to provide limited privileges for refresher training would be an undue burden on SDLAs. The commenter noted that, in addition, ''Minnesota currently has a conflict with the 'R' restriction as that letter code is already used for something else in MN and this most likely is the case in many other states.'' The State of Michigan commented that ''the proposal for a limited license that allows for a training period when a person is currently under a suspension/revocation violates the Motor Carrier Safety Improvement Act (MCSIA) that was very specific that CDL drivers were not to be issued a limited term (restricted) license.''

The NY DMV commented that ''[t]here are too many variables to consider to implement a 'limited CDL' and would be putting a heavy burden on the States to program and monitor.'' The ODOT said that ''requirement for the SDLA to issue a 'restricted CDL' for the purpose of the BTW portion of the refresher training is unmanageable and burdensome.'' The Nebraska DMV, the State of Montana-DOJ/MVD, the Iowa DOT, the CA DMV, and the Delaware DMV also expressed concerns regarding the practical difficulties associated with a temporary reinstatement of the CDL in order for the holder to complete refresher training. AAMVA asked what evidence would be provided which would allow an individual ''to operate a CMV for the sole purpose of satisfying the refresher training.''

FMCSA Response: The final rule does not include a requirement for refresher training. The Agency removed the provision based primarily on the SDLAs' comments identifying specific ways in which implementation and administration of the proposed refresher training requirement would be difficult and burdensome to administer. Based on the comments, it is reasonable to assume that requiring an individual to obtain a restricted license solely for the purpose of completing the BTW road training would cause confusion for law enforcement, SDLAs, and individual drivers.

Further, the States impose their own reinstatement protocols on CDL holders who have been disqualified, some of which include remedial driver education and/or a requirement that the driver re-take the State-administered skills test as a condition of CDL reinstatement.[20] FMCSA therefore concludes that States should maintain their current flexibility to determine when, and on what basis, disqualified CDL holders will be reinstated. Accordingly, the final rule removes any reference to or requirement for refresher training.

22. Training Requirements for Driver-Trainees Obtaining Multiple CDL Credentials

In the NPRM, FMCSA proposed a Class A CDL core curriculum; a Class B CDL core curriculum and curricula for the P, S, and H endorsements. The curricula for Class A and B CDLs and the P and S endorsements are comprised of both theory and BTW (range and public road) elements. Individuals seeking the H endorsement would be required to complete theory training only. As explained previously, the H endorsement is not linked to any specific vehicle group or type of vehicle; consequently, there is no skills test required in order to obtain it. The Agency's responses to the comments below address the curriculum requirements applicable to driver-trainees seeking multiple CDL credentials.

Comments: The NY DMV noted that it is not clear whether a driver who is applying for a Class A or B CDL, as well as the P and S endorsements at the same time, must undergo multiple trainings and obtain certification in all three training curricula. NY DMV requested that FMCSA clarify that ''more than one training curriculum and certification would be required if undertaking the skills testing at the same time for more than one of the applicable Class CDLs or endorsements.''

NY DMV also noted that the NPRM is not clear regarding the obligations of driver-trainees undertaking multiple curricula when some of those curricula have overlapping elements in theory and/or BTW instruction. They posed the following example: ''a trainee undergoes the Class A curriculum, then wants to undergo the Class B curriculum, may the Training Provider offer them reduced theory and/or BTW instruction, if the trainee took the same theory and/or BTW instruction form the Class A curriculum?'' Other commenters wanted to know whether a driver upgrading from a Class B CDL to a Class A CDL would have to complete the entire Class A curriculum. The Nebraska DMV asked whether ''anything completed for the Class B training count[s] toward the Class A requirement.'' San Juan College, noting that the Class A and Class B curricula are virtually identical but for the inclusion of ''coupling/uncoupling'' in Class A training, stated that ''there should be some training required to upgrade from Class B to Class A, but it should only relate to skill required for pulling a trailer.''

The DDE commented that the NPRM does not address the requirements that a driver with a Class A CDL would need to meet in order to drive a school bus, *i.e.* ''just do the theory and BTW curriculum for 'P' & 'S' endorsements or also complete the Class B theory and BTW curricula?'' The CA DMV noted that the NPRM apparently requires that a person seeking a P, S, and/or H endorsement for a Class A or B CDL meet the specific endorsement training requirements in addition to the ''standard training requirements for the specified class of CDL.'' However, CA DMV commented that ''that fact is not clearly noted in the proposed language'' and requested that FMCSA clarify these requirements.

The DE DMV commented that ''[r]equiring additional training on top of Class A and B core 'entry-level' training for a specific endorsement is unnecessary'' because ''the applicant has already obtained the knowledge base necessary to operate a CMV.'' DE DMV also noted that it currently requires 12 hours of classroom training and 6 hours of BTW training for the ''S application,'' which ''falls short of the requirements set forth in this rule.'' DE DMV asserted that if the NPRM's S endorsement training requirements were adopted in the final rule, ''major changes to our current State laws, regulations and procedures will need to be made in order to meet this mandate.''

FMCSA Response: As proposed in the NPRM, the final rule requires that a training provider cover all theory and/or BTW topics in the curriculum for the applicable Class or endorsement in order for a driver-trainee to complete the training. The Agency acknowledges that there is overlap in some of the curricula content. For example, the topics included in both theory and BTW curricula for the Class A and B CDLs are virtually identical in most respects. However, there is a significant difference in the types of CMVs to which the Class A and B CDLs apply. Group A includes combination vehicles with a Gross Combination Weight Rating (GCWR) of 26,001 pounds or more, provided the Gross Vehicle Weight Rating (GVWR) of the vehicle

[20] Drivers who are required to take a State-administered skills test in order to reinstate their CDL would not be subject to the training requirements of this rule.

being towed exceeds 10,000 pounds (§ 383.91(a)(1)). Group B includes heavy straight vehicles (*i.e.,* non-combination) with a GVWR of 26,000 pounds or more, or any such vehicle towing vehicle not in excess of 10,000 pounds GVWR (§ 383.91(a)(2)).

The different operating characteristics of these two distinct vehicle groups require that many of the elements in the Class A and B curricula, though topically the same, be taught in ways tailored to the specific vehicle class. Space management, extreme driving conditions, pre-trip inspection, and backing are examples of topics that would call for different methods of instruction depending on the underlying vehicle class. The current CDL skills testing process accounts for the difference in handling characteristics between and among vehicle groups by requiring that the driving tests must be given in a representative vehicle for a given vehicle group (§ 383.91(b)). Similarly, today's rule requires that BTW training be conducted in representative vehicles for the class or endorsement for which training is provided. To the extent there is overlap between the Class A and B curricula, FMCSA agrees with the numerous commenters who noted that some level of repetition in training is acceptable as a means of reinforcing core concepts and competencies. Moreover, since the final rule does not require any minimum number of hours for BTW training, Class B CDL holders can reasonably expect to demonstrate proficiency in the Class A BTW elements in less time.

In response to the NY DMV's question regarding whether a Class A CDL holder, having already completed Class A training, who wishes to obtain a Class B CDL would have to complete the Class B training curriculum, the answer is no. Currently, any Class A CDL holder is permitted to drive a CMV in either Group B or Group C without taking the related knowledge/skills tests (§ 383.91(c)(1)). Today's rule does not change existing part 383 licensing requirements; therefore, no additional training would be required under those circumstances.

We note, however, that the ELDT requirements established in today's rule apply to persons who take a skills test either to obtain a Class A or B CDL for the first time, to upgrade to a Class A from a Class B, and to upgrade to a Class A or B from a Class C. Accordingly, after the compliance date of the final rule, a Class B CDL holder wishing to upgrade to a Class A CDL would be required to complete the entire Class A curricula (theory and BTW) before taking the skills test for the Class A CDL. Class C CDL holders seeking to upgrade to a Class A or B CDL would need to complete that curriculum before taking the applicable skills test. In addition, anyone holding a Class A, B, or C CDL who wants to obtain a P and/or S endorsement would need to complete the entire P and/or S endorsement curricula (theory and BTW) before taking the State-administered skills test in a representative passenger vehicle. Similarly, any CDL holder seeking an H endorsement must complete the H endorsement theory curriculum before taking the State-administered knowledge test.

As noted above, the DE DMV asserted that Class A or B holders already ''have the knowledge base to operate'' a CMV and should therefore not be required to undergo any additional endorsement-related training. To the contrary, the Agency believes it is both necessary and appropriate that CDL holders obtaining either the P or the S endorsement be trained specifically in the safe operation of the passenger vehicle(s) they will be licensed to operate.

Several commenters had questions regarding the ELDT requirements for driver-trainees obtaining more than one CDL credential at the same time. For example, DDE asked whether a Class A CDL holder wishing to obtain the S endorsement would need to complete the Class B, S, and P endorsement curricula. In that situation, the CDL holder would need to complete both portions of the S curriculum since the applicant would be required to take a State-administered skills test in order to obtain the endorsement. Because § 383.123(a)(1) currently requires that S endorsement applicants must also pass the knowledge and skills test for obtaining the P endorsement, the applicant must also complete the theory and BTW portion of the P endorsement training curriculum. The Class A CDL holder in this example would not need to complete the ELDT curriculum for the Class B CDL because, as previously stated, under § 383.91(c)(1), a Class A CDL holder is already licensed to operate a Group B (or Group C) vehicle.

As noted above, the DE DMV expressed concern that the DDE's current training program for the S endorsement, which requires 12 hours of classroom and 6 hours of BTW training, ''falls well short of the requirements set forth in this rule.'' We believe that concern is unfounded since the NPRM did not require any minimum number of hours for completion of either the theory or BTW portions of the S endorsement curriculum, and today's rule does not include such requirements. In order to comply with the minimum standard established by the final rule, existing programs simply must cover the S endorsement curriculum, and the instructor must determine that the driver-trainee is proficient in the knowledge and skills covered by the training. As stated previously, States are free to impose training requirements that exceed this minimum standard.

23. Training Materials

As proposed, training providers that train more than three driver-trainees annually must provide written training materials addressing the applicable curricula to each driver-trainee. Providers training three or fewer driver-trainees annually were not subject to this requirement.

Comments: The VA DMV asked ''whether FMCSA will provide training materials, such as instructor manuals and student manuals, for use by training providers or whether FMCSA will provide a list of approved vendors where compliant training materials may be obtained.'' NYAPT inquired ''as to the intention of FMCSA to provide course of study related to the theory portion of the training to enable training entities to simply deliver already approved training programs in the future.''

IUOE recommended that the Agency ''post written training materials on-line and develop an interactive, on-line training program for the theory portion of the Core Curricula'', noting that this approach would ''provide a feasible mechanism'' through which FMCSA could ensure quality and uniformity of training. IUOE also noted that FMCSA-sponsored training and testing would ''reduce by one-third the costs of ELDT borne by individual workers.'' Similarly, OOIDA commented that ''FMCSA should be able to create the necessary training and assessment for the theory curriculum'', which would prevent disparity among ELDT providers and provide a basis for tracking training performance.

FMCSA Response: FMCSA does not intend to provide written or electronic training materials for any of the curricula set forth in today's rule, nor will the Agency endorse or certify specific materials or vendors. The minimum curricular standards in the final rule are designed to provide sufficient topical guidance to theory training providers, while allowing those providers to determine the specific content and format of their training materials. The Agency anticipates that there will be variations in ELDT curricula based on a training provider's

presentation preferences and the needs of the driver-trainees they serve. In addition, training providers are permitted to add additional curriculum elements they deem appropriate. Accordingly, FMCSA-provided theory training materials represents an approach entirely inconsistent with the flexibility envisioned by today's rule.

FMCSA anticipates that the final rule will encourage new entrants into the market for ELDT services, which will increase the availability of innovative and cost-effective alternatives from which driver-trainees may choose. In addition, many motor carrier employers seeking qualified driver applicants currently provide ELDT (including training materials) at little or no cost to the driver-trainee, and the Agency has no basis to anticipate that will change as a result of the final rule. Because IUOE offered no substantiation for its claim that FMCSA-provided online training materials would reduce driver-trainees' costs by one-third, the Agency is unable to respond directly to that assertion.

As noted above, the final rule makes no distinction based on the size of the training provider; therefore, smaller training entities are subject to the requirement that written training materials must be provided to driver-trainees.

24. Sequence of ELDT

In the NPRM, FMCSA did not propose that the theory, BTW-range, and BTW-public road training occur in a specific sequence, but requested comment on whether there should be a particular order for any of the required curricula. The Agency also requested comment on whether theory training should be required before a driver-trainee takes the State-administered knowledge test to obtain a CLP.

Comments: FMCSA received a number of comments supporting the NPRM's approach, which allows training providers the flexibility to determine how they would structure and sequence their programs. According to DTCC, many schools have been very successful in training CDL drivers using a variety of curricular sequencing and that ''[t]o take this academic freedom away would cause undue hardship to the training providers and students alike.''

ATA agreed that training providers should be granted flexibility to determine when to teach various elements of the ELDT curricula, noting that many of CDL training schools currently provide instruction in most, if not all, of the curricula elements proposed in the NPRM. Over the years, the experience of those providers has taught them the best sequence in which to teach various elements. Additionally, ATA stated that maintaining this flexibility will encourage innovative and adaptive training programs that could greatly improve collective understanding of effective CDL training.

The VA DMV suggested that the final rule should require that theory and BTW-range instruction be provided before the BTW-public road portion of the training in order to ''ensure that drivers have a basic understanding of the laws governing CMVs and what to expect before beginning operation of a vehicle.'' AAMVA commented that it would be ''logical'' to provide theory training prior to any BTW ''where an increased element of danger is introduced into the environment,'' also noting that prior theory training would increase the value and efficiency of BTW training. AAMVA recommended that ''range hours precede public road training to limit public exposure to drivers that have not had BTW training in a controlled environment.'' The State of Michigan favored requiring that ''some'' theory instruction be completed before beginning BTW training, Michigan also commented that the final rule should require that theory training ''be coordinated with'' BTW training and, if not, ''states should be allowed to require such coordination.''

VU asked whether driver-trainees will be required to complete the full ten hours of range training for a Class A CDL before proceeding to the public road portion of the training.

AAMVA also commented that theory training should not be a mandatory requirement for taking the SDLA knowledge test, but should be made available to students who may want to use theory training to aid in their preparation for obtaining a CLP. San Juan College commented that, although completion of the theory portion of the ELDT does not need to be required before taking the State-administered CLP written tests, applicants would be much better prepared to take the CLP tests after completing their theory training. VU strongly believes that driver-trainees should not be required to take theory training before obtaining a CLP, noting that a student's ability to obtain a CLP, whether prior to or during the theory training, will facilitate the timely completion of the BTW portion of the training.

FMCSA Response: In today's final rule, FMCSA retains the approach proposed in the NPRM; there is no mandatory order in which the theory, BTW-range, and BTW-public road training must be administered, nor does the rule require that theory training must be completed before obtaining a CLP. The Agency believes it is appropriate to allow the training providers to determine how to structure their programs and best serve the needs of their students. Accordingly, the final rule does not require that a certain portion of range training precede the public road portion of BTW training for either a Class A or Class B CDL. However, as we noted in the NPRM, FMCSA expects that, for any of the BTW curricula established in today's rule, trainers will require that driver-trainees master basic vehicle control maneuvers in a controlled environment before allowing them to operate a CMV on a public road. In addition, if States currently have or wish to impose requirements for sequential or integrated ELDT, nothing in the final rule prohibits them from doing so.

25. ELDT Instructor Qualifications

The NPRM proposed that, among other things, ELDT instructors providing theory and BTW training must be ''experienced drivers'' having at least one year of experience in either CMV operation or driver training instruction. The Consensus Agreement noted the ELDTAC's preference for two or more years of CMV driving experience. FMCSA requested comment on whether a two-year experience requirement would affect the applicability of State laws relating to instructors or training providers.

The NPRM also proposed that BTW instructors complete training in the public road portion of the curriculum in which they are instructing.

a. BTW Instructors—Level of CMV Driving or Instruction Experience

Comments: Most commenters supported a minimum of two years of experience operating a CMV; however, several commenters thought the minimum of CMV driving experience should be five years. Truckers for a Cause strongly disagreed with the length of the proposed experience requirement, stating that ''[i]t does not mandate enough experience to properly train a CLP holder.'' Truckers for a Cause recommended that experience be specified as either 200,000 miles of ''logged over the road driving'' or 3000 hours of ''paycheck documented driving work time.'' Similarly, Minnesota noted that its CDL BTW instructor qualifications refer to hours of experience, *i.e.,* ''3000 hours within the last five years of experience operating the class of vehicle for which instruction will be provided.''

Other commenters, including NAPT and ATD, urged FMCSA to allow a maximum degree of flexibility in setting instructor qualifications. Virginia requested the final rule make clear ''that these are minimum requirements so that the states have flexibility in requiring additional criteria.'' ATD expressed concern that ''overly restrictive instructor qualification requirements would unduly limit the number and availability of qualified instructor/trainers.'' DTCC commented that the final rule should specify that the instructor's experience pertain to the classification of CMV in which instruction is being provided.

FMCSA Response: In today's rule, FMCSA increases the minimum level of CMV driving or instructional experience from one year, as proposed, to two years. Accordingly, the rule requires that BTW instructors hold a CDL of the same (or higher) class, with all endorsements necessary to operate the CMV for which training is to be provided, and have either a minimum of two years of experience driving a CMV requiring a CDL of the same or higher class and/or the same endorsement *or* at least two years of experience as a BTW CMV instructor. In addition, as proposed in the NPRM, BTW instructors must meet all applicable State requirements for CMV instructors. Accordingly, nothing in the final rule prohibits States from imposing more stringent qualifications for BTW instructors, such as a requirement that they have at least five years of CMV driving experience.

FMCSA believes this approach, which reflects the ELDTAC's preference for at least two years of CMV driving or BTW instruction experience, as well as the opinion of numerous commenters, establishes a sufficient minimum qualification standard for BTW instructors. We also note that the instructional requirements described above are now incorporated directly into the definition of ''BTW instructor'' in § 380.603, rather than in the definition of ''experienced driver,'' as proposed. Consequently, the term ''experienced driver'' does not appear in the final rule.

Finally, we note the final rule does not include the requirement, proposed in the NPRM, that certain BTW instructors must have completed training in the public road portion of the curriculum in which they are instructing. The Agency believes the higher level of CMV driving experience now required makes that additional requirement unnecessary.

b. Theory Instructors—Level of CMV Driving or Instruction Experience

Comments: The NY DMV requested that FMCSA clarify how the proposed definition of ''experienced driver'' applies to theory instructor qualification requirements.

FMCSA Response: As noted above, the final rule does not use the term ''experienced driver.'' The qualifications for theory instructors are now incorporated directly into the definition of ''theory instructor'' in § 380.605. Under the final rule, theory instructors must hold a CDL of the same (or higher) class, and with all endorsements necessary, to operate the CMV for which training is to be provided, and have a minimum of two years of experience driving a CMV requiring a CDL of that class or endorsement *or* at least two years of experience as a BTW CMV instructor. The NPRM proposed that theory instructors have a minimum of one year of CMV driving or instruction experience. The two-year level of CMV driving or instruction experience is thus commensurate with the BTW instructor qualifications described above.

In addition, FMCSA deletes the proposed qualification that theory instructors must have audited or instructed the portion of theory training that they intend to provide. On further consideration, we concluded that this qualification standard is insufficient because it does not require that the theory instructor have actual CMV driving or instructional experience. In the final rule, the Agency adds an exception to the theory instructor qualifications set forth in § 380.605: An instructor is not required to hold a CDL of the same (or higher) class and with all endorsements necessary to operate the CMV for which training is to be provided, as long as the instructor previously held a CDL of that class and meets all other qualification requirements. The Agency makes this change in order to permit retired CMV drivers, who may have many years of experience operating a CMV but who no longer hold a CDL, to provide theory instruction. As noted below, this change responds to a comment regarding the valuable experience that such drivers possess.

The final rule requires that, as proposed, theory instructors must also meet any applicable State requirements for CMV instructors. However, today's rule includes a limited exception to that requirement when online theory training is provided. Because the nature of online training makes it available literally anywhere there is an internet connection, it would be impractical to expect an online provider to meet multiple (and possibly conflicting) State-based requirements pertaining to CMV theory instructors. Therefore, State-based qualification requirements otherwise applicable to theory instructors would not apply to those instructors who provide content for online providers. The Agency adds a requirement pertaining to theory providers who offer online content in any of the theory curricula included in today's rule: They must ensure that the online theory curriculum content is prepared and/or delivered by theory instructors who meet the qualifications described above (*e.g.,* two years of CMV driving or BTW instruction experience).

c. Additional Instructor Qualification Issues

Comments: Truckers for a Cause suggested that ''older experienced drivers who may no longer be able to obtain a DOT medical card'' be able to qualify as instructors under the final rule.

FMCSA Response: FMCSA adds an exception to the BTW instructor qualifications in today's rule: A BTW instructor who provides training on a range that is not a public road does not need to hold a CDL of the same or higher class, and with all endorsements necessary, for which training is to be provided, as long as he or she previously held a CDL of the same or higher class, and with all endorsements necessary to operate the vehicle for which training is to be provided, has at least two years of CMV driving experience or CMV instruction experience, meets applicable State requirements, and meets the driving history requirements for BTW instructors, as discussed below. This limited exception allows older drivers, some of whom may be retired from driving or are no longer medically qualified to operate a CMV on a public road, to teach entry-level drivers during the range portion of BTW training. However, since any instructor who provides BTW range training on a public road or BTW public road training would need to hold a CDL, this exception would not apply to training conducted under either of those circumstances. (*See* § 380.605 for BTW instructor qualifications and requirements.)

26. BTW Instructors' CMV Driving History

The NPRM proposed that within the past two years, BTW instructors must not have had any CMV-related convictions for the offenses identified in § 383.51(b) through (e). It also required

training providers to utilize public road BTW instructors whose driving records meet applicable Federal and State requirements.

Comments: All comments addressing this issue agreed that a BTW instructor's driving record is relevant in determining whether the instructor is qualified. Both DMTA and DTCC commented that, because of the serious nature of the offenses identified in § 383.51(b) through (e), any driver disqualified for any of those offenses should be permanently barred from engaging in BTW instruction. OOIDA commented that three of the offenses proposed as a basis for disqualifying a BTW instructor (*i.e.,* speeding excessively, following the vehicle ahead too closely, and railroad-highway grade crossing offenses) have the potential to be ''cited incorrectly'' and thus should not be relied on to determine an instructor's qualification. OOIDA also suggested that the time period for disqualifying offenses should be five years, rather than two years as proposed.

An individual driver stated that instructors should ''have no record of theft or violence of any kind, nor have had any record of drug use or DUI.'' The NY DMV noted that, in addition to the offenses identified in § 383.51(b) through (e), ''there are many other factors on a driving record that would make an instructor undesirable, including, but not limited to, other sanctions, fraud, non-CMV violations, and accidents,'' suggesting that FMCSA strengthen the provision pertaining to an instructor's prior driving record. The ODOT asked what is meant by the proposed requirement that an instructor's driving record meet ''applicable Federal and State requirements.''

FMCSA Response: In an effort to both simplify and clarify this provision, today's rule states that if an instructor's CDL has been suspended, revoked, or cancelled due to any of the disqualifying offenses identified in § 383.51, the instructor is prohibited from engaging in BTW instruction for two years following the date his or her CDL is reinstated following the disqualification. Anyone who loses the privilege to drive a CMV due to engaging in any of these unsafe driving behaviors should not be entrusted to teach entry-level drivers how to safely operate a CMV.

The Agency believes that the standard for BTW instructor disqualification is more appropriately based on CDL suspension, revocation, or cancellation, rather than on CMV-related convictions, as proposed. This change reflects the fact that under § 383.51, certain offenses require more than one conviction before a driver's CDL is suspended, cancelled, or revoked, while other offenses result in loss of CDL driving privileges after the first conviction. The outcome therefore varies according to the severity of the underlying offense. Therefore, BTW instructor disqualification is based on the loss of CDL driving privileges due to unsafe driving behaviors.

We also note that the NPRM's proposed requirement that a BTW instructor's driving record meet ''applicable Federal and State requirements'' has been deleted from the final rule. FMCSA concludes the language is unnecessary in light of the reference to ''applicable State requirements for CMV instructors'' in the definition of ''BTW instructor'' in § 380.605.

Finally, FMCSA reiterates that States are permitted to impose more stringent BTW instructor requirements.

27. ''De-Certification'' of ELDT Instructors

Comments: The NY DMV noted that the NPRM did not include processes related to the ''de-certification'' or reinstatement of ELDT instructors.

FMCSA Response: Under today's rule, FMCSA has no role in certifying training instructors. The final rule defines a minimum qualification standard for BTW and theory instructors, but leaves it up to the training provider to determine whether those qualifications, as well as any applicable State requirements, are met. Further, FMCSA is not in a position to evaluate a training provider's compliance with State requirements. As part of the self-certification process, training providers must attest, under penalty s of perjury, that they comply with the requirements of §§ 380.703 and 380.719 in order to be eligible for initial and continued listing on the TPR. Those requirements include utilizing BTW and/or theory instructors meeting the criteria set forth in § 380.713. Failure to meet State requirements could result in the training provider's removal from the TPR.

28. Self-Certification of Training Providers

As proposed, in order to be listed on the TPR, a training provider must meet the applicable eligibility requirements set forth in subpart G and electronically submit a completed Training Provider Registration Form affirming, under penalty of perjury, that the provider will teach the FMCSA-prescribed curriculum that is appropriate for the CDL class or endorsement. FMCSA did not propose that training providers be accredited by a third-party organization in order to be eligible for listing on the TPR.

Comments: Commenters strongly supported the concept of training provider self-certification. ATA supported the proposed requirement that training providers self-certify because it will ensure there are an adequate number of training providers available when the rule is fully implemented. Furthermore, ATA believed that periodic audits will confirm that these training providers are offering fully compliant programs.

The NMFTA was also supportive. It stated that while self-certification processes are ''commonly viewed as suspect,'' in this case FMCSA has proposed adequate safeguards to ensure they are meaningful. NMFTA cited the proposed documentation retention requirements and on-site audits or investigations by FMCSA as additional enhancements to program integrity.

ATD supports the self-certification proposal because a third-party accreditation mandate would be too bureaucratic, inflexible, and costly. They also noted that an accreditation model could result in an insufficient supply of training options to meet industry demands.

The Agency did not receive any comments opposing self-certification.

FMCSA Response: In today's rule, FMCSA retains the self-certification approach for training providers, as proposed in the NPRM. In response to specific comments, the Agency clarified some of the data elements to be included in the Training Provider Registration Form, which are discussed immediately below.

29. Training Provider Identification Form and Related Information Requirements

The proposed Training Provider Identification Report form (TPID form), available in the NPRM docket, was designed to capture the information necessary for registration on the TPR, such as identifying business and training facility information, training provider type (*e.g.,* in-house, for-hire), and type of CDL training offered (*i.e.,* specific CDL class or endorsement). The TPID also included a section titled ''Third-Party Quality Control,'' in which providers could indicate the CMV driver training third-party certification or accreditation organizations with which they are affiliated. The proposed form identified three organizations by name (*i.e.,* PTDI, CVTA, and NAPFTDS) and also provided a blank space in which applicants could specifically identify other third-party groups to which they

belong. The NPRM proposed that training providers report changes in key information within 30 days of the change and biennially submit an updated TPID form to FMCSA. The Agency also noted that the TPR would provide a way for individuals seeking training to find an eligible provider meeting their specific needs.

Comments: The State of Michigan supports the requirement for training providers to report each training location (§ 380.703(a)(6)) and that each location have some unique identifier in the TPR, but is concerned that as proposed, the rule may not link multiple locations to one training provider. Michigan suggested that two ''linked sets of unique identifiers be created—one for training providers (business entities) and another for facilities (locations used by providers).'' UPS expressed concern about ''the lack of clarity in the rule regarding whether each of the numerous training facilities it operates across the United States must be separately registered'' and subject to biennial renewal of registration and other requirements for continued listing on the TPR.

The VA DMV asked whether there ''will be an initial fee for applicants to register'' or a fee associated with continued listing on the TPR. Some commenters were concerned that the registration process would be unduly burdensome and expensive. UPS said that ''[t]he proposed rule would impose on UPS and other carriers with proven in-house training programs the unnecessary cost and burden of ensuring that all of it facilities meet the specific requirements'' for listing on the TPR. The NSTA, citing ''administrative fees and burdens'' that it expects to be associated with the registration process, urged FMCSA to streamline the required information and registration process as much as possible in order to minimize costs.

Dart Transportation recommended that ''motor carriers not be required to register as certified training programs as long as [they] use BTW trainers with at least one year of experience and otherwise meet all DOT qualification requirements.'' UPS recommended that ''any school operated by a motor carrier that employs more than 1000 CDL-licensed drivers for the purpose of training drivers that the motor carrier intends to employ, shall be conclusively presumed to satisfy the requirements for listing on the TPR.''

The VA DMV requested that FMCSA maintain a ''publicly accessible listing of approved training providers that includes when providers have received a notice of proposed removal.'' The NYAPT commented that, as proposed, the TPR will ''require many school districts to sign up as training providers'' which ''will inflate the size of the Registry significantly with entities that seek to train their own drivers and who are not intending to make their services available to other employers.''

Minnesota commented that ''[t]here will need to be communication between the TPR registry and states that license CDL training schools when a training school fails to follow state requirements.'' The NY DMV asked whether the State has an affirmative obligation to inform FMCSA if a training provider ''ceases to be certified to provide training in that State.''

IUOE requested that FMCSA clarify that ''apprenticeship programs and other joint labor-management programs satisfy the 'third-party quality control' section'' of the TPID Report form. IUOE also noted that, in the NPRM, FMCSA stated its intention to provide post-rule guidance regarding both suggested and proposed documentation establishing a training provider's compliance with the eligibility requirements for listing on the TPR. IUOE urged the Agency to ''resolve issues related to third-party quality control through the rulemaking process, rather than through post-regulatory guidance.'' The Montana Logging Association (MLA) asked that FMCSA ''eliminate or modify the part where training facilities need to be accredited by an educational source.''

FMCSA Response: The Agency appreciates the comments it received on the training provider registration process, some of which led to revisions in the newly titled Training Provider Registration Form (TPRF) and/or the related instructions, both available in the docket of this rulemaking. For example, FMCSA agrees with commenters who raised questions about the registration process for training providers with multiple training facility locations. The Agency revises the registration form to accommodate Michigan's suggestion that, for such entities, linked sets of unique identifier numbers be assigned, one for the training provider business entity and others for separate training locations operated by that entity. FMCSA intends to minimize the training location-specific information required for the biennial updates for entities that maintain multiple training locations. We also note that the TPRF is an online form that must be electronically transmitted through the TPR Web site. The Agency will not accept paper registrations forms.

There is no fee associated with either initial or continuing registration on the TPR. Further, FMCSA expects that the registration process itself will be neither burdensome nor costly, as the process is entirely electronic and captures basic identifying and categorical information. The Agency sees no rationale under which motor carrier-operated training schools should be permitted to opt out of the TPR registration requirements on the basis of their size or safety record, as several commenters suggested. Such exceptions would defeat the very purpose of the registration process, which is to provide FMCSA with identifying information and to require all training providers to attest, under penalty of perjury, that they provide ELDT in accordance with the final rule. In addition, registration is necessary to allow for the electronic transmission of training certification information to the TPR.

FMCSA acknowledges that some training providers, including those who provide ELDT only for their own employees or prospective employees, may wish to keep their contact information private and therefore not have it publicly displayed on the TPR Web site. Accordingly, training providers who do not intend to make their services available to all driver-trainee applicants can elect not to include their contact information in the public listing that appears on the TPR Web site. This option will be made available at the time of initial registration and can be changed anytime the provider so chooses. Because these training providers do not wish to be contacted by driver-trainee applicants, they will be listed on the TPR Web site simply by name, city, and State. We note, however, that it is important that *all* training providers eligible to deliver training that complies with today's rule be publicly listed, so that driver-trainee applicants will have a reliable means of confirming the provider's eligibility. The publicly available information on the TPR may be accessed by anyone, at no cost. A provider listed on the TPR is eligible to provide ELDT once it has been assigned a unique training provider ID number. However, the Agency emphasizes that, as explained above in the discussion of the self-certification approach adopted in today's rule, merely because a training provider is listed on the TPR does *not* mean that FMCSA certifies or otherwise ''approves'' that provider's operations. Prospective entry-level drivers are thus encouraged to perform their own due diligence before selecting a suitable training provider.

The Agency agrees with the VA DMV's suggestion that training providers who have received a notice of

proposed removal should be publicly identified on the TPR Web site. The final rule requires, as proposed, that training providers who receive a notice of proposed removal under § 380.723(b) to inform current driver-trainees, as well as those scheduled for future training, of the proposed removal. However, FMCSA believes this information should also be available on the TPR Web site as an additional means of putting prospective students on notice that the Agency issued a notice of proposed removal to a training provider listed on the TPR. In the event that FMCSA withdraws the notice, the Agency would remove the designation that a notice was issued. FMCSA adds this provision to § 380.723(b) of the final rule.

Several commenters asked whether a State must inform the Agency whenever a CMV driver training provider licensed, certified, or otherwise approved by that State no longer complies with the applicable requirements imposed by the State. The answer is yes, and parts 383 and 384 are revised to make that obligation clear. This notification requirement is necessary because FMCSA has no independent means by which to monitor a training provider's compliance with existing State laws and regulations. A training provider's failure to comply with the licensure, certification, or other requirements of the State in which it conducts training may result in that provider's removal from the TPR.

In response to comments by MLA and IUOE, FMCSA notes that we may have inadvertently caused confusion by labeling a section of the TPID form as ''Third-Party Quality Control.'' As noted above, no third-party certification or accreditation requirements for training providers were proposed in the NPRM and none are adopted in the final rule. The purpose of this section on the proposed TPID form was merely to identify organizational affiliations that training providers may have. There is no requirement that training providers belong to any third-party group as a condition of listing on the TPR. In order to avoid confusion going forward, FMCSA changes the name of that section of the registration form from ''Third-Party Quality Control'' to ''Third-Party Affiliations.'' We also add ''joint labor-management programs'' to the list of third-party organizations identified in this section of the form.

FMCSA further clarifies that the Agency does not intend to issue post-rule guidance pertaining to ''third-party quality control''. The guidance to which we referred in the NPRM concerned the specific documentation requirements set forth in § 380.725. In light of the clarifying changes made in § 380.725 of the final rule discussed below, the Agency believes that post-rule guidance on training provider documentation requirements is unnecessary. In addition, draft instructions accompanying the TPRF, available in the docket for this rulemaking, provide detailed descriptions of the categories of information required for registration on the TPR.

30. Timeframe to Electronically Transmit ELDT Certification Information

FMCSA proposed that all training providers must upload training certificates to the TPR by close of the next business day after the driver-trainee completes the training.

Comments: The Delaware DOE stated that not all of its certified trainers have the hardware or software to transmit certificates. Delaware DOE, DMTA, and DTCC asserted the requirement to notify FMCSA by the next day will not be possible in all cases. DMTA and DTCC favored allowing training providers up to one week to upload training certification. Werner requested that the time for electronic transmission of certificates be extended beyond what was proposed, noting that ''[a] potential daily requirement to complete and upload training certificates is an unreasonable and potentially expensive administrative burden on training providers.'' AAMVA recommended that ''instead of using the subjective timing of when a business day 'closes,' FMCSA [should] instead use 'midnight of the next business day'.''

FMCSA Response: FMCSA acknowledges that, for a variety of reasons, training providers may need more than one business day to transmit the training certification information to the Agency through the TPR. Accordingly, in today's rule, training providers have until midnight of the second business day after a driver-trainee completes training to electronically transmit the ELDT certification to the TPR. In addition, the final rule requires that providers electronically submit training certification information, as defined in § 380.717, to the TPR through an online form, rather than uploading the training certificate, as proposed. FMCSA believes this method of data transmission is more efficient and ensures that the required informational elements will be uniformly understood and reported.

31. FMCSA's Transmittal of ELDT Certification and Related Information Requirements

As proposed, following a driver-trainee's completion of ELDT administered by a training provider listed on the TPR, the provider will electronically transmit to the TPR a certificate of completion which contains specified information, including the driver-trainee's name, CLP/CDL number and the CDL class and/or endorsement training the driver-trainee received. FMCSA would then instantaneously transmit the certificate to the SDLA via CDLIS for entry into the appropriate driver record. In the NPRM, the Agency indicated that it would not retain a copy of the trainee certificate in any Agency system of records. For Class A or B CDLs or P, S, or H endorsements issued after the compliance date of the final rule, FMCSA proposed that, before issuing a CDL, States be required to initiate a check with CDLIS to determine that the applicant completed the required ELDT from a training provider listed on the TPR.

Comments: A number of commenters had questions related to the process by which SDLAs would confirm that a CDL applicant completed the required ELDT. AAMVA and the ODOT asked whether SDLAs would be permitted to accept paper training certificates. Other commenters recommended that FMCSA retain the training certificate as ''back-up'' documentation in the event the SDLAs do not receive the information or there is a verification problem. The Connecticut DMV asked FMCSA to clarify how States will be notified when the Agency removes a training provider from the TPR.

AAMVA noted further that it is unclear how quickly the SDLAs would be notified after the ELDT certificate is uploaded to the TPR and requested that the Agency clarify the time frame in the final rule. AAMVA also asked FMCSA to clarify how long SDLAs have to post the ELDT certificates and for what length of time the States must retain the information. South Dakota DPS commented that if license examiners must record the training certificate when the driver applied for a CDL, there would be longer wait times at examining stations, requiring States to hire additional staff. The ABA asked whether FMCSA intends to make ELDT certificates available to motor carriers seeking to hire qualified drivers.

The NY DMV commented that FMCSA ''has not set any regulations or guidelines as to the establishment of [the TPR] or the integration of the transmittal of TPR certification data to

CDLIS.'' AAMVA noted that, while § 380.717 identified the information that a training provider must submit to the TPR, the NPRM did not include a list of proposed data elements that need to be posted to the CDLIS driver record. AAMVA requested that FMCSA clarify ''which data elements CDLIS and the SDLAs will be required to accommodate.'' ODOT observed that, because CDLIS does not retain CDL issuance history, ''after only a few years, every driver will appear to be under the training requirement.'' Accordingly, ODOT suggested that the Agency add specific data elements for recording in CDLIS, such as whether the ELDT requirements applied to an individual driver as of the compliance date of the final rule and what class of CDL and/or endorsements the driver received.

ATA commented that ''[i]t is imperative that training providers are able to electronically transmit training certificates to the SDLAs, and that the SDLAs are able to append the certificate, or confirmation thereof, to the driver's [CDLIS] record prior to implementation of this rule.'' Similarly, NY DMV recommended that the TPR be ''fully established and operational to integrate the training certifications to CDLIS *prior* to'' the compliance date of the final rule. AAMVA suggested that the TPR send an inquiry to CDLIS to verify that the training certification can be matched to a CDLIS Master Pointer record prior to the TPR's transmission of ELDT certification to the SDLA.

FMCSA Response: In the final rule, FMCSA will not, as proposed, transmit the training certificate to the States through CDLIS for entry on the driver's record. Instead, the Agency intends to provide the relevant ELDT certification information through data elements added to CDLIS that will be entered by the SDLAs directly onto the driver's record. At a minimum, these additional data elements will include the training provider's unique ID number (assigned upon initial listing on the TPR), the date the applicant completed applicable ELDT, and the type of ELDT the applicant received (*e.g.,* Class A, Class B and/or the P, S, or H endorsements). The Agency intends to transmit the training certification information as soon as FMCSA confirms the information is complete. Under this approach, States will not be required to verify that the applicant received ELDT from a training provider on the TPR, as proposed. Consequently, there is no need for FMCSA to notify States if a provider in their State is removed from the TPR. SDLAs will simply need to confirm, by checking the applicant's driver record, that he or she has completed requisite ELDT before allowing the individual to take the applicable skill test(s) or, in the case of the H endorsement, the knowledge test. In addition, the final rule does not require that States separately retain the training certification information, since the relevant data will be entered directly onto the driver's record through CDLIS.

Contrary to the position that FMCSA expressed in the NPRM, the Agency will retain the training certification information electronically transmitted to the TPR. Upon consideration, FMCSA believes retention of this information is prudent in the event that data transmission to CDLIS is unsuccessful, as several commenters noted. Further, as noted previously, the Agency intends to use the specific training information contained in the certificates to assess the impact of ELDT on motor carrier safety and to monitor the effectiveness of individual training providers. FMCSA will not make individual driver-trainee ELDT certification information available through the TPR to potential employers or any entity other than the SDLAs. The means by which FMCSA will protect the personally identifiable information (PII) contained in the training certification information is discussed in the Privacy Impact Assessment associated with this rulemaking.

The Agency will not issue paper training certificates for use by the SDLAs; FMCSA's transmittal of ELDT certification information to the SDLAs will be entirely electronic through CDLIS. The Agency believes that the use of paper training certificates is susceptible to fraud. Accordingly, in the final rule, FMCSA revises § 383.73(b)(10) to clarify that States must accept only electronic notification of ELDT certification. However, today's rule does not prohibit training providers from issuing paper certificates to individual driver-trainees, who may wish to have their own documentation of ELDT completion.

The comments submitted by SLDAs and training providers have raised important questions and concerns regarding the transmittal of ELDT certification information to the States through CDLIS. Many of the operational details will necessarily be developed during the implementation phase of the TPR, and the Agency will take these comments into account during that process. In addition, FMCSA will work closely with AAMVA and the SDLAs during the implementation phase to address these issues in a way that minimizes the administrative burden on States to the greatest possible extent.

a. Separate Training Providers

The NPRM permitted theory and BTW training to be delivered by separate providers. The Agency noted that it ''would not transmit training certification to the SDLA until it receives notice of successful completion of both theory and BTW (range and public road) training, when applicable.'' (81 FR 11960)

Comments: The NY DMV wanted to know whether, if the training is completed by two different providers, both providers would be required to complete a training certification. If so, how would separate certifications ''be reconciled for transmittal of a single certification of driver training completion to CDLIS?'' NY DMV recommended that ''the training certification not be issued and pushed to CDLIS until both components of the training are completed.'' Similarly, the CA DMV noting that ''[t]he proposed language seems to indicate the DMV will receive multiple electronic completion notices when separate training providers deliver the theory and BTW training,'' commented that ''it would be less complicated if the states only receive one certification per curriculum.''

FMCSA Response: If a driver-trainee completes BTW and theory training delivered by two separate providers, each provider must transmit its certification to the TPR. The Agency will not transmit notice of ELDT certification through CDLIS until both portions of the training are completed. Therefore, as the NY and CA DMVs suggested, there will be a single notification to SDLAs indicating that the CDL applicant complies with applicable ELDT requirements. We also note that, as discussed above, today's rule requires that the range and public road components of BTW training be obtained from the same training provider.

32. Audits, Investigations, and Documentation Requirements—FMCSA's ''Authorized Representative''

As proposed, one of the requirements that training providers must meet in order to remain listed on the TPR is to allow an audit or investigation of their operations conducted by FMCSA or its authorized representative (§ 380.719(a)(6)). Training providers must also ensure that all required documentation is available upon request by FMCSA or its authorized representative.

Comments: Several commenters questioned the meaning of the term ''authorized representative'' as used in

the NPRM. The NY DMV commented that it ''does not have the funding or the resources & expertise to undertake such a task if FMCSA decided to utilize state agencies.'' The Nebraska DMV stated that ''SDLAs not be considered an 'authorized representative' now or any time in the future,'' requesting that FMCSA make this clear in the final rule.

FMCSA Response: The provisions in § 380.719(a)(6) and (7), cited above, remain unchanged in the final rule. By using the term ''authorized representative'', FMCSA does not intend to impose any audit, investigation, or documentation inspection requirement on the States. The term simply indicates that the Agency may fulfill these functions by using third party representatives as appropriate.

33. Involuntary Removal From the TPR—Due Process

As proposed, § 380.723 set forth procedures related to the voluntary and involuntary removal of a training provider from the TPR.

Comments: Driver Holdings LLC (Driver Holdings) noted that under proposed § 380.723, any training provider to whom FMCSA issues a notice of proposed removal must notify current students, as well as students scheduled for future training, of the proposed removal ''and all training after that date is not compliant.'' Driver Holdings commented that § 380.723 ''does not appear to provide due process'' because ''[t]here does not seem like there is an opportunity for the [training provider] to correct the problem, short of suspending its program.''

FMCSA Response: The procedures set forth in § 380.723 are largely retained as proposed. Under § 380.723(b), FMCSA initiates the process for removing a training provider by issuing a notice of proposed removal from the TPR, setting forth the reasons for the proposed removal and any corrective actions necessary for the provider to remain listed on the TPR.

The Agency acknowledges the commenter's concern that the proposed language does not appear to afford the training provider an opportunity to correct noted deficiencies ''short of suspending its program.'' In response, FMCSA deletes the proposed language in § 380.703(b) stating that ''no training conducted after issuance of a notice of proposed removal will be considered to comply with this subpart until FMCSA withdraws the notice.'' Accordingly, under the final rule, training providers who receive a notice of proposed removal can continue to conduct training during the period in which they are undertaking the necessary corrective actions, which is generally 60 days. However, the final rule requires, as proposed, that providers who receive a notice of proposed removal must inform driver-trainees currently enrolled in training, as well as those scheduled for future training, of the proposed removal. In addition, as noted below, FMCSA will indicate on the TPR Web site that it has issued a notice of proposed removal to the training provider. (The Agency will remove that notation from the TPR Web site if it withdraws the notice.) If FMCSA subsequently removes the provider from the TPR because it did not respond to the notice or proposed removal within 30 days, or because it did not complete the required corrective actions, any training conducted after the date of removal is invalid.

In the Agency's judgment, this approach balances the needs of training providers who wish to correct deficiencies in their program and driver-trainees who are already receiving training from a provider to whom FMCSA issues a notice of proposed removal. Finally, we note that, under the emergency removal procedures in § 380.723(e), FMCSA can immediately remove any training provider engaged in fraud, criminal behavior or when the public interest or safety requires.

The rest of § 380.723(c)(1) remains largely as proposed. The Agency, therefore, believes that the final rule offers training providers significant due process protections which allow them to: (1) Respond to the notice of proposed removal by explaining why the proposed removal is not warranted or by agreeing to take specified corrective actions; (2) conduct training following issuance of the notice of proposed removal (3) avoid removal from the TPR by taking prescribed corrective actions; (4) request administrative review of removal; and (5) apply for reinstatement to the TPR no earlier than 30 days after involuntary removal.

34. Scheduling the State-Administered CDL Skills Test

The NPRM did not address when a driver-trainee may schedule his or her State-administered CDL skills test. Under existing regulations, a CLP holder is not eligible to take the CDL skills test in the first 14 days after initial issuance of the CLP (§ 383.25(e)). However, part 383 does not prohibit a CDL applicant from scheduling a skills test before that date.

Comments: Several commenters suggested that driver-trainees should be permitted to schedule skills testing prior to the completion of the required ELDT and urged FMCSA to address the issue in the final rule. Most commenters cited State CDL skill testing delays as the reason for their request that scheduling be permitted before ELDT is completed.

FMCSA Response: The final rule does not prohibit an applicant from scheduling a skills test in advance of his or her completion of the required training. However, the rule is very clear that a State may not administer a skills test until a driver-trainee completes the training for the CDL or endorsement for which he or she is applying. Today's rule will better prepare the applicant to take the skills test, thereby reducing the chance of failure and the need to take the test more than once.

35. Third-Party Skills Testers—Verification of ELDT Certification

The NPRM did not address whether, or how, a third-party CDL skills tester would access a driver-trainee's training certification information. Under § 383.75, States may currently authorize a third-party tester to administer the CDL skills tests, as long as specified conditions are met.

Comments: AAMVA commented that, as an agent of the State, a third-party CDL skills tester would need to verify that the applicant completed the required ELDT, but noted that ''[n]o consideration of this verification process by third-party providers is included in the NPRM . . .'' AAMVA suggested that, in the final rule, FMCSA permit third-party testers to ''submit a search inquiry to the TPR and obtain the necessary certificate data to administer the skills test.'' Similarly, ATA observed that, absent granting third-party skills testers access to CDLIS, they ''would have no way to verify the course has been completed.'' However, ATA opposed granting third-party testers access to the TPR to obtain the information, citing privacy concerns. The State of Michigan also noted the third-party tester's need to confirm the ELDT certification, suggesting that the certificates be submitted to the Commercial Skills Test Information Management System (CSTIMS).

FMCSA Response: The Agency acknowledges that third-party skills testers may need to obtain ELDT certification information. Currently, however, individual States decide whether to use third parties to administer the CDL skills test and, if so, how the third-party testers verify the applicant's eligibility. Therefore, it would not be feasible for the Agency to set forth third-party testing ELDT verification requirements in today's rule. FMCSA will work with AAMVA and the SDLAs during the

implementation phase to address the process by which a third-party tester may determine whether the driver-trainee has completed the applicable ELDT.

36. Compliance Date for ELDT Requirements

As proposed, the compliance date will be three years after the effective date of the final rule.

Comments: FMCSA received a number of comments from State licensing authorities asserting that three years does not allow sufficient time for the States to make necessary adaptations to their IT systems and record the CDL applicant's training certificate information on the driver's record through CDLIS. The State of Michigan commented that, ''[g]iven these training requirements have been many years in the making, ELDT requirements should be effective 5 years (not 3) after the effective date of the final rule.'' Noting that ''three years to implement this program is a very short and unreasonable amount of time,'' the Delaware DMV suggested a minimum of seven years from publication of the final rule. Some SDLAs cited the refresher training requirements, including the issuance of a restricted CDL, as particularly problematic. For example, Oregon DMV stated that ''[i]ssuing a restricted CDL as described in this rulemaking would require a very lengthy programming effort . . .''

AAMVA commented that ''[t]he registry of entry-level training providers and the process for transmittal and acceptance of all applicable information associated with the entry-level training certification must be in place before the compliance date.'' AAMVA requested that the three year compliance date be specifically predicated on the completion of all process and functional requirements associated with the final rule. Similarly, the Connecticut DMV asked the Agency to extend the compliance date ''until all process requirements of the rule and [the TPR] are functional.'' The NY DMV also commented that the compliance date should be tied directly to the functionality of the TPR, suggesting that the date be no earlier than one year after the ''fully established and operational training Registry.''

In addition to SDLAs, several other commenters expressed concern regarding the proposed compliance date. The NYAPT commented that FMCSA could place the State licensing agencies in the difficult position of having to implement requirements before the related systems changes are fully operational. UMA reminded the Agency ''of the importance of a fully functional electronic system between schools, FMCSA and states prior to full implementation.''

FMCSA Response: The compliance date of today's rule remains as proposed, three years after the effective date of the final rule. While FMCSA acknowledges the implementation concerns raised by commenters, the Agency nevertheless believes that three years allows adequate time for the States to pass implementing legislation and modify their technology platforms accordingly. FMCSA intends to work closely with AAMVA to address CDLIS-related implementation issues as expeditiously as possible and to provide post-rule implementation guidance to assist SDLAs in addressing specific implementation issues. Further, we note that because the final rule does not include a refresher training requirement (as proposed), SDLAs will not need to modify their systems in order to issue restricted CDLs for the purpose of completing BTW refresher training on a public road.

Finally, unlike FMCSA's phased approach to the Medical Certification and National Medical Registry implementation, the Agency will not provide SDLAs with paper training certificates, nor will SDLAs be permitted to accept paper certificates as evidence of ELDT compliance. Accordingly, FMCSA believes that the underlying information systems can be integrated and operational by the compliance date of today's rule.

37. Bond Requirements for Training Providers

The NPRM did not propose any bond requirements for training providers listed on the TPR. However, in the preamble, the Agency noted that the ELDTAC considered the effect of a training provider's involuntary removal from the TPR on driver-trainees who had already paid tuition, but had not yet completed their training. The ELDTAC determined the issue should be resolved between the training provider and the driver-trainee.

Comments: The Virginia DMV and the ODOT both expressed concern about the NPRM's lack of consumer protection for a driver-trainee who paid tuition to a training provider that, due to non-compliance with today's rule, is involuntarily removed from the TPR before the driver-trainee completes his or her training. The commenters suggested that training providers be required to submit a surety bond in order to provide recourse to driver-trainees under such circumstances. The ODOT noted that, in the absence of a bond requirement, driver-trainees will look to their State licensing or education authorities, neither of which would be in a position to offer assistance. In support of its request for a bond requirement for training providers, the ODOT cited an FMCSA regulation requiring third-party CDL skills testers to maintain a bond.

FMCSA Response: As noted above, the NPRM did not require training providers to maintain a surety bond in order to be eligible for listing on the TPR and neither does today's rule. The Agency agrees with the ELDTAC's assessment that the issue of tuition reimbursement related to the training provider's involuntary removal from the TPR is appropriately addressed directly by driver-trainees and the training providers they choose. Prudent driver-trainees will assess the provider's training operations before making a financial commitment. Potential sources to assist in such evaluation include State or local consumer protection agencies, third party training accreditation entities, State Departments of Education or Transportation, and the U.S. Department of Education. We also note that the final rule does not prohibit a State from requiring a training provider to post or maintain a surety bond as a condition of doing business in that State.

The bond requirement for third-party skill examiners, referenced by the ODOT, is not an appropriate precedent for requiring training providers to maintain a bond under today's rule. Section 383.75(a)(8)(v), provides that when the State has an agreement with a third party to administer CDL skills testing, that agreement must include a provision requiring the third-party tester to initiate and maintain a bond, in an amount determined by the State, sufficient to pay for re-testing drivers in the event the third-party is involved in fraudulent activities related to conducting skills testing for CDL applicants. That bond requirement is therefore part of a contractual agreement between the State and third-party, non-government entities who provide testing services for the State.

No contractual relationship exists between a training provider and FMCSA. In order to be eligible for listing on the TPR, training providers need only attest, under penalty of perjury, that they meet the eligibility criteria to provide ELDT and that they agree to comply with other requirements set forth in subpart G. This self-certification approach is very different from the way that third-party CDL skills examiners are regulated under part 383. Section 383.75 requires, for example,

that States authorizing third-party testers to conduct CDL skills testing do the following: (1) Perform onsite inspections of the testers; (2) periodically validate the legitimacy of the testers' skills testing operations; (3) include specified contractual provisions in agreements between the State and the third-party; and (4) take prompt remedial action against testers failing to comply with CDL program standards. Since today's rule does not impose any similar regulatory requirements related to the oversight of training providers, the Agency does not believe there is sufficient basis to implement a bond requirement related to ELDT.

However, the Agency recognizes that driver-trainees should be timely informed about the status of providers from whom they obtain, or plan to obtain, ELDT. The final rule requires, as proposed, that training providers inform driver-trainees currently enrolled in training, as well as those scheduled for future training, of the proposed removal (§ 380.723(b)). Further, as noted above, the Agency adds a provision to § 380.723(b) stating that, if the provider is listed on the TPR Web site, FMCSA will indicate on the Web site that it has issued a notice of proposed removal to the provider. (In the event that FMCSA withdraws the notice, that designation will be removed from the provider's TPR listing.)

As noted above, in today's rule, FMCSA deletes the proposed provision stating that training conducted after the Agency's issuance of a notice of proposed removal is invalid until FMCSA withdraws the notice. Under § 380.723(b) of the final rule, training conducted following issuance of a notice of proposed removal is generally considered compliant until the provider is actually removed from the TPR. Therefore, a driver-trainee in the process of receiving ELDT from a provider to whom FMCSA issues a notice of proposed removal will very likely be able to complete their training before the provider can be removed, which is a minimum of 30 days following issuance of the notice. (Any training provided after the date of removal from the TPR is not valid.)

Further, FMCSA expects that the potential imposition of civil and criminal penalties on training providers failing to comply with the requirements of today's rule will, in most case, deter fraudulent conduct. However, in the event that driver-trainees become aware of fraudulent training operations, they are encouraged to report the activity to the DOT Office of Inspector General (OIG). Instructions for reporting fraud, waste and abuse are available on the OIG's Web site, *www.oig.dot.gov/hotline*, and will also be available on the TPR Web site.

38. Executive Order 13045—Protection of Children From Environmental Health Risks and Safety Risks

E.O. 13045 requires that Federal agencies, consistent with their mission, identify whether ''economically significant'' rules pose environmental health risks and safety risks that may disproportionately affect children. In the NPRM, FMCSA stated that, while the proposed rule was economically significant, the Agency does not anticipate that this regulatory action could in any way create an environmental or safety risk that could disproportionately affect children.

Comment: NAPT took ''strong exception'' to the Agency's assertion that the NPRM does not create an environmental health or safety risk that could disproportionately affect children and therefore does not invoke E.O. 13045. NAPT commented that the S endorsement training requirements will lead to school bus driver shortages, resulting in children having to find alternative and less safe means of transportation to and from school. NAPT concluded that the NPRM would thus create ''a very real situation that may indeed disproportionately affect children since they are the primary beneficiaries of school bus service.''

FMCSA Response: E.O. 13045 defines ''environmental health risks and safety risks'' as risks that ''are attributable to products or substances that the child is likely to come in contact with (such as the air we breathe, the food we eat, the water we drink or use for recreation, the soil we live on, and the products we use or are exposed to).'' (E.O. 13045, Section 2–203.) This rulemaking does not pose any risks ''attributable to products or substances [a] child is likely to come in contact with.'' As previously discussed, today's rule retains the S endorsement training requirements proposed in the NPRM. The S endorsement curriculum is intended to *enhance* the safety of school bus transportation by ensuring that all school bus drivers have the requisite knowledge and skills to operate the vehicle safely. As we explained in the discussion of the Agency's decision to retain the S endorsement training requirement, we do not anticipate that this requirement will result in reduced school bus service. FMCSA therefore disagrees with NAPT's assertion that the rule poses a safety risk that disproportionately affects children.

VIII. Discussion of Comments and Responses on the Analysis

Opportunity Costs

Comment: An individual commenter stated that the tuition costs do not take into account the fact that driver-trainees would not be earning an income while they are in training, and that all training was uncompensated time that the Agency did not account for.

FMCSA Response: FMCSA discussed this issue in Section 3.1.3 (Opportunity Cost of Time) of the RIA for the NPRM and for today's rule. FMCSA first estimated the total amount of time that a driver-trainee would spend in training—both theory and BTW hours—for each of the proposed curricula. Additionally, FMCSA estimated the cost of this time using the appropriate driver wage rate; that is, presuming that the time driver trainees spend in training is time they could otherwise be working as a driver.

Carrier Opportunity Cost

Comment: The NPGA stated that FMCSA did ''not account for the opportunity cost of the propane motor carrier while the potential driver receives training from an institution.''

FMCSA Response: FMCSA discussed this issue in Section 3.2.1 (Opportunity Cost of Entry-Level Driver Training to Motor Carriers) of the RIA for the NPRM and for today's rule. FMCSA estimated that the opportunity cost of the motor carriers, that is, the best alternative to the carriers in the absence of regulatory action, would have been the value of drivers' labor under the carriers' employ and consequently, the carriers earning some increment of profit or value from each of those drivers' labor hours of work.

Barrier To Entry for Prospective Drivers

Comments: FMCSA received numerous comments regarding the effect of the proposed ELDT requirements on the supply of CMV drivers. Most of these commenters, which included the school bus industry, custom harvesters, the limousine industry, and some SDLAs, believe that the rule may inhibit the entry of new drivers into the CMV industry, thereby making it more difficult for carriers to hire drivers, and more expensive for carriers to employ those drivers once they are hired. A number of commenters asserted that, accordingly, the proposed rule would exacerbate any preexisting CMV driver shortage.

FMCSA Response: FMCSA does not believe that today's rule will impose a barrier to entry or exacerbate any preexisting CMV driver shortage. As

discussed in Section 2.4.1 (Number of Entry-Level CDL Drivers Annually) and Section 2.4.6 (Current Entry-Level Driver Training Efforts) of the RIA, the rule is estimated to have minimal impact on drivers because most of them already receive training that meets or exceeds the requirements of today's rule, and therefore it seems unlikely that significant barriers to entry would be imposed in the CDL driver labor market as a result of the ELDT rule.

FMCSA's Tuition Estimate

Comment: C.R. England stated that FMCSA underestimated tuition costs because BTW hours are more costly than theory hours, and under the current baseline, which does not include a Federal minimum hours requirement, the number of BTW hours in the existing training programs identified by FMCSA would be fewer than the minimum of 30 BTW hours for Class A training.

FMCSA Response: As explained in Section 3.1.2 (Tuition Costs) of the RIA for today's rule, the Agency concludes that it overestimated tuition costs in the RIA for the NPRM. In the final rule, the Agency has eliminated the minimum hours requirement for Class A and Class B BTW training, but retains the requirement for instructors to determine that entry-level drivers have achieved proficiency in the required BTW skills. FMCSA disagrees with the commenter's statement that the number of BTW hours in existing training programs identified by FMCSA would be fewer than the estimated average 30 hours of BTW training for the Class A curricula and estimated average 15 hours of BTW training for the Class B curricula that some entry level drivers will receive as a result of this final rule. As discussed in Section 2.4.6 (Current Entry-Level Driver Training Efforts) in the RIA, the Class A programs provided by the approximately 865 CDL training programs identified by FMCSA mostly consist of programs with substantially more hours of BTW, and more hours of theory training, than the estimated average 30 hours of BTW training for the Class A curricula and estimated 60 hours theory in the ELDT rule. Therefore, if anything, the Agency's original tuition estimates in the RIA for the NPRM were likely overly conservative in that they would overestimate the cost of tuition given that both the estimated average 30 hours of BTW training for the Class A curricula, and the estimated 60 hours of theory training, are less than that generally observed on average.

FMCSA acknowledges that the costs per hour for delivering BTW training may exceed the costs per hour for delivering theory training, given that one includes the costs of more one-on-one instruction and observation of the student operating a CMV on the range and road, while the other involves the costs of theory instruction which may be provided simultaneously in a classroom setting to multiple students or via online training. The Agency does not believe this fact is relevant to the content of the rule or the estimates of the costs for completing all the training necessary to obtain the CDL.

Non-Safety and Safety Benefits

Comment: An individual commenter stated that reduced fuel consumption, while admirable, is not a safety issue, and that therefore fuel savings should not be evaluated in the RIA.

FMCSA Response: FMCSA interprets this comment not as a challenge to the methodology by which fuel savings were estimated, but rather more broadly to suggest that no RIA should quantify any ancillary benefits that would arise from regulation. The commenter is correct in that none of the quantified benefits (fuel savings, CO_2 emissions reductions, and maintenance and repair cost savings) are primary goals of this rule. However, it is appropriate for the Agency to quantify each of these because they are legitimate benefits resulting from the rule. OMB Circular A–4 encourages agencies to consider and, if possible, monetize both ancillary benefits (*i.e.,* favorable impacts of the rule that are typically unrelated or secondary to the statutory purpose of the rulemaking), and undesirable side effects or countervailing risks (*i.e.,* adverse consequences of a rule not already accounted for in other direct cost estimates of the rulemaking).[21] FMCSA's evaluation of ancillary costs, but not ancillary benefits, would result in an incomplete and inconsistent accounting of regulatory impacts.

Comment: The National Rural Electric Cooperative Association (NRECA) stated that the social cost of carbon ($SC–CO_2$ or SCC) is highly uncertain and its applicability to benefit-cost analysis is inappropriate and results in arbitrary analysis.

FMCSA Response: FMCSA disagrees with these contentions. For a history of the development of the $SC–CO_2$ that documents the lengths to which the Administration has gone to ensure the scientific accuracy and transparency of the preparation of the $SC–CO_2$ guidance, the recent White House guidance addressing the quantification of $SC–CO_2$ benefits states ''Federal agencies will continue to use the current SCC estimates in regulatory impact analysis until further updates can be made to reflect the forthcoming guidance from the Academies.'' [22] We note further that FMCSA opted not to quantify or monetize the reduction of other harmful emissions and criteria pollutants that would result from reduced fuel consumption in order to ensure that the aggregate environmental benefits estimated in the RIA are conservatively low. In the RIA for today's final rule, an expanded and enhanced fuel savings (and consequently, $SC–CO_2$) sensitivity analysis has been added to better reflect the uncertainty regarding the extent to which driver training may result in fuel savings.

Additional details can be found in Section 4.1.1 (Savings from Reduction in Fuel Consumption) and Section 4.1.2 (Monetized CO_2 Impacts—Social Cost of Carbon Dioxide Emissions) of the RIA.

Comment: The NPGA also commented on the projected reduction in CO_2 emissions, stating that FMCSA failed to account in the NPRM RIA for the cost or effect of the increase in CMV operations and emissions to comply with the rule. NGPA's comment was made in the context of a broader argument that a purely ''performance-based'' BTW standard (which does not include a minimum number of required BTW hours) would *not* result in these purported costs or effects.

FMCSA Response: In the final rule, the Agency has eliminated the minimum hours requirement for Class A and Class B BTW training, but retains the requirement for instructors to determine that entry-level drivers have achieved proficiency in the required BTW skills. Nonetheless, FMCSA disagrees with NPGA's assumption that FMCSA failed to account for the cost or effect of an increase in CMV operations and emissions to comply with the rule. Throughout the RIA, FMCSA consistently applies the assumption that, in the absence of the rule, those entry-level drivers who would continue to receive no or minimal BTW training would be hired sooner by motor carriers and thus begin to drive on the job sooner. Regardless of whether these entry-level drivers are driving in the employ of motor carriers, or with instructors providing pre-CDL BTW

[21] Office of Management and Budget. *Circular A–4. Regulatory Analysis.* September 17, 2003. Available at: *https://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf* (accessed June 21, 2016).

[22] ''Estimating the Benefits from Carbon Dioxide Emissions Reductions,'' Shelanski, H. and Obstfeld, M. The White House, July 2015. Available at *https://www.whitehouse.gov/blog/2015/07/02/estimating-benefits-carbon-dioxide-emissions-reductions* (accessed June 21, 2016).

training, fuel is combusted, CO_2 is emitted, and vehicle operational costs are incurred. The Agency therefore concludes there is no net increase in CO_2 emissions or vehicle operational costs at the societal level resulting from this rule.

Comments: ATA and C.R. England commented that the studies FMCSA relied on to estimate a 5 percent fuel economy improvement are ''irrelevant'' and overstate any fuel economy benefit attributable to this rule.

FMCSA Response: The Agency disagrees with the commenters that the 5 percent fuel economy improvement is incorrect, overstated, based on faulty premises, or lacking in relevance. In the RIA for the NPRM, FMCSA evaluated several studies (*see* February 2016 RIA, pp. 79–81) that covered a broad range of fuel economy improvements resulting from a variety of factors impacting driver behavior. FMCSA understands that some of those studies used approaches beyond the scope of this rulemaking (such as in-cab feedback technologies to provide drivers with real-time analysis of fuel economy, the use of simulators, or the use of incentive schemes to reward fuel-efficient driving). However, the Agency believes these studies have value because they demonstrate that driver behavior can substantially alter fuel consumption. Again, in order to be conservative, FMCSA, in identifying a 5 percent reduction in fuel consumption, chose to rely on the value at the lowest end of the estimates, which is not predicated on in-cab technologies, incentives, simulators or other factors that could reasonably be expected to improve fuel economy.

In Section 4.1.1 of the RIA (Savings from Reduction in Fuel Consumption), the Agency demonstrates that the 5 percent fuel economy benefit attributable to this final rule is conservative, because it is predicated on only a few key training concepts, encompassed in the Class A and Class B curricula, that could reasonably be expected to improve fuel economy (*e.g.,* speed management, space management and avoidance of rapid acceleration and sudden deceleration).

Additionally, due to wide ranges of estimates in studies relevant to the quantified benefits of the rule and the lack of studies that specifically focus on the curricula prescribed by this rule,[23] the Agency presents benefits estimated under alternate benefit scenarios in which the fuel savings, CO_2 emissions reductions, and maintenance and repair cost savings are 50 percent lower (low benefits case) and 50 percent greater (high benefits case) than the central benefits estimates, which are based on the 5 percent fuel economy improvement. Further discussion of the low and high benefits cases is presented in the RIA for today's rule (see sensitivity analyses in Sections 4.1.1 through 4.1.3 of the RIA for today's rule).

Impact of Automatic Transmission on Potential Fuel Saving

Comment: ATA commented that the industry is increasingly moving toward the use of automatic shift transmissions and that this trend reduces the potential fuel savings that may result from ELDT.

FMCSA Response: FMCSA acknowledges that the prevalence of automatic transmission-equipped CMVs appears to be on the rise. Although training on shifting is expected to produce fuel savings benefits, particularly for entry-level drivers operating manual transmission-equipped vehicles, the Agency did not quantify this impact in its analysis. Instead, the estimated 5 percent fuel savings attributable to this rule is based solely on the portion of the training related to driving with the flow of traffic. A more extensive discussion of this issue is presented in Section 4.1.1 (Savings from Reduction in Fuel Consumption) of the RIA.

In addition, FMCSA accounted more broadly for other external factors related to vehicle technology by adjusting downward the baseline fuel consumption projection to reflect the possible impact of the joint EPA/NHTSA Phase 2 Medium- and Heavy-Duty Vehicle Fuel Efficiency and Greenhouse Gas Standards rule.[24] This adjustment, discussed in Section 4.1.1 (Savings from Reduction in Fuel Consumption) of the RIA, ensures that the fuel savings benefits attributable to this final rule does not overlap with benefits that would be achieved by other emerging technologies.

Maintenance and Repair Cost Savings

Comment: ATA claims that maintenance and repair cost savings estimated in the RIA for the NPRM would not occur as drivers are already required to perform pre-trip, en-route and post-trip inspections daily to identify potential equipment failure before an accident occurs.

Additionally, ATA commented that the RIA does not estimate the cost of additional maintenance that would be required for the non-safety benefits to be achieved.

FMCSA Response: The Agency excludes this element from the estimation and monetization of maintenance and repair cost savings attributable to this final rule, but notes in Section 4.1.3 (Maintenance and Repair Cost Savings) of the RIA for today's rule that it may nonetheless yield some potential additional benefits that are not quantified in the RIA. It is irrelevant that these daily inspections are already performed in the absence of this rule. The relevant point is that a better-informed driver, with greater understanding of inspection procedures and of vehicle hardware, can more readily observe and note minor maintenance needs that, if left undetected, may eventually require more costly fixes and greater vehicle downtime. While there is a cost associated with attention to maintenance needs that would remain unobserved by some entry-level drivers in the baseline, the Agency considers the benefits of that additional maintenance to exceed the corresponding costs. Various sources support the link between the identification of the need for preventive maintenance and—contingent upon the performance of such maintenance—a reduction in the likelihood and severity of breakdown and repair costs. These sources are discussed in more detail in Section 4.1.3 (Maintenance and Repair Cost Savings) of the RIA for today's rule. Despite this, the Agency is unable to quantify the magnitude of the net benefit of the additional identification of necessary preventive maintenance resulting from enhanced driver awareness resulting from this final rule, and therefore, as noted earlier, excludes this element from the estimation and monetization of maintenance and repair cost savings attributable to this final rule. Finally, the estimated decrease in maintenance and repair costs attributable to this final rule has been reduced by approximately 75 percent relative to the RIA for the NPRM, which is discussed in more detail in Section 4.1.3 of the RIA for today's rule.

[23] As described in Sections 4.1.1 through 4.1.3 of the RIA, the Agency identified a variety of relevant studies related to each of the quantified benefits. With particular respect to the estimated fuel and CO_2 savings, the Agency was unable to identify any studies that perfectly align with the curricula of this rule.

[24] Environmental Protection Agency (EPA), and U.S. Department of Transportation, National Highway Traffic Safety Administration (NHTSA). *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicle—Phase 2.* October 25, 2016. 81 FR 73478–74274. Available at: *https://www.gpo.gov/fdsys/pkg/FR-2016-10-25/pdf/2016-21203.pdf* (accessed October 26, 2016).

Improvements in Safety That Would Occur in the Absence of This Final Rule

Comment: C.R. England states that FMCSA did not account for the speed at which new technology will result in improvements in CMV safety.

FMCSA Response: The Agency assumed no growth in the absolute number of crashes per year, despite projected growth in CMV vehicle miles traveled. By holding this number constant throughout the analysis period for this rule, this implicitly includes safety benefits that are independent of this rule, such as new CMV safety technologies. For more information, see Section 4.2 (Safety Benefits) of the RIA.

Threshold Analysis

Comments: Multiple commenters, including ATA, ODOT, NPGA, and C.R. England, found overly optimistic the 8.15 percent reduction in crashes, estimated in the RIA for NPRM as necessary for the costs and benefits of the rule to be equal.

FMCSA Response: FMCSA believes that commenters incorrectly characterized the reduction in crashes necessary for the rule to be cost-neutral as a reduction in the *total* industry-wide number of crashes involving the operation of trucks and buses. This 8.15 percent reduction does not mean an 8.15 percent reduction in the *total* number of large truck and bus crashes. Rather, the 8.15 percent reduction is specific to the *subset* of the most recent year's crash totals (2013 in the RIA for the NPRM) involving the 14 percent of entry-level drivers estimated to receive no pre-CDL training in the baseline. With respect to the magnitude of the reduction in the frequency of *all* crashes involving large trucks and buses relative to the 8.15 percent reduction noted above from the NPRM, there were an estimated total 3,806 fatal, 86,000 injury, and 299,000 property damage only (PDO) crashes in 2013.[25] Based on the annual average number of crash reductions necessary for the NPRM to achieve cost-neutrality (11 fatal, 236 injury, and 786 PDO), this equates to the reduction of *only* 0.29 percent of fatal, 0.27 percent of injury, and 0.26 percent of PDO crashes, respectively (relative to large truck and bus crash totals for calendar year 2013).[26] Therefore, FMCSA disagrees that the 8.15 percent reduction in the subset of crashes as presented in the RIA for NPRM is overly optimistic. This rule requires only a small change in behavior to have a significant impact.

FMCSA notes that these numbers have been updated in the RIA for today's rule and can be found in Section 4.2 (Safety Benefits).

Crash Reduction Data

Comments: In the NPRM, the Agency acknowledged that ''[o]ne of the most significant challenges faced by both FMCSA and the ELDTAC is the limited qualitative or quantitative data correlating the provision of *any type* of ELDT with positive safety outcomes, such as crash reduction.'' There were numerous comments concerning the lack of data linking ELDT with crash reduction and the corresponding relation to the Agency's break-even analysis. Commenters on this issue included ATA, C.R. England, the North Dakota DOT, Driver Holdings LLC, NRECA, Delaware DMV, Werner, Southern Company, Virginia DMV, and the Oregon DMV.

FMCSA Response: When it is not possible to quantify and monetize the estimated benefits (or costs) of a rule, OMB guidance, as set forth in Circular A–4, is to perform a threshold or break-even analysis.[27] Other agencies have conducted threshold analyses in their regulatory evaluations of safety training rules (noted in both the RIA for the NPRM, and in the RIA for today's rule). These include rulemakings from FRA, FTA, USCG, and OSHA. The 8.15 percent crash reduction the Agency estimated in the RIA for the NPRM as necessary for the rule to be cost-neutral is on the low end of the range relative to other agencies' rulemakings. The Agency sought data related to the correlation between training and safety through the ELDTAC and specifically requested such data in the NPRM (81 FR 11959). Detailed discussion of the Agency's efforts to obtain correlative data, and the shortcomings of data and studies that were provided to FMCSA, are noted in Section 4.2 (Safety Benefits) of the RIA for today's rule.

Comment: ATA asserted that, in the absence of correlative data, FMCSA's use of a threshold analysis to estimate the benefits necessary to produce a cost-neutral rule ''should have led the agency to pick the alternative that would produce the maximum net benefit.'' ATA concluded that the Agency's failure to analyze the ''performance-based'' Master Trip Sheet alternative to BTW training offered by some ELDTAC members, ''would have prevailed because . . . it produces a more favorable cost benefit analysis.''

FMCSA Response: ATA provided no analysis to support their conclusion that an outcomes-based approach would result in lower costs. Further, based on currently available data and information as discussed in the RIA, FMCSA has no basis to believe that such an outcomes-based approach would, in fact, result in lower costs. Nonetheless, in the final rule, the Agency has eliminated the minimum hours requirement for Class A and Class B BTW training, but retains the requirement for instructors to determine that entry-level drivers have achieved proficiency in the required BTW skills.

H Endorsement Benefits

Comment: Schneider National requested that FMCSA separately quantify the benefits of the H endorsement training.

FMCSA Response: The nature of the likely benefits from the H endorsement training is specific to safety. As explained above, FMCSA lacked sufficient empirical data to quantify the safety benefits of the H endorsement training; therefore, a threshold analysis is appropriate and was performed in Section 4.2 (Safety Benefits) of the RIA. Furthermore, as noted above, the H endorsement training is required by MAP–21.

Training Provider Eligibility and Costs Related To Training

Comments: Many current entities that provide in-house entry-level driver training commented that they would not be able to afford to send their entry-level drivers to a ''formal'' CDL training school. Other commenters that provide in-house entry-level driver training stated that the burden to become a ''certified'' training provider is so great that they would not be able to continue training entry-level drivers.

FMCSA Response: Any entity currently providing in-house entry-level driver training can continue to offer such training under the rule by becoming listed on the TPR.

FMCSA does not believe the final rule imposes a heavy burden or cost on training providers seeking to be listed on the TPR. As discussed above, FMCSA does not ''certify'' training providers under the final rule, instead relying on a self-certification approach for training providers who want to be eligible for listing on the TPR. Training

[25] U.S. Department of Transportation, Federal Motor Carrier Safety Administration (FMCSA). *2016 Pocket Guide to Large Truck and Bus Statistics.* Pages 33 and 34. *Available at: http://ntl.bts.gov/lib/59000/59100/59189/2016_Pocket_Guide_to_Large_Truck_and_Bus_Statistics.pdf* (accessed July 1, 2016).

[26] Necessary reductions' shares of total crashes calculated as follows: Fatal = 11 ÷ 3,806; Injury = 236 ÷ 86,000; PDO = 786 ÷ 299,000.

[27] Office of Management and Budget. *Circular A–4. Regulatory Analysis.* September 17, 2003. Available at: *https://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf* (accessed June 21, 2016).

provider costs are based on four separate activities: (1) Completing the initial TPRF, (2) a biennial update to the TPRF, (3) compliance audits, and (4) submission of certification information to the TPR. The average cost for submitting certification information to the TPR is estimated at about $7 per student,[28] and the training provider's total cost associated with submission certification information to the TPR will vary depending on the number of students the provider trains. FMCSA notes that the anticipated costs are greatest in the first year and therefore uses the estimated first year costs as a basis for determining the impact per training provider in order to ensure that costs were conservatively estimated. Based on the information presented in Section 3.3 (Costs to the Training Providers) of the RIA for today's rule, we calculate that the average total cost in the first year for a training provider that trains only one student would be approximately $189, and the average total cost for a training provider that trains ten students would be approximately $251.

State Costs Related to the Rulemaking

Comments: Some SDLAs and AAMVA commented that the proposed rule would result in implementation costs for the States. These costs would be related to revising CDL license processing programs, modification of State driver records, accommodation of data transferred from the TPR, an additional CDLIS Central Site, as well as costs associated with ongoing maintenance of effort. The ODOT expected an impact of $1.1 million for modification of State driver-records in the State of Oregon.

FMCSA Response: FMCSA recognizes that there will be costs associated with CDLIS modifications and other systems-related changes necessary for implementation of the final rule. In the RIA for the NPRM, FMCSA estimated that the State implementation costs would total approximately $500,000 per SDLA. In the RIA for today's rule, FMCSA increases its estimate of the State implementation costs to $1.1 million per SDLA. For a further discussion of how FMCSA estimated these costs, see Section 3.4 (Costs to the State Driver Licensing Agencies) of the RIA for today's rule.

[28] The calculated $7 cost on a per-student basis is based on the estimated 5 minutes necessary for a training provider to upload certification information for an entry-level driver, multiplied by the total hourly compensation as shown in Section 2.3.2 of the RIA for the ''training and development managers'' occupational category ($7.17 = $86 × (5/60)).

Applicability

Comments: A number of commenters, including the American Pyrotechnics Association, NRECA, NGWA, NGPA, the New England Fuel Institute, the Associated General Contractors of America, PMAA, and the IUOE, observed that the analysis did not address specific industries that fall outside of the motor carrier industry, but that nevertheless require drivers to obtain a CDL for ancillary parts of their jobs.

FMCSA Response: In the RIA for the NPRM, FMCSA estimated the number of entry-level CDL drivers annually using different methods, and using data from a variety of sources (including CDLIS, and the SDLAs themselves). These data include all entry-level CDL drivers, regardless of the particular occupation or industry in which they are ultimately employed. Therefore, all entry-level CDL drivers are fully represented in FMCSA's estimate of the number of entry-level drivers annually. For further discussion on this topic, see Section 2.4.1 (Number of Entry-Level CDL Drivers Annually) of the RIA for today's rule.

IX. Section–By–Section Explanation of Changes From the NPRM

As discussed in the response to comments, the final rule makes the following changes to the NPRM:

Subpart F—Entry-Level Driver Training Requirements

§ 380.600 Compliance Date for Training Requirements for Entry-Level Drivers

This section remains as proposed. Compliance is required with this subpart three years after the effective date of the final rule.

§ 380.601 Purpose and Scope

As proposed, this subpart established training requirements for entry-level drivers, minimum curricula contents, and standards for training providers. It also stated that ELDT, as defined in this subpart, applies only to individuals who apply for a CDL or CDL upgrade or endorsement and does not otherwise amend substantive requirements in part 383.

In the final rule, FMCSA deletes the reference to ''standards for training providers'', which the Agency inadvertently included in this section. (Training provider standards are addressed in subpart G, discussed below.) We also make conforming changes to reflect the revised definition of ''entry-level driver,'' as discussed below. The provision remains otherwise unchanged.

§ 380.603 Applicability

The Agency makes several clarifying and conforming changes to this section, which explains how ELDT requirements apply to drivers who intend to operate CMVs in intrastate and/or interstate commerce.

First, in § 380.603(a), we add an exception: CMV drivers applying for removal of a restriction in accordance with § 383.135(b)(7) are not subject to the training requirements set forth in today's rule (§ 380.603(a)(4)).

The meaning of § 380.603(b), which stated that drivers holding a valid CDL issued before the compliance date of the final rule are not subject to ELDT requirements, remains essentially as proposed. However, FMCSA deletes the term ''valid CDL'' and adds clarifying language in order to make this provision explicitly consistent with the scope of today's rule. Accordingly, the subsection now states that anyone holding a Class A or Class B CDL, or the passenger (P), school bus (S), or hazardous materials (H) endorsement, issued before the compliance date is not subject to ELDT requirements pertaining to that CDL or endorsement. We also delete the words ''except as otherwise specifically provided''.

Section 380.603(c)(1) proposed that individuals holding a CLP before the compliance date of the final rule are not subject to ELDT requirements if they obtain a CDL within 360 days of obtaining the CLP. In the final rule, the Agency adds clarifying language to specify that individuals who obtain a CLP before the compliance date of the final rule are not subject to ELDT requirements if they obtain the underlying CDL and/or endorsement to which the CLP applies before the CLP or renewed CLP expires. As noted in the response to comments, the deletion of ''360 days'' accounts for the fact that individual States address the renewal of CLPs differently. Section 380.603(c)(2), which proposed that individuals obtaining a CLP after the compliance date of the final rule are subject to ELDT requirements, remains as proposed.

FMCSA adds new subsection § 380.603(c)(3). Originally proposed as new § 383.71(a)(4), this requirement stated that, except for individuals seeking the H endorsement, individuals successfully completing the theory portion of the training had to complete the BTW portion within 360 days. In the final rule, FMCSA moves this requirement to § 380.603(c) and changes ''360 days'' to ''one year''. We also clarify that theory and BTW portions of

the training do not need to be taken in a particular sequence (as the proposed language implied), as long as the two training components are completed within one year. Accordingly, the requirement now states that, except for individuals obtaining the H endorsement, the theory and BTW portions of ELDT must be completed within one year of completing the first portion.

In the final rule, the Agency deletes proposed § 380.603(d), which stated that, except for those persons subject to the proposed refresher training requirements, a person who received ELDT qualifying him or her to take the skills test for a CDL or endorsement would not be required to obtain such training again before reapplying for a CDL or endorsement. FMCSA believes that the revised definition of ''entry-level driver'' in § 380.605, discussed below, makes this provision unnecessary.

The Agency also deletes proposed § 380.603(e), which required that a CDL holder disqualified from operating a CMV under § 383.51(b)–(e) must complete refresher training as proposed in § 380.625. Because the final rule does not include a refresher training requirement, this provision is no longer necessary.

§ 380.605 Definitions

The Agency makes various clarifying and conforming changes to this section, as discussed below, but does not add any new definitional terms in the final rule.

''Behind-the-Wheel (BTW) Instructor''

As proposed, the definition of ''behind-the-wheel (BTW) instructor'' required that the instructor be an ''experienced driver'' as defined in this section and must have completed training in the public road portion of the curriculum in which they are instructing, except that BTW instructors utilized by ''providers that train, or expect to train, three or few drivers annually'' are not required to comply with that requirement.

In the final rule's definition of BTW instructor, we delete the reference to the term ''experienced driver'' as well as the reference to providers training three or fewer drivers annually because the final rule does not retain the proposed distinction between large and small training entities.

In addition, the Agency incorporates the qualification requirements for BTW instructors, proposed as § 380.713(b) (and cross-referenced to the proposed definition of ''experienced driver'' in § 380.605), directly into the definition of BTW instructor in the final rule. The qualifications are also revised to reflect comments suggesting that BTW instructors should have a minimum of two years of relevant driving or instructional experience, rather than the one year of experience, as proposed.

Accordingly, in the final rule, the definition of BTW instructor means an individual providing BTW training involving the actual operation of a CMV on a range or public road who meets one of the following qualifications: Holds a CDL of the same (or higher) class, and with all endorsements necessary, to operate the CMV for which training is to be provided; has a minimum of two years of experience driving a CMV requiring a CDL of that class or endorsement; and meets all applicable State requirements for CMV instructors; *or* holds a CDL of the same (or higher) class, and with all endorsements necessary, to operate the CMV for which training is to be provided; has a minimum of two years of experience as a BTW CMV instructor; and meets all applicable State requirements for CMV instructors.

In addition, FMCSA adds an exception to the definition of BTW instructor: instructors who provide BTW training solely on a private range are not required to currently hold a CDL of the same or higher class and all endorsements necessary to operate the CMV for which training is provided as long as they previously held that class of CDL. As noted in the response to comments, FMCSA makes this change to permit non-CDL holders, such as retired CMV drivers, or CMV drivers not medically certified, to provide training on a private range.

Finally, FMCSA revises the BTW training instructor qualification requirement pertaining to the instructor's CMV driving record. As proposed in § 380.713(b), during the two years prior to engaging in BTW instruction, instructors must not have had any CMV-related convictions for the offenses identified in § 383.51(b)–(e) and the instructor's driving record must meet applicable Federal and State requirements.

In the final rule, if an instructor's CDL has been cancelled, suspended, or revoked due to any of the disqualifying offenses identified in § 383.51, the instructor is prohibited from engaging in BTW instruction for two years following the date his or her CDL is reinstated following the disqualification. FMCSA adds this provision to the definition of ''BTW instructor'' in the final rule.

''Theory Instructor''

As proposed, ''theory instructor'' was defined as instructors who provide knowledge instruction on the operation of a CMV and are either an ''experienced driver'' as defined in this section or have previously audited or instructed that portion of the theory training course they intend to instruct.

FMCSA makes several substantive changes to this definition, as well as conforming changes to account for the fact that, as noted above, the definition of ''experienced driver'' is not retained in the final rule. The qualifications for theory instructors are now incorporated directly into the definition of the term, just as they are for BTW instructors.

In the final rule, theory instructors must hold a CDL of the same (or higher) class, and with all endorsements necessary, to operate the CMV for which training is to be provided, and have a minimum of two years of experience driving a CMV requiring a CDL of that class or endorsement, *or* at least two years of experience as a BTW CMV instructor. The NPRM proposed that theory instructors have a minimum of one year of CMV driving or instruction experience. The two-year level of CMV driving or instructional experience in the final rule is thus commensurate with the revised BTW instructor qualifications described above. The Agency also adds an exception to this definition: An instructor is not required to hold a CDL of the same (or higher) class and with all endorsements necessary to operate the CMV for which training is to be provided, as long as the instructor previously held a CDL of that class and meets all other qualification requirements, The Agency makes this change in order to permit retired CMV drivers, who may have many years of experience operating a CMV but who no longer hold a CDL, to provide theory instruction.

FMCSA also adds the following provision to the definition of'' theory instructor'' in the final rule: If an instructor's CDL has been cancelled, suspended, or revoked due to any of the disqualifying offenses identified in § 383.51, the instructor is prohibited from engaging in theory instruction for two years following the date his or her CDL is reinstated following the disqualification. As noted above, a similar provision is also included in the definition of ''BTW instructor''. FMCSA adds the provision to the definition of ''theory instructor'' because we believe the instructor's CMV driving record is also a relevant qualification for individuals who provide theory

instruction in the safe operation of CMVs.

In addition, as discussed in the response to comments, FMCSA deletes the proposed qualification standard a theory instructor must have previously audited or instructed that portion of the theory training course they intend to instruct.

''Experienced Driver''

As proposed, an ''experienced driver'' was defined as a driver who holds a CDL of the same or higher class and with all endorsements necessary to operate the CMV for which training is to be provided; has at least one year of experience driving a CMV requiring a CDL of the same or higher class and/or the same endorsement or has at least one year of experience as a BTW CMV instructor; and meets all applicable State training requirements for CMV instructors. That proposed definition was cross-referenced in proposed § 380.713, which set forth the theory and BTW instructor qualification requirements. As described above, the proposed definition of ''experienced driver'' is not retained in the final rule. The Agency revises the instructor qualification requirements proposed in § 380.713 and incorporates them into the definitions of ''BTW instructor'' and ''theory instructor'' in the final rule.

''Behind-the-Wheel (BTW) Range Training''/''Behind-the-Wheel (BTW) Public Road Training''

The definitions of BTW range training and BTW road training remain as proposed, except that FMCSA changes the term ''driver-instructor'' to ''BTW instructor'' in each definition.

''Entry-Level Driver''

As proposed, the definition of ''entry-level driver'' included a person who must complete the CDL skills test requirements under 49 CFR 383.71 prior to receiving the initial CDL or having a CDL reinstated, upgrading to a Class A or B CDL, or obtaining the P, S, or H, endorsement. Individuals for whom States waive the CDL skills test under 49 CFR 383.77 were excepted from the proposed definition.

As discussed above, the Agency received a number of comments stating that the proposed definition was unclear. Accordingly, in the final rule, FMCSA revises the definition of ''entry-level driver'' as follows: An individual who must complete the CDL skills test requirements under § 383.77 prior to receiving a Class A or Class B CDL for the first time, upgrading to a Class B or a Class A CDL, or obtaining a P, S, or H, endorsement for the first time. FMCSA believes that the phrase ''receiving a Class A or Class B CDL for the first time'' is clearer than the term ''initial CDL'', as proposed. This phrase is also consistent with the language of MAP–21, which requires that FMCSA establish entry-level training requirements addressing the knowledge and skills that ''must be acquired before obtaining a commercial driver's license for the first time,'' 49 U.S.C. 31305(c)(1)(B).

The Agency deletes the reference to ''having a CDL reinstated'' primarily because the proposed refresher training requirement is not retained in the final rule. In addition, as noted above in the explanation of changes to § 380.603(a), FMCSA adds an exception for individual drivers applying to have a restriction removed from their CDL. The exception for individuals for whom the States waive the skills test under § 383.77 remains as proposed.

''Entry-Level Driver Training''

FMCSA makes conforming changes to the definition of ''entry-level driver training'' in the final rule in order to reflect the revised definition of ''entry-level driver'' described above. Accordingly, ELDT means training that an entry-level driver receives from an entity listed on the TPR prior to taking the CDL skills test required to receive a Class A or Class B CDL for the first time or upgrade to a Class B or a Class A CDL; taking the CDL skills test required to obtain a P and/or S endorsement for the first time; or taking the CDL knowledge test required to obtain the H endorsement for the first time.

''Refresher Training''

As proposed, ''refresher training'' was defined as training that a CDL holder who has been disqualified from operating a CMV must take. For reasons explained in FMCSA's response to comments on the proposed refresher training requirement, we delete this definition (along with the refresher training curriculum) from the final rule.

''Training Provider''

As proposed, ''training provider'' was defined as an entity listed on the TPR, as required by subpart G. In the NPRM preamble, FMCSA noted that training providers could be training schools, motor carriers providing ''in-house'' training to current or prospective employees, local governments, or school districts.

In order to clarify that any entity meeting the eligibility requirements set forth in subpart G can be a ''training provider,'' FMCSA revises the definition of the term in the final rule by adding specific examples of potentially qualifying entities. Accordingly, ''training provider'' is defined as an entity listed on the TPR, as required by subpart G; training providers include, but are not limited to, training schools, educational institutions, rural electric cooperatives, motor carriers, State/local governments, school districts, joint labor management programs, owner-operators, and individuals. As noted in our response to comments on this issue, these examples are not intended to be a finite list; the Agency adds them to illustrate the range of entities that could potentially be eligible for listing on the TPR.

§ 380.609 General Entry-Level Driver Training Requirements

As proposed, this section explained that CDL applicants must complete training that meets the CDL class and/or endorsement (*i.e.,* Class A, Class B, P, S, or H endorsements) they wish to obtain from a provider listed on the TPR, and that CDL holders disqualified from operating a CMV must receive refresher training from a provider listed on the TPR.

While the essential meaning of § 380.609 remains unchanged in the final rule, the Agency makes various conforming changes to this section. We delete the reference to ''refresher training,'' as that proposed requirement is not retained in the final rule. FMCSA also clarifies that specified ELDT requirements apply to individuals who wish to obtain a Class A or B CDL for the first time and/or a P, S, or H endorsement for the first time. The Agency makes these changes to conform to the revised language in § 380.603 (Applicability), as discussed above. We make other conforming changes to reflect the fact that all of the training curricula in the final rule are included in Appendices A–E to part 380 of the final rule and are no longer set forth in §§ 380.613, 380.615, 380.619, 380.621 and 380.623, as proposed.

§ 380.611 Driver Training Provider Requirements

As proposed, this section stated that training providers seeking to be listed on the TPR must meet the requirements of subpart G, attest that they meet the requirements of this part, and supply documentary evidence of their compliance with these requirements to FMCSA or its authorized representative, upon request.

FMCSA deletes this section in the final rule. As proposed, the provision applied directly to training providers; we therefore conclude that it does not belong in subpart F. Additionally, this

section effectively duplicates requirements now set forth in §§ 380.703, 380.719, and 380.725 of subpart G, discussed below.

§ 380.613 Class A CDL—Training Curriculum

In the final rule, the Class A training curriculum is moved to Appendix A of part 380. Although the curriculum elements for the Class A CDL remain largely as proposed, FMCSA makes clarifying and conforming changes, as well as several topic-related additions and deletions, as described below. Additionally, as discussed in the response to comments, FMCSA deletes the requirement that driver-trainees complete a minimum of 30 BTW hours in order to complete that portion of the curriculum. In the introduction to the curriculum, FMCSA adds the requirement that training providers must determine that the driver-trainee has demonstrated proficiency in all elements of the BTW curriculum, unless otherwise noted. This language is consistent with the NPRM's designation of certain elements of the BTW curriculum, such as night driving or skid control, as ''discussed during public road training or simulated, but not necessarily performed.'' The Agency also clarifies that training instructors must provide commentary instruction in those elements of the BTW curriculum. FMCSA considers these additions to be clarifying rather than substantive.

FMCSA also adds a requirement that instructors document the total number of (clock) hours that each driver-trainee spends in completing all elements of the BTW (range and public road) curriculum. As noted above, the purpose of this requirement is to allow FMCSA to collect data which will assist the Agency in assessing the effectiveness of ELDT and in monitoring the effectiveness of training providers. Finally, the Agency clarifies that BTW training may not be conducted by using a driving simulation device, nor may a driver-trainee use a simulation device to demonstrate BTW proficiency.

Additionally, in response to comments, the Agency adds two safety-related topics to the Class A curriculum. First, ''entering and exiting the interstate or controlled access highway'' is added to the ''Basic control'' unit of the theory curriculum and to the ''Vehicle controls'' unit of and BTW-public road portion of the curriculum. In addition, the Agency adds an element to the ''Railroad-highway grade crossings'' unit in the ''Advanced operating practices'' section of the theory curriculum, which requires that training providers instruct driver-trainees that railroads maintain ''Emergency Notification Systems'' to receive notification of unsafe conditions, such as a disabled vehicle blocking the track.

The Agency deletes several topics because they are not directly related to the safe operation of a CMV, as required by MAP–21 (49 U.S.C. 31305(c)(1)(A)). In the ''Fatigue and wellness awareness'' unit of the theory curriculum, the Agency deletes the following topics: Diet, exercise, personal hygiene, stress, and lifestyle changes. In the final rule, this unit covers the consequences of chronic and acute driver fatigue, in addition to wellness and basic health maintenance issues that affect a driver's ability to safely operate a CMV. In the ''Post-crash procedures'' unit of the theory curriculum, FMCSA deletes the following topics: Responsibilities for assisting injured parties; ''Good Samaritan'' laws; a driver's legal obligations and rights, including rights and responsibilities for engaging with law enforcement personnel; and the importance of learning company policy on post-crash procedures. As previously noted, training providers may address these and other topics as they see fit, but they are not required curriculum elements under today's rule.

FMCSA also cross-references the current FMCSRs (*i.e.,* §§ 392.7 and 396.11) to the description of pre-trip/post-trip inspections in the theory and BTW-range portions of the curriculum. The Agency adds specific examples of braking systems (*i.e.,* hydraulic, ABS, air) ''as applicable'' to the description of the ''Basic operation'' section of the theory portion. We add ''as applicable'' to the description of ''coupling and uncoupling'' unit in the theory and BTW (range) portions of the curriculum to account for the fact that there are different types of coupling systems. The unit entitled ''Distracted driving,'' proposed as part of the ''Advanced operating practices'' section of the Class A Theory curriculum, is moved to the ''Safe operating procedures'' section of that curriculum; the unit descriptor remains as proposed.

Finally, the Agency makes various clarifying and conforming changes to the Class A curriculum in the final rule in order to improve organizational efficiency and consistency between curricula and delete redundancies in individual curriculum topics.

§ 380.615 Class B CDL—Training Curriculum

In the final rule, the Class B training curriculum is moved to Appendix B of part 380. Although the curriculum elements for the Class B CDL remain largely as proposed, FMCSA makes clarifying and conforming changes, as well as several topic-related additions and deletions, as described below. Additionally, as discussed in the response to comments, FMCSA deletes the requirement that driver-trainees complete a minimum of 15 BTW hours in order to complete that portion of the curriculum. In the introduction to the curriculum, FMCSA adds the requirement that training providers must determine that the driver-trainee has demonstrated proficiency in all elements of the BTW curriculum, unless otherwise noted. This language is consistent with the NPRM's designation of certain elements of the BTW curriculum, such as night driving or skid control, as ''discussed during public road training or simulated, but not necessarily performed.'' The Agency also clarifies that training instructors must provide commentary instruction in those elements of the BTW curriculum. FMCSA considers these additions to be clarifying rather than substantive.

FMCSA also adds a requirement that instructors document the total number of (clock) hours that each driver-trainee spends in completing all elements of the BTW (range and public road) curriculum. As noted above, the purpose of this requirement is to allow FMCSA to collect data which will assist the Agency in assessing the effectiveness of ELDT and in monitoring the effectiveness of training providers. Finally, the Agency clarifies that BTW training may not be conducted by using a driving simulation device, nor may a driver-trainee use a simulation device to demonstrate BTW proficiency.

Additionally, in response to comments, the Agency adds two safety-related topics to the Class B curriculum. First, ''entering and exiting the interstate or controlled access highway'' is added to the ''Basic control'' unit of the theory curriculum and to the ''Vehicle controls'' unit of and BTW-public road portion of the curriculum. In addition, the Agency adds an element to the ''Railroad-highway grade crossings'' unit in the Advanced operating practices'' section of the theory curriculum, which requires that training providers instruct driver-trainees that railroads maintain ''Emergency Notification Systems'' to receive notification of unsafe conditions, such as a disabled vehicle blocking the track.

The Agency deletes several topics because they are not directly related to the safe operation of a CMV, as required by MAP–21 (49 U.S.C. 31305(c)(1)(A)). In the ''Fatigue and wellness

awareness'' unit of the theory curriculum, the Agency deletes the following topics: Diet, exercise, personal hygiene, stress, and lifestyle changes. In the final rule, this unit covers the consequences of chronic and acute driver fatigue, in addition to wellness and basic health maintenance issues that affect a driver's ability to safely operate a CMV. In the ''Post-crash procedures'' unit of the theory curriculum, FMCSA deletes the following topics: Responsibilities for assisting injured parties; ''Good Samaritan'' laws; a driver's legal obligations and rights, including rights and responsibilities for engaging with law enforcement personnel; and the importance of learning company policy on post-crash procedures. As previously noted, training providers may address these and other topics as they see fit, but they are not required curriculum elements under today's rule.

FMCSA also cross-references the current FMCSRs (*i.e.,* §§ 392.7 and 396.11) to the description of pre-trip/post-trip inspections in the theory and BTW-range portions of the curriculum. The Agency adds specific examples of braking systems (*i.e.,* hydraulic, ABS, air) ''as applicable'' to the description of the ''Basic operation'' section in the theory portion. The unit entitled ''Distracted driving'', proposed as part of the ''Advanced operating practices'' section of the Class B theory curriculum, is moved to the ''Safe operating procedures'' section of that curriculum; the unit descriptor remains as proposed.

Finally, FMCSA makes various clarifying and conforming changes to the Class B curriculum in the final rule in order to improve organizational efficiency and consistency between curricula and delete redundancies in individual curriculum topics.

§ 380.619 Passenger Endorsement Training Curriculum

In the final rule, the passenger (P) endorsement curriculum is moved to Appendix C of part 380. The P curriculum remains largely as proposed. FMCSA adds language to the introduction to the curriculum clarifying that the training instructor must determine that the driver-trainee has demonstrated proficiency in all elements of the BTW curriculum. FMCSA also adds a requirement that instructors document the total number of (clock) hours that each driver-trainees spends in completing the BTW curriculum, for the reasons previously noted. The Agency adds ''drawbridges'' to the ''Railroad-highway grade crossings'' topic in the theory portion of the P curriculum for consistency with § 383.111. FMCSA also cross-references the current FMCSRs (*i.e.,* §§ 392.7 and 396.11) to the description of pre-trip/post-trip inspections in the theory and BTW-range/public road portions of the curriculum.

In the ''Post-crash procedures'' unit of the P endorsement theory curriculum, FMCSA deletes the following topics: Responsibilities for assisting injured parties; ''Good Samaritan'' laws; a driver's legal obligations and rights, including rights and responsibilities for engaging with law enforcement personnel; and the importance of learning company policy on post-crash procedures. As noted above, the Agency removes these topics from the curriculum because they are not directly related to the safe operation of a CMV, as required by MAP–21. In addition, FMCSA deletes paragraph (4) from the ''Baggage and/or cargo management'' units of the theory and BTW-range and public road portions of the curriculum, which identifies various prohibited items and materials; in the final rule, that topic is now covered in revised paragraph (2) of each unit.

FMCSA also makes clarifying and conforming changes to the P curriculum in the final rule in order to improve organizational efficiency and consistency between curricula and delete redundancies in individual curriculum topics.

§ 380.621 School Bus Endorsement Training Curriculum

In the final rule, the school bus (S) endorsement curriculum is moved to Appendix D of part 380. The S curriculum remains largely as proposed. FMCSA adds language to the introduction to the curriculum clarifying that the training instructor must determine that the driver-trainee has demonstrated proficiency in all elements of the BTW curriculum. FMCSA also adds a requirement that instructors document the total number of (clock) hours that each driver-trainee spends in completing the BTW curriculum. The Agency also cross-references the current FMCSRs (*i.e.,* §§ 392.7 and 396.11) in the description of pre-trip/post-trip inspections in the theory and BTW-range/public road portions of the curriculum.

FMCSA adds a ''vehicle orientation'' unit to the theory portion of the S curriculum, which covers the basic physical and operational characteristics of a school bus. This addition is made to provide consistency with the theory portions of the Class A and B and the P curricula, each of which contains a vehicle orientation unit. FMCSA deletes the proposed theory unit entitled ''antilock braking systems'', because ''brake systems'' are included in the vehicle orientation unit added to the S curriculum in the final rule. The Agency deletes the ''Night operation'' unit from the theory curriculum, because that topic, which is not unique to the operation of a school bus, is addressed in the Class A and B core curricula.

§ 380.623 Hazardous Materials Endorsement Curriculum

In the final rule, the hazardous materials (H) endorsement curriculum is moved to appendix E of part 380. The H curriculum remains essentially as proposed.

§ 380.625 Refresher Training Curriculum

As proposed, the refresher training curriculum set forth the training requirements that CDL holders who are disqualified from operating a CMV must complete before their CDL can be reinstated. As explained above, the final rule does not include any requirements related to refresher training. Accordingly, FMCSA deletes the refresher training curriculum in the final rule.

Subpart G—Registry of Entry-Level Driver Training Providers

§ 380.700 Scope

As proposed, this section stated that subpart G establishes eligibility requirements for listing on the TPR, and that drivers seeking ELDT may use only providers listed on the TPR to comply with this part. In the final rule, FMCSA clarifies that, in order to provide ELDT in compliance with this part, providers must be listed on the TPR. The Agency deletes the reference to the driver's need to obtain ELDT only from providers listed on the TPR, as that obligation is referenced in § 380.609.

§ 380.703 Requirements for the Training Provider Registry

As proposed, this section set forth the requirements a training provider must meet in order to be eligible for initial listing on the TPR. It remains essentially as proposed.

FMCSA makes several conforming changes to reflect that, in the final rule, the ELDT curricula are set forth in Appendices A–E and that refresher training requirements are not included in the final rule. We also change the name of the registration document from ''Entry-Level Driver Training Identification Report'', as proposed, to ''Training Provider Registration Form'', in the final rule. Further, FMCSA clarifies that training providers must

complete the form online and electronically transmit it through the TPR Web site.

FMCSA adds new § 380.703(a)(5)(i), requiring that training providers be licensed, certified, registered, or authorized to provide training in accordance with the applicable laws and regulations of any State where in-person training is provided. This provision, proposed as § 380.719(a)(4), is moved to § 380.703 because it is a threshold eligibility requirement; the wording of this provision remains as proposed, except for the clarifying addition of ''in-person''. The Agency also adds new § 380.703(a)(5)(ii), which states that State qualification requirements otherwise applicable to theory instruction do not apply to providers who offer instruction only online. As discussed in the response to comments, this exception is necessary to account for the fact that, because online training can be delivered virtually anywhere, online providers cannot reasonably be expected to comply with multiple (and possibly conflicting) State requirements. However, as noted above in the discussion of the revised definition of ''theory instructor'' in § 380.605, online providers must ensure that the training content is delivered and/or prepared by theory instructors meeting the definition.

Finally, the Agency deletes the reference to the creation and maintenance of driver-trainee records of completion and/or withdrawal, as proposed in § 380.703(a)(7). The Agency will have access to the pertinent information through the providers' transmission of ELDT certification information for each driver-trainee completing their training program.

§ 380.707 Entry-Level Training Provider Requirements

As proposed, this section set forth the requirements applicable to ELDT providers. It mandated that providers require that all accepted applicants for BTW public road training meet Federal, State and/or local laws pertaining to drug screening, controlled substances testing, age, medical certification, licensing and driving record. This section also required that training providers cover all required elements of the BTW (range and public road) and theory curricula, as applicable. As proposed, providers training more than three driver-trainees annually must provide training materials to each trainee addressing the applicable curricula; providers training three or fewer trainees annually were not subject to this requirement. This section also stated that separate training providers may deliver the theory and BTW portions of the curricula.

FMCSA makes several changes to this section in the final rule. The Agency makes conforming changes to reflect that the final rule does not include a refresher training curriculum and that different requirements are not imposed on providers training three or fewer trainees annually, as proposed. In § 380.707(a), the Agency clarifies that accepted BTW applicants must certify that they will comply with DOT regulations, as well as State and local laws, pertaining to alcohol and controlled substances testing, age, medical certification, licensing and driving record. As proposed, the requirement could be interpreted to mean that training providers are responsible for driver-trainees' compliance with these requirements, which was not FMCSA's intention. FMCSA also adds a requirement that training providers verify that accepted BTW applicants hold valid CLPs/CDLs, as applicable, in order to ensure that driver-trainees operating CMVs on a public road are licensed to do so.

FMCSA clarifies in § 380.707(c) that, while separate providers may provide theory and BTW training, both the range and public road portions of BTW training must be provided by the same training entity, as noted in the response to comments. FMCSA adds a requirement that training providers offering online training must ensure that the content is prepared by a theory instructor as defined in § 380.605. Finally, FMCSA deletes the provisions, proposed as § 380.707(b) and (c), requiring that BTW and theory instruction include all elements set forth in the applicable curricula because those requirements are already imposed on training providers in § 380.703(a)(1).

§ 380.709 Facilities

As proposed, this section required that a training provider's classroom and/or range facilities comply with all applicable Federal, State, and/or local laws. Additionally, training providers offering BTW-range training must have an instructor on site to demonstrate applicable skills and correct deficiencies of individual students; and the range must be free of obstructions, enable the driver to maneuver safely and free from interference from other vehicles and hazards, and have adequate sight lines.

In the final rule, FMCSA retains, as proposed, the requirement that a training provider's classroom and/or range facilities comply with all applicable Federal, State, and/or local laws. The Agency deletes the requirements pertaining to range instruction because they are duplicative. In the final rule, the range-related requirements proposed in § 380.709 are addressed in the introductions to the Class A, Class B, P, and S curricula in Appendices A–D and in the definition of ''range'' in § 380.605.

§ 380.711 Equipment

As proposed, this section required that all vehicles used in BTW must be in safe mechanical condition and that vehicles used in BTW-public road training comply with applicable Federal and State safety requirements. In addition, training vehicles must be in the same class (A or B) and type (bus or truck) that driver-trainees intend to operate for their CDL skills test.

In the final rule, FMCSA deletes the provision requiring that all vehicles used for BTW-range training be in safe mechanical condition. The Agency believes that the requirement that vehicles used for BTW training comply with applicable Federal and State safety requirements, now in § 380.711(a), adequately addresses the issue of training vehicle safety. In addition, we delete the parenthetical references to ''(A or B)'' and ''(bus or truck)'' in response to a comment that Group C vehicles, which may be used in BTW training for the P and/or S endorsement, are not used in Class A or B CDL training and may be neither a bus nor a truck.

§ 380.713 Driver-Instructor Qualification Requirements

As proposed, this section required that training providers utilize theory and BTW instructors meeting the specified definitions in § 380.605. Additionally, this section required training providers to utilize BTW instructors whose driving record meets applicable State and Federal requirements and who, in the two years prior to engaging in BTW instruction, have not had any CMV-related convictions for the offenses identified in § 385.51(b)–(e).

FMCSA significantly revises § 380.713 in the final rule, as noted above in the explanation of changes made to § 380.605. The specific qualification requirements pertaining to theory and BTW instructors are now addressed directly in the definitions of those terms. Accordingly, in the final rule, this section simply requires that training providers utilize ''theory instructors'' and ''BTW instructors'' meeting the definition of those terms as set forth in § 380.605.

§ 380.715 Assessments

As proposed, this section required that driver-trainees successfully complete a course of instruction meeting the ELDT curriculum requirements. Training providers must use assessments (in written or electronic format) to demonstrate the trainee's proficiency in the knowledge objectives set forth in the applicable theory curriculum; trainees must achieve an overall score of 80 percent or higher on the theory assessment. Training providers are required to assess a driver-trainee's proficiency on the driving range in accordance with the applicable curriculum, as well as a trainee's proficiency in BTW driving skills on a public road in the class (A or B) and type (bus or truck) of vehicle the trainee will operate for the CDL skills test.

In the final rule, § 380.715 remains largely as proposed. FMCSA makes conforming changes to reflect that the ELDT theory and BTW curricula are now in Appendices A–E of part 380 and are no longer set forth in §§ 380.613, 380.615, 380.619, 380.621 and 380.623, as proposed. FMCSA deletes the requirement that driver-trainees must complete a course of instruction meeting the applicable ELDT requirements, because that provision is set forth in § 380.609.The Agency clarifies that training providers must document their assessment of a driver-trainee's proficiency in the BTW skills, as required in Appendices A–D, as well as the total number of (clock) hours each driver-trainee spends in completing BTW (range and public road) training, but the proficiency documentation requirement in § 380.715(b) of the final rule is now combined for all BTW skills (range and public road). Separate documentation for range and public road skills, as proposed in § 380.715(b) and (c), is therefore no longer required. FMCSA does not require any specific means or method of documentation of BTW proficiency or the number of hours spent in completing the BTW curriculum.

Finally, FMCSA deletes the proposed requirement that BTW skills assessment must occur in ''a vehicle class (A or B) and type (bus or truck) that the driver-trainee will operate for the CDL skills test,'' for the reason noted above in the explanation of changes to § 380.711. We also note that all of the BTW curricula in today's rule require that the training occur in a representative vehicle for the CDL class or endorsement.

§ 380.717 Training Certification

As proposed, this section required that training providers upload ELDT certificates to the TPR by the close of the next business day after the individual's completion of the training. It also set forth the specific information elements to be included in the training certification, such as the driver-trainee's name, CLP/CDL number and State of licensure, the type of training completed the training provider's name and unique TPR identification number, and the date of training completion.

In the final rule, § 380.717 remains largely as proposed. In response to comments, FMCSA extends the time period for electronically transmitting the ELDT certification information to the TPR to midnight of the second business day following the individual's completion of the training. As noted above, FMCSA adds the total number of (clock) hours spent to complete BTW training, as applicable, to the required certification information. We also add the trainee's driver's license number as a potential data element to account for the fact that trainees who are not CDL holders and who complete the theory curricula before obtaining BTW training may not have a CLP number at that point. The Agency also requires that training providers electronically transmit the ELDT data elements to the TPR, rather than uploading a training certificate, as proposed.

§ 380.719 Requirements for Continued Listing on the Training Provider Registry

As proposed, this section identified the specific obligations imposed on training providers as a condition of continued listing on the TPR. The requirements include: Meeting the applicable requirements of this subpart; providing biennial updates to the Entry-Level Driver Training Provider Identification Report; reporting to FMCSA specified changes in key information within 30 days; being licensed, certified, registered or authorized to provide training in each State where training is provided, as applicable, and maintaining related documentation; allowing FMCSA or its authorized representative to conduct an audit or investigation of the training provider; and ensuring that all required documentation is provided within 48 hours of receiving a request for documentation from FMCSA or its authorized representative.

In the final rule, this section remains largely as proposed. The Agency clarifies that biennial updates to the Training Provider Registration Form, as well as any reports of changes in key information, must be transmitted electronically through the TPR Web site. As noted above, the requirement that training providers meet applicable State laws and regulations in each State where training is provided, proposed as § 380.719(a)(4), is in § 380.703(5)(i) of the final rule. The Agency moves the provision to § 380.703 because it is a threshold eligibility requirement for listing on the TPR.

§ 380.721 Removal From Training Provider Registry: Factors Considered

As proposed, this section established the factors that FMCSA may consider when removing a training provider from the TPR. All training certificates issued after the training provider is removed from the TPR will be considered invalid.

In the final rule, this section remains essentially as proposed. FMCSA makes clarifying changes to § 380.721(a)(5), deleting the reference to ''the SDLA CDL exam passage rate.'' In the final rule, the regulatory text refers to the CDL skills test passage rate for applicants for the Class A CDL, Class B CDL, P endorsement, and/or S endorsement and the SDLA knowledge test passage rate for applicants for the H endorsement. In response to comments, the Agency also deletes ''abnormally low'' from this provision in order to clarify that we do not intend to establish a minimum required CDL test passage rate. FMCSA will assess the passage rate information in the context of State norms. Finally, the Agency makes a clarifying change to the proposed language stating that all training certificates issued after the date a provider is removed from the TPR will be considered invalid. In the final rule, the provision states that any training conducted after the removal date is invalid.

§ 380.723 Removal From Training Provider Registry: Procedure

As proposed, this section set forth the procedures for voluntary and involuntary removal of a training provider from the TPR. This section addresses FMCSA's initiation of the involuntary removal process, the training provider's right to respond to the notice and undertake corrective action, the provider's right to oppose FMCSA's notice of proposed removal, the provider's right to request administrative review of an involuntary removal, procedures for FMCSA's emergency removal of a provider from the TPR, and the process by which a provider may apply for reinstatement to the TPR following voluntary or involuntary removal.

In the final rule, FMCSA makes several changes to the procedures related to a training provider's involuntary removal from the TPR, as

set forth in § 380.723(b). First, in order to ensure that training providers to whom FMCSA issues a notice of proposed removal have adequate opportunity to implement corrective actions, the Agency deletes the proposed language stating that training conducted after issuance of the notice is non-compliant until FMCSA withdraws the notice. FMCSA also adds a provision to this subsection stating that the Agency will note on the TPR Web site whenever a training provider listed on the TPR is issued a notice of proposed removal, as further means of informing prospective students of the status of that provider. If FMCSA withdraws the notice, the notation will also be removed from that provider's listing on the TPR Web site.

In § 380.723(c)(1)(iii), the Agency adds a sentence stating that any training conducted after the date a provider is removed from the TPR is invalid. This provision was proposed and is retained as part of § 380.721; it is included here for clarity and consistency. Otherwise, § 380.723 remains as proposed.

§ 380.725 Documentation and Record Retention

Section 380.725 sets forth the documentation and record retention requirements that apply to training providers eligible for listing on the TPR. As proposed, providers must retain their policy containing requirements for driver-trainee applicants related to controlled substances testing, medical certification, licensing, and driving records; specified instructor qualification documentation (*e.g.,* copies of CDL/endorsements); the amount of time generally allocated to theory and BTW training, as applicable; the instructor-trainee ratio for each portion of the curriculum; the number of vehicles used in training and a description of lesson plans for theory and BTW, as applicable; and the names of all driver-trainees who completed or withdrew from instruction and who passed/failed the training provider's assessment of theory and BTW training, as applicable. In addition, training providers must generally retain these records or documentation for a minimum of three years from the date the document was generated or received.

In order to consolidate and clarify the record keeping requirements imposed on training providers, FMCSA makes several changes to § 380.725 in the final rule. The Agency deletes the proposed retention requirements for the amount of time generally allocated to theory and BTW training, proposed as § 380.725(b)(3); the instructor-driver-trainee ratio and number of training vehicles; and the names of driver-trainees who complete or withdraw from the instruction and who passed/failed the theory or BTW assessment, proposed as § 380.725(b)(5). FMCSA will instead capture the relevant information on the Training Provider Registration Form (TPRF), so the provider does not need to retain that information separately. In addition, the Agency makes conforming changes to § 380.725(b)(1) to require the retention of self-certifications by driver-trainee BTW applicants, who must attest that they will comply with U.S. Department of Transportation regulations in parts 40, 382, 383, and 391, as well as State and local laws, related to alcohol and controlled substances testing, age, medical certification, licensing, and driving records, as required in § 380.707(a).

FMCSA adds the following record retention requirements: the TPRF, copies of a driver-trainee's CLP/CDL (as applicable), and records of ELDT assessments as described in § 380.715. FMCSA believes these revised requirements capture the information essential for the Agency to perform a meaningful audit or investigation of a training provider's operations. The three-year record retention requirement in § 380.725(c) remains as proposed.

Part 383—Commercial Driver's License Standards; Requirements and Penalties

In the proposed rule, FMCSA revised the authority citation for part 383 and made various conforming changes. The proposed rule did not make any substantive changes to the existing requirements in part 383. FMCSA discusses below only the proposed conforming changes to part 383 which were notably revised in the final rule. All other conforming changes to part 383 remain essentially as proposed.

§ 383.51 Disqualification of Drivers

In the proposed rule, new subsection (a)(8), stated that CDL holders disqualified as a result of convictions of offenses under § 383.51(b) through (e) must not be fully reinstated until completing the refresher training curriculum.

As discussed above, the final rule does not include any refresher training requirements. Accordingly, FMCSA deletes this proposed conforming amendment to § 383.51 from the final rule.

§ 383.71 Driver Application Procedures

§ 383.71(a)(3)

As proposed, new § 383.71(a)(3) required that, as of the compliance date of the final rule, a person must complete the training prescribed in subpart F of part 380 of this chapter prior to taking the skills test for a Class A CDL, Class B CDL, a P or S endorsement, or the knowledge test for the H endorsement. The training must be administered by a training provider listed on the TPR.

In the final rule, this conforming change remains largely as proposed. FMCSA adds language to this provision to clarify that the required training must be completed prior to taking the skills test for the Class A CDL or Class B CDL *for the first time,* or the skills test for a P or S endorsement *for the first time,* or the knowledge test for the H endorsement *for the first time* (emphasis added). As noted above, this language is consistent with MAP–21's requirement that training standards be established for individuals obtaining a CDL ''for the first time''.

§ 383.71(a)(4)

As proposed, new § 383.71(a)(4) provided that, except for driver-trainees seeking the H endorsement, driver-trainees completing the theory portion of the training must complete the skills portion within 360 days.

As discussed above, FMCSA deletes this requirement from § 383.71, as proposed, makes clarifying changes to this requirement, and moves it to § 380.603(c) of the final rule. The provision now requires that trainees complete both portions of the required ELDT within one year of completing the first portion of the training.

§ 383.71(b)(11)

As proposed, new § 383.71(b)(11) required that, as of the compliance date of the final rule, a person must complete the training prescribed in subpart F of part 380 of this chapter prior to taking the skills test for an initial Class A CDL, Class B CDL, or a P or S endorsement, or the knowledge test for the H endorsement. The training must be administered by a training provider listed on the TPR.

In the final rule, this conforming change remains largely as proposed. As noted above in the discussion of conforming changes to § 383.71(a)(3), FMCSA adds language to this provision to clarify that the required training must be completed prior to taking the skills test for the Class A CDL or Class B CDL for the first time, or the skills test for a P or S endorsement for the first time, or

the knowledge test for the H endorsement for the first time.

§ 383.71(e)(5)

As proposed, new § 383.71(e)(5) required that a person must complete the training prescribed in subpart F of part 380 of this chapter prior to taking the skills test for upgrading to a CDL from one class to another, or upgrading a CDL with a P or S endorsement, or taking the knowledge test for the H endorsement issued on a CDL. The training must be administered by a training provider listed on the TPR.

In the final rule, this conforming change remains largely as proposed. As noted above in the discussion of conforming changes to §§ 383.71(a)(3) and 383.71(b)(11), FMCSA adds language to this provision to clarify that the required training must be completed prior to taking the skills test for upgrading to a Class A or Class B CDL, adding a P or S endorsement to a CDL the first time, or taking the knowledge test for the H endorsement for the first time.

§ 383.73 State Procedures

§ 383.73(b)(3)(ii)

As proposed, this section would be amended to add, in § 383.73(b)(3)(ii), a requirement that the State check with CDLIS to determine, if the CDL was issued on or after the compliance date of the final rule, whether an applicant for a Class A or Class B CDL or a CDL with a P, S, or H endorsement has completed the training required by subpart F of this subchapter from a training provider listed on the TPR.

In the final rule, FMCSA deletes the requirement that the State determine that the required ELDT was obtained from a training provider on the TPR. As discussed in the response to comments, the Agency will not be transmitting a training certificate to the State through CDLIS, as proposed in the NPRM. Instead, data elements containing the relevant training certification information will be added to the driver's record through CDLIS. Accordingly, the State is not obligated to confirm that the applicant received training from a provider listed on the TPR; FMCSA will verify that before transmitting the data elements to the driver's record. This subsection otherwise remains as proposed.

§ 383.73(b)(10)

As proposed, new § 383.73(b)(10) provided that, beginning on the compliance date of the final rule, the State must not conduct a skills test for a Class A or Class B CDL, or a P or S endorsement, until the State verifies that the applicant completed the training prescribed in subpart F of part 380 of this chapter from a training provider listed on the TPR.

In the final rule, FMCSA clarifies that the State must verify *electronically* the applicant's completion of the required ELDT. As discussed in the response to comments, the Agency makes this change in order to clarify that the State may not accept paper training certificates from either the applicant or the training provider as evidence that the applicant has completed the required training. In addition, for the reasons noted above in the discussion of § 383.73(b)(3)(ii), FMCSA deletes the requirement that the State determine that the required ELDT was obtained from a training provider on the TPR. This subsection otherwise remains as proposed.

§ 383.73(e)(8)

As proposed, new § 383.73(e)(8) provided that, beginning on the compliance date of the final rule, the State must require a person with a CDL upgrading from one class of CDL to another or upgrading a CDL with an H, P, or S endorsement, to complete the training prescribed in subpart F of part 380 of this chapter from a training provider listed on the TPR.

In the final rule, FMCSA makes several clarifying changes to this subsection. First, the Agency specifies that the requirement applies to upgrades to either a Class A or Class B CDL, or the addition of a P, S, or H endorsement. Additionally, for the reasons noted above in the discussion of §§ 383.73(b)(3)(ii) and 383.73(b)(10), FMCSA deletes the requirement that the State determine that the required ELDT was obtained from a training provider on the TPR.

§ 383.73(p)

Finally, the Agency adds new (p) to § 383.73 to require that, after the compliance date of the final rule, the State must notify FMCSA in the event that a training provider in the State does not meet applicable State requirements for CMV instruction. As discussed in the response to comments, this change is necessary since FMCSA has no means of independently determining whether a training provider complies with applicable State requirements for CMV instruction. If the training provider is listed on the TPR, failure to meet State requirements could result in that provider's removal from the TPR. This subsection otherwise remains as proposed.

§ 383.95 Restrictions

As proposed, new § 383.95(h) provided that the State would reinstate the CDL for a CDL holder disqualified from operating a CMV under § 383.51(b)–(e) solely for the limited purpose of completing the refresher training curriculum. The State may not restore full CMV driving privileges until receiving notification that the driver completed the refresher training curriculum.

As discussed above, the final rule does not include any refresher training requirements as proposed. Accordingly, FMCSA deletes this proposed subsection from the final rule.

§ 383.153 Information on the CLP and CDL Documents and Applications

As proposed, § 383.153(a)(10) was amended to add (ix), a new restriction (R) for refresher training only.

Because the final rule does not include any refresher training requirements as proposed, FMCSA deletes this proposed addition to § 383.153(a)(10) from the final rule.

Part 384—State Compliance With Commercial Driver's License Program

In the proposed rule, FMCSA revised the authority citation for part 384 and made various conforming changes. The proposed rule did not make any substantive changes to the existing requirements in part 384. FMCSA discusses below only the proposed conforming changes to part 384 which were revised in the final rule. All other conforming changes to part 384 remain essentially as proposed.

§ 384.230 Entry-Level Driver Certification

As proposed, new § 384.230(a) required a State, beginning on the compliance date of the final rule, to follow the procedures prescribed in § 383.73 for verifying that a person received training from a provider listed on the TPR before issuing an initial Class A or Class B CDL, a CDL with an H, P, or S endorsement, upgrading a CDL from one class to another, or upgrading a CDL with an H, P, or S endorsement. In addition, under proposed § 384.230(b), States would be permitted to issue a CDL to individuals who obtain an initial CLP before the compliance date of the final rule who have not complied with the ELDT requirements in subpart F of part 380, so long as they obtain the CDL within 360 days after obtaining the initial CLP. Finally, under proposed § 384.230(c), a State may not issue a CDL to individuals who obtain a CLP on or after the compliance date of the final rule unless

they comply with the ELDT requirements in subpart F of part 380.

In the final rule, FMCSA makes several clarifying changes to § 384.230(a) and (b). In § 384.230(a), we add specific references to § 383.73(b)(3)(ii), (b)(10), and (e)(8) in order to clarify the ELDT completion verification procedures a State is required to follow and make corresponding conforming changes to the regulatory text. In § 384.230(b), the Agency makes a conforming change to clarify that a State may issue a CDL to individuals who obtain a CLP before the compliance date of the final rule who have not complied with the ELDT requirements in subpart F of part 380, so long as they obtain a CDL before the CLP or renewed CLP expires. Section 384.230(c) remains as proposed.

§ 384.235 Entry-Level Driver Training Provider Notification

FMCSA adds new § 384.235 to mandate that the State must meet the entry-level driver training notification requirement of § 383.73(p).

X. Section-by-Section

Part 380

Subpart E of Part 380

Subpart E would be retitled as ''Subpart E—Entry-Level Driver Training Requirements Before February 7, 2020.'' On the compliance date of the final rule, this subpart would be removed and reserved and replaced by new subparts F and G.

New Subpart F of Part 380

This new subpart establishes the requirements for entry-level drivers, minimum curriculum content, and standards for training providers. The entry-level driver training requirements that would replace those in current subpart E would be titled ''Subpart F—Entry-Level Driver Training Requirements On and After February 7, 2020.''

New Subpart G of Part 380

This new subpart establishes the minimum qualifications for an entity to be eligible for listing on the FMCSA TPR. The TPR will be an online portal administered by FMCSA allowing training providers to register. Training providers will also transmit driver-trainee training certifications to FMCSA electronically through the TPR. The TPR allows drivers seeking training to find an eligible provider who meets their needs.

Part 383

§ 383.71 Driver Application Procedures

FMCSA adds new paragraphs—(a)(3), (b)(11), and (e)(3) through (5)—regarding the completion of the training prescribed in part 380, subpart F, before a Class A or B CDL, a passenger, school bus, or hazardous materials endorsement for the first time, or an upgrade to a Class A or Class B CDL is issued.

§ 383.73 State Procedures

FMCSA adds new paragraphs (b)(10), (e)(8), and (p) and revised paragraph (b)(3)(ii) to prohibit a State from issuing a Class A or B CDL, or a CDL with a hazardous materials, passenger, or school bus endorsement for the first time, or an upgrade to a CDL, unless the SDLA has received electronic ELDT certification information.

Part 384

FMCSA adds new §§ 384.230 and 384.235. Additionally, the Agency adds a new paragraph (j) to § 384.301.

XI. Regulatory Analyses

A. E.O. 12866 (Regulatory Planning and Review and DOT Regulatory Policies and Procedures as Supplemented by E.O. 13563)

FMCSA has determined that this rulemaking is an economically significant regulatory action under Executive Order (E.O.) 12866,[29] Regulatory Planning and Review, as supplemented by E.O. 13563.[30] It also is significant under Department of Transportation regulatory policies and procedures because the economic costs and benefits of the rule exceed the $100 million annual threshold and because of the substantial Congressional and public interest concerning the lack of Federal entry-level driver training requirements. A Regulatory Impact Analysis (RIA) is available in the docket. That document:

- Identifies the problem targeted by this rulemaking, including a statement of the need for the action.
- Defines the scope and parameters of the analysis.
- Defines the baseline.
- Defines and evaluates the costs and benefits of the action.
- Compares the costs and benefits.
- Interprets the cost and benefit results.

The RIA is the synthesis of research conducted specific to current entry-level driver training practices, industry discussions from the ELDTAC, and research conducted on the costs and benefits of the entry-level driver training provisions of this final rule.

Entry-level drivers, motor carriers, training providers, SDLAs, and the Federal Government would incur costs for compliance and implementation. The costs of the final rule include tuition expenses, the opportunity cost of time while in training, compliance audit costs, and costs associated with the implementation and monitoring of the TPR. As shown in Table 1, FMCSA estimates that the 10-year cost of the final rule would total $3.66 billion on an undiscounted basis, $3.23 billion discounted at 3 percent, and $2.76 billion discounted at 7 percent (all in 2014 dollars). Values in Table 1 are rounded to the nearest million.

TABLE 1—TOTAL COST OF THE FINAL RULE

[In millions of 2014$]

Year	Undiscounted						Discounted	
	Entry-level drivers	Motor carriers	Training providers	SDLAs	Federal government	Total [a]	Discounted at 3%	Discounted at 7%
2020	$324	$20	$9	$56	$6	$415	$415	$415
2021	326	20	6	0	1	353	343	330
2022	328	20	7	0	1	356	336	311
2023	330	20	6	0	1	357	327	291
2024	331	20	7	0	1	359	319	274
2025	333	20	6	0	1	360	311	257

[29] *Executive Order 12866 of September 30, 1993. Regulatory Planning and Review.* 58 FR 51735–51744 (October 4, 1993).

[30] *Executive Order 13563 of January 18, 2011. Improving Regulation and Regulatory Review.* 76 FR 3821–3823 (January 21, 2011).

TABLE 1—TOTAL COST OF THE FINAL RULE—Continued

[In millions of 2014$]

Year	Undiscounted						Discounted	
	Entry-level drivers	Motor carriers	Training providers	SDLAs	Federal government	Total [a]	Discounted at 3%	Discounted at 7%
2026	335	20	7	0	1	363	304	242
2027	337	20	6	0	1	364	296	227
2028	339	21	7	0	1	368	291	214
2029	341	21	6	0	1	369	283	201
Total	3,324	202	67	56	15	3,664	3,225	2,762
Annualized						366	367	368

Notes:

[a] Total cost values may not equal the sum of the components due to rounding (the totals shown in this column are the rounded sum of unrounded components).

The costs of this final rule specifically attributable to the S endorsement training requirement were also evaluated separately in the RIA. This was done because MAP–21 mandates training for entry-level drivers who wish to obtain a CDL, or a P endorsement, or an H endorsement, but is silent with respect to the S endorsement. Inclusion of the S endorsement training requirement increases the total cost of the rule by only approximately 0.82 percent. On an annualized basis at a 7 percent discount rate, this equates to an increase in the total cost of the rule from $365 million to $368 million (this can be seen in Section 3 of the RIA). Details of these comparative analyses of the costs of the rule and the reasons for this relatively small change in costs resulting from the inclusion of the S endorsement training requirement are presented in Section 3 of the RIA. The costs presented in Table 1 include this small additional incremental cost associated with the S endorsement training requirement as part of the total costs of the final rule.

This final rule will result in benefits to CMV operators, the transportation industry, the traveling public, and the environment. FMCSA estimated benefits in two broad categories: Safety benefits and non-safety benefits. Training related to the performance of complex tasks may improve performance; in the context of the training required by this final rule, improvement in task performance constitutes adoption of safer driving practices that the Agency believes will reduce the frequency and severity of crashes, thereby resulting in safer roadways for all. The training related to fuel efficient driving practices that will be taught under the 'speed management' and 'space management' sections of the curriculum reduce fuel consumption and consequently lower environmental impacts associated with carbon dioxide emissions. As discussed in Section 4.1.1 of the RIA for today's rule, FMCSA does not believe that the training in fuel efficient driving practices addressed by this rule will contribute to measurably longer trip times, as the curricula focus on factors such as maintaining safe distances between vehicles and avoiding hard acceleration and braking, rather than reducing vehicle speed. The Agency therefore assumes in its analysis that these fuel efficient driving practices will not contribute to measurably longer trip times.

Safer driving will reduce maintenance and repair costs. Table 2 below presents the directly quantifiable benefits that FMCSA projects will result from this final rule (all in 2014 dollars, values rounded to the nearest million). Due to wide ranges of estimates in studies relevant to the quantified benefits of the rule and the lack of studies that specifically focus on the curricula prescribed by this rule,[31] the Agency presents benefits estimated under alternate benefit scenarios in Table 3 and Table 4. These alternate scenarios are derived from the low and high benefit cases (see sensitivity analyses in Sections 4.1.1 through 4.1.3 of the RIA) in which the fuel savings, CO_2 emissions reductions, and maintenance and repair cost savings are 50 percent lower (low benefits case) and 50 percent greater (high benefits case) than the central estimates that the Agency relied on in developing the values presented in Table 2. Further discussion of the low and high benefits cases is reserved to the RIA for the final rule.

TABLE 2—TOTAL QUANTIFIABLE BENEFITS OF THE FINAL RULE

[Central case, in millions of 2014$]

Year	Undiscounted				Discounted	
	Value of fuel savings	Value of CO_2 reduction [a]	Maintenance and repair cost savings	Total [b]	Discounted at 3%	Discounted at 7%
2020	$89	$15	$13	$117	$117	$117
2021	151	26	22	198	192	186
2022	186	31	26	243	229	214
2023	190	32	27	248	227	206
2024	194	32	27	253	225	197
2025	197	33	27	257	222	188

[31] As described in Sections 4.1.1 through 4.1.3, the Agency identified a variety of relevant studies related to each of the quantified benefits. With particular respect to the estimated fuel and CO_2 savings the Agency was unable to identify any studies that perfectly align with the curricula of this rule.

TABLE 2—TOTAL QUANTIFIABLE BENEFITS OF THE FINAL RULE—Continued

[Central case, in millions of 2014$]

Year	Undiscounted				Discounted	
	Value of fuel savings	Value of CO_2 reduction [a]	Maintenance and repair cost savings	Total [b]	Discounted at 3%	Discounted at 7%
2026	202	34	28	263	220	181
2027	205	34	28	266	217	172
2028	207	35	28	270	214	165
2029	211	35	28	274	210	157
Total	1,830	306	253	2,389	2,073	1,783
Annualized				239	236	237

Notes:

[a] The monetized benefits associated with reduced CO_2 emissions are discounted at the 3% rate in both the ''discounted at 3%'' and ''discounted at 7%'' columns in this table. This is in keeping with the guidance of the Interagency Working Group that developed the OMB guidance on monetizing CO_2 reductions, and is consistent with past DOT and EPA practices. Further details on the monetization of CO_2 reductions are presented in Section 4.1.2 of the RIA.

[b] Total benefit values may not equal the sum of the components due to rounding (the totals shown in this column are the rounded sum of unrounded components).

TABLE 3—TOTAL QUANTIFIABLE BENEFITS OF THE FINAL RULE

[Low benefits case, in millions of 2014$]

Year	Undiscounted				Discounted	
	Value of fuel savings	Value of CO_2 reduction [a]	Maintenance and repair cost savings	Total [b]	Discounted at 3%	Discounted at 7%
2020	$44	$8	$6	$58	$58	$58
2021	75	13	11	99	96	93
2022	93	16	13	121	114	107
2023	95	16	13	124	114	103
2024	97	16	13	127	112	99
2025	99	17	14	129	111	94
2026	101	17	14	131	110	90
2027	102	17	14	133	108	86
2028	104	17	14	135	107	82
2029	106	17	14	137	105	78
Total	915	153	127	1,195	1,036	891
Annualized				119	118	119

Notes:

[a] The monetized benefits associated with reduced CO_2 emissions are discounted at the 3% discount rate in both the ''discounted at 3%'' and ''discounted at 7%'' columns in this table. This is in keeping with the guidance of the Interagency Working Group that developed the OMB guidance on monetizing CO_2 reductions, and is consistent with past DOT and EPA practices. Further details on the monetization of CO_2 reductions are presented in Section 4.1.2 of the RIA.

[b] Total benefit values may not equal the sum of the components due to rounding (the totals shown in this column are the rounded sum of unrounded components).

TABLE 4—TOTAL QUANTIFIABLE BENEFITS OF THE FINAL RULE

[High benefits case, in millions of 2014$]

Year	Undiscounted				Discounted	
	Value of fuel savings	Value of CO_2 reduction [a]	Maintenance and repair cost savings	Total [b]	Discounted at 3%	Discounted at 7%
2020	$133	$23	$19	$175	$175	$175
2021	226	38	32	295	287	278
2022	278	47	38	363	343	321
2023	285	48	39	371	340	308
2024	291	49	40	379	337	295
2025	296	50	40	385	332	282
2026	302	50	41	393	329	271
2027	307	51	41	399	324	258
2028	311	52	41	405	320	246
2029	316	52	42	410	314	235

TABLE 4—TOTAL QUANTIFIABLE BENEFITS OF THE FINAL RULE—Continued

[High benefits case, in millions of 2014$]

Year	Undiscounted				Discounted	
	Value of fuel savings	Value of CO_2 reduction [a]	Maintenance and repair cost savings	Total [b]	Discounted at 3%	Discounted at 7%
Total	2,745	459	372	3,576	3,100	2,668
Annualized				358	353	355

Notes:

[a] The monetized benefits associated with reduced CO_2 emissions are discounted at the 3% discount rate in both the ''discounted at 3%'' and ''discounted at 7%'' columns in this table. This is in keeping with the guidance of the Interagency Working Group that developed the OMB guidance on monetizing CO_2 reductions, and is consistent with past DOT and EPA practices. Further details on the monetization of CO_2 reductions are presented in Section 4.1.2 of the RIA.

[b] Total benefit values may not equal the sum of the components due to rounding (the totals shown in this column are the rounded sum of unrounded components).

While FMCSA believes that this final rule will at a minimum achieve cost-neutrality, the net of quantified costs and benefits (presented in Table 5 below) results in an annualized net cost of $131 million at a 7 percent discount rate. This estimate is based only on *quantifiable* costs and benefits (central case) attributable to this rule. Safety benefits are assessed separately via a threshold analysis discussed in detail in Section 4.2 of the RIA.

TABLE 5—NET COST OF THE FINAL RULE (CENTRAL CASE), ABSENT QUANTIFIABLE SAFETY BENEFITS

[In millions of 2014$]

Year	3% Discount rate	7% Discount rate
2020	$298	$298
2021	151	144
2022	107	97
2023	100	85
2024	94	77
2025	89	69
2026	84	61
2027	79	55
2028	77	49
2029	73	44
Total	1,152	979
Annualized	131	131

In the absence of a clear link between training and safety, FMCSA followed the guidance of the Office of Management and Budget (OMB) in its Circular A–4 to perform a threshold analysis to determine the degree of safety benefits that will need to occur as a consequence of this final rule in order for the rule to achieve cost-neutrality.[32] As presented and discussed in detail in Section 4.2 of the RIA, the central estimate of this analysis is that a 3.61 percent improvement in safety performance (that is, a 3.61 percent reduction in the frequency of crashes involving those entry-level drivers who will receive additional pre-CDL training as a result of this final rule during the period for which the benefits of training are estimated to remain intact) is necessary to offset the $142 million (annualized at 7 percent) net cost of this final rule. Note that under the low and high benefits cases presented in Table 3 and Table 4, the net cost of this final rule ranges from $13 million to $250 million (annualized at 7 percent), suggesting the improvement in safety performance necessary to offset the rule's costs may be as low as 0.36 percent and as high as 6.89 percent (see Section 4.2 of the RIA for the final rule for further detail).

Table 6 below presents the projected number of crash reductions involving entry-level drivers that must occur in each of the 10 years following this final rule's implementation and in the aggregate, in order to offset the net cost ($131 million annualized at 7 percent).[33] To be clear, it is the sum of the monetized value of *all columns* of Table 6—not the sum of the monetized value of any individual column—that results in cost-neutrality.

[32] Office of Management and Budget. Circular A–4. *Regulatory Analysis.* September 17, 2003. Available at: *https://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf* (accessed July 25, 2016).

[33] Some commenters to the RIA that was performed for the NPRM for this rule incorrectly interpreted the breakeven percentage reduction in crashes estimated here as being relative to *all* CMV crashes *industry-wide,* rather than being relative to only to the much smaller sub-set of crashes involving entry-level drivers that are affected by the rule. Note that with respect to the magnitude of the reduction in the frequency of all crashes involving large trucks and buses that the annual average crash reductions presented in Table 6 represent, the Agency notes that there were an estimated total 3,649 fatal, 93,000 injury, and 379,000 PDO crashes in 2014 (see U.S. Department of Transportation, Federal Motor Carrier Safety Administration (FMCSA), *2016 Pocket Guide to Large Truck and Bus Statistics,* May 2016, pages 33 and 34, available at: *http://ntl.bts.gov/lib/59000/59100/59189/2016_Pocket_Guide_to_Large_Truck_and_Bus_Statistics.pdf* (accessed July 1, 2016)). Therefore, viewed in this manner, based on the annual average number of crash reductions necessary for this final rule to achieve cost-neutrality (shown in the second row from the bottom of Table 6), this equates to a reduction of only 0.14% of fatal, 0.11% of injury, and 0.11% of PDO crashes, respectively (relative to calendar year 2014). These percentage reductions are calculated as follows: Fatal = 5 ÷ 3,649; Injury = 102 ÷ 93,000; PDO = 432 ÷ 379,000. It should be re-emphasized, however, that this view of the data taken by some of the commenters is *incorrect,* and that the breakeven percentage reduction in crashes estimated here is relative to only the much smaller sub-set of crashes involving entry-level drivers that are affected by the rule.

TABLE 6—CRASH REDUCTIONS INVOLVING ENTRY-LEVEL DRIVERS, BY TYPE, NECESSARY TO ACHIEVE COST-NEUTRALITY

[For the Central Case]

Year	Number of fatal crashes	Number of injury crashes	Number of property damage only (PDO) crashes
2020	3	59	251
2021	5	98	418
2022	6	118	502
2023	6	118	502
2024	6	118	502
2025	6	118	502
2026	6	118	502
2027	6	118	502
2028	6	118	502
2029	6	118	502
Annual Average [a]	5	110	468
Total [b]	53	1,102	4,682

Notes:
[a] Rounded to the nearest whole number.
[b] The individual values shown may not sum to the totals shown due to rounding.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, Public Law 96–354, 94 Stat. 1164 (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857, March 29, 1996) and the Small Business Jobs Act of 2010 (Pub. L. 111–240, 124 Stat. 2504, September 27, 2010), requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term ''small entities'' comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. Additionally, DOT policy requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these businesses.

Accordingly, FMCSA prepared an Initial Regulatory Flexibility Analysis (IRFA) for the NPRM and a Final Regulatory Flexibility Analysis (FRFA) for the Final Rule. This rule will affect all entities that choose to become training providers. As shown in the FRFA (see Section 5 of the RIA), FMCSA estimated that approximately 4.6 million small entities could employ entry-level drivers, but that only 22,000 entities will register with FMCSA to become training providers. The impact on those entities that choose to become training providers will be less than $500 in the first year of the analysis, which is less than 1% of revenue for entities in any of the potentially affected industries. Therefore, I certify that this rule will not have a significant economic impact on a substantial number of small entities.

C. Assistance for Small Entities

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, FMCSA wants to assist small entities in understanding this final rule so that they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the final rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance; please consult the FMCSA point of contact, Richard Clemente, listed in the **FOR FURTHER INFORMATION CONTACT** section of this final rule.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business Administration's Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1–888–REG–FAIR (1–888–734–3247). DOT has a policy regarding the rights of small entities to regulatory enforcement fairness and an explicit policy against retaliation for exercising these rights.

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $155 million (which is the value equivalent of $100,000,000 in 1995, adjusted for inflation to 2013 levels) or more in any one year. This rulemaking would result in private sector expenditures in excess of the $155 million threshold. Gross costs, however, are expected to be offset by fuel, carbon dioxide, and maintenance and repair savings, making this final rule cost-neutral based on reduced instances of crashes, as further discussed in the threshold-based analysis described in the RIA.

A written statement under the Unfunded Mandates Reform Act is not required for regulations that incorporate requirements specifically set forth in law (2 U.S.C. 1531). MAP–21 mandated that FMCSA issue regulations to establish minimum entry-level training requirements for all first-time CDL applicants, CDL holders seeking a license upgrade from one class of CDL to another, and applicants for the passenger (P) or hazardous materials (H) endorsements.[34] Accordingly, because

[34] As explained above and discussed in the RIA, mandatory school bus (S) endorsement training is also included in the final rule. While not specifically mandated by MAP–21, the Agency believes the inclusion of an S endorsement curriculum is entirely consistent with MAP–21's

Continued

this rule implements the direction of Congress in mandating ELDT, a written statement under the Unfunded Mandates Reform Act is not required.

E. Paperwork Reduction Act

These amended regulations require training providers to obtain, collect, maintain, and in some cases transmit, information about their facilities, curricula, and the individuals who complete entry-level driver training. In accordance with the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520), FMCSA has analyzed the need for these information-collection (IC) activities and how the information will be managed. On March 7, 2016, the Agency provided a preliminary estimate of the time burden that would be imposed on training providers under the proposed rules and asked for public comment (81 FR 11967). No comments were received.

The compliance date for the amended training rules is three years after the effective date of this final rule. For the next three years, the Agency's current regulations pertaining to the training of entry-level drivers (49 CFR Subpart E) will remain in place. OMB approves information-collection activities for a maximum period of 3 years. Thus, the Agency's estimate of IC burden must be based upon the current regulations. That burden was approved by OMB on December 23, 2015, after public notice and comment (80 FR 53385). The Agency at this time does not amend that approved estimate: 66,250 hours. Formal OMB approval of the IC collection to be conducted under the amended rules must be obtained before the compliance date of those rules. Therefore, in approximately two years, the Agency will submit its estimate of the burden of the amended rules to OMB for approval and provide notice and an opportunity for public comment on the estimate.

Preliminary Estimate

FMCSA offers the following preliminary estimate of the IC burden it foresees the amended training rules will impose on the compliance date three years hence.

Summary of the Collection of Information: Training providers must register each training location with the TPR by electronically submitting an initial TPRF. Training providers must also submit an updated TPRF for each training location to the TPR every two years. In addition, training providers must electronically submit training certification information to the TPR for each individual who completes entry-level driver training.

Need for Information: The Agency must be able to assess the qualifications of training providers in order to list them on the TPR, and the identity of training locations is needed for FMCSA to be able to visit the sites to verify compliance. Finally, information about individuals who complete ELDT is needed so the Agency can inform SDLAs that CDL applicants completed the required training.

Proposed Use of Information: The Agency will monitor training providers to ensure that they conduct training in accordance with these rules. Monitoring will include on-site audits of the operations of training providers. Further, the Agency will monitor the safety performance of drivers who complete entry-level training in order to assess the efficacy of the training required by the amended regulations.

Description of the Respondents: Training providers.

Number of Respondents: 20,510.

Frequency of Response: Training providers must initially register each training location with the TPR by submitting an initial TPRF. Training providers must also submit an updated TPRF for each training location to the TPR every two years. Finally, on an irregular basis, training providers must electronically submit training certification information to the TPR for each individual who completes entry-level driver training.

Burden of Response: Over the first three years of the new rules, the Agency estimates that training providers will require 20,405 hours annually to register their training locations with FMCSA. Training providers will also require 38,625 hours annually to electronically submit training certification information to the TPR for each individual who completes entry-level driver training.

Preliminary Estimate of the Total Annual Burden of the Revised Rules on the Compliance Date (three years from this date): 59,030 hours (20,405 + 38,625).

F. Executive Order 13132 (Federalism)

A rule has implications for Federalism under Section 1(a) of Executive Order 13132 if it has ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. FMCSA has analyzed this rule in accordance with E.O. 13132 and has determined that it does not have federalism implications.

The key concept here is ''substantial direct effects on the States.'' Sec. 3(b) of the Federalism Order provides that ''[n]ational action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance.'' The rule amends the current entry-level driver training requirements in 49 CFR part 380, as required by the MAP–21 amendment to 49 U.S.C. 31305, the training section of the CDL statute. The CDL program does not have preemptive effect. It is voluntary; States may withdraw at any time, although doing so will result in the loss of certain Federal aid highway funds pursuant to 49 U.S.C. 31314. Because this rule makes conforming, and not substantive, changes to the requirements already imposed on participating States, FMCSA has determined that it does not have substantial direct effects on the States, on the relationship between the Federal and State governments, or on the distribution of power and responsibilities among the various levels of government.

Nonetheless, FMCSA recognizes that, as a practical matter, this rule may have some impact on the States. Accordingly, the Agency sought advice from the National Governors Association (NGA), the National Conference of State legislatures (NCSL), the American Association of Motor Vehicle Administrators (AAMVA), and the National Association of Publicly Funded Truck Driving Schools (NAPFTDS) on the topic of entry-level driver training, by letters to each organization, dated July 6, 2015. (Copies of these letters are available in the docket for this rulemaking.) FMCSA offered NGA, NCSL, AAMVA, and NAPFTDS officials the opportunity to meet and discuss issues of concern to the States. It should also be noted that AAMVA and NAPFTDS were members of the ELDTAC, whose consensus recommendations formed the basis of the NPRM. State and local governments were also able to raise Federalism issues during the NPRM comment period.

Furthermore, FMCSA sent follow-up letters to NGA, NCSL, AAMVA, and NAPFTDS on March 18, 2016, notifying them that the NPRM had been published.

recognition of the importance of ELDT in the operation of passenger-carrying CMVs. FMCSA notes that the S endorsement training requirement increases the cost of the final rule by a negligible amount (approximately 0.82%), due primarily to the fact that about 95% of entry-level school bus drivers currently receive training that is at least equal to the minimum standard established in today's rule.

G. Executive Order 12988 (Civil Justice Reform)

This final rule meets applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, to minimize litigation, eliminates ambiguity, and reduce burden.

H. Executive Order 13045 (Protection of Children)

E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, Apr. 23, 1997), requires agencies issuing ''economically significant'' rules, if the regulation also concerns an environmental health or safety risk that an agency has reason to believe may disproportionately affect children, to include an evaluation of the regulation's environmental health and safety effects on children. Although FMCSA has determined that this in an economically significant rule, the Agency concludes, as noted in the response to comments, that this regulatory action does not present ''environmental health risks and safety risks,'' as that term is defined in E.O. 13045, which could disproportionately affect children.

I. Executive Order 12630 (Taking of Private Property)

FMCSA reviewed this final rule in accordance with E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and has determined it will not effect a taking of private property or otherwise have taking implications.

J. Privacy

FMCSA conducted a privacy impact assessment (PIA) of this rule as required by section 522(a)(5) of division H of the FY 2005 Omnibus Appropriations Act, Public Law 108–447, 118 Stat. 3268 (Dec. 8, 2004). The assessment considered impacts of the final rule on the privacy of information in an identifiable form and related matters. The final rule will impact the handling of personally identifiable information (PII). FMCSA has evaluated the risks and effects the rulemaking might have on collecting, storing, and sharing PII and has evaluated protections and alternative information handling processes in developing the final rule in order to mitigate potential privacy risks.

For the purposes of both transparency and efficiency, the privacy analysis conforms to the DOT standard Privacy Impact Assessment (PIA) and will be published on the DOT Web site, *http://www.transportation.gov/privacy*, concurrently with the publication of the rule. The PIA addresses the rulemaking, associated business processes contemplated in the rule, and any information known about the systems or existing systems to be implemented in support of the final rulemaking. While a PIA for the Entry Level Driver Training NPRM was not required, due to changes in the rulemaking and associated business processes during the final rule stage, this effort will now require the publication of a PIA. FMCSA will not be directly collecting information from individuals, but the agency will be storing and using PII collected by the training providers about individuals that received training at the facilities.

As required by the Privacy Act, FMCSA and the Department will publish, with request for comment, a system of records notice (SORN) that will describe FMCSA's maintenance and electronic transmission of information affected by this final rule and covered by the Privacy Act. This SORN will be developed to reflect the new storage and electronic transmission of information and published in the **Federal Register** not less than 30 days before the Agency is authorized to collect or use PII retrieved by unique identifier.

K. Executive Order 12372 (Intergovernmental Review)

The regulations implementing E.O. 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

L. Executive Order 13211 (Energy Supply, Distribution, or Use)

FMCSA has analyzed this final rule under E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The Agency has determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, it does not require a Statement of Energy Effects under E.O. 13211.

M. Executive Order 13175 (Indian Tribal Governments)

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

N. National Technology Transfer and Advancement Act (Technical Standards)

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) are standards that are developed or adopted by voluntary consensus standards bodies. This rule does not use technical standards. Therefore, FMCSA did not consider the use of voluntary consensus standards.

If you disagree with our analysis of the voluntary consensus standards or are aware of voluntary consensus standards that might apply but are not listed here, please send a comment to the docket using one of the methods under **ADDRESSES**. In your comment, please explain why you disagree with our analysis and/or identify voluntary consensus standards FMCSA has not listed that might apply.

O. Environment (NEPA, CAA, E.O. 12898 Environmental Justice)

The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) requires Federal agencies to integrate environmental values into their decision-making processes by requiring Federal agencies to consider the potential environmental impacts of their actions. In accordance with NEPA, FMCSA's NEPA Order 5610.1 (NEPA Implementing Procedures and Policy for Considering Environmental Impacts), and other applicable requirements, FMCSA prepared an Environmental Assessment (EA) to review the potential impacts of the rule. Because the implementation of this action would only impose new training standards for certain individuals applying for their CDL, an upgrade of their CDL, or hazardous materials, passenger, or school bus endorsement for their license, FMCSA has tentatively found that noise, endangered species, cultural resources protected under the National Historic Preservation Act, wetlands, and resources protected under Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 303, as amended by Public Law 109–59, would not be impacted. The impact areas that may be affected and will be evaluated in this EA

include air quality, hazardous materials transportation, solid waste, and public safety. But the impact area of focus for the EA will be air quality. Specifically, as outlined in the RIA for this rulemaking, FMCSA anticipates that an increase in driver training to result in improved fuel economy based on changes to driver behavior, such as smoother acceleration and braking practices. Such improved fuel economy is anticipated to result in lower air emissions and improved air quality for gases including carbon dioxide. FMCSA expects that all negative impacts, if any, will be negligible. However, we expect the overall environmental impacts of this action to be beneficial. The EA will be available for inspection or copying in the *Regulations.gov* Web site listed under **ADDRESSES**.

FMCSA also analyzed this final rule under the Clean Air Act, as amended (CAA), section 176(c) (42 U.S.C. 7401 *et seq.*), and regulations promulgated by the Environmental Protection Agency (40 CFR part 93, subpart B). Under the General Conformity Rule, a conformity determination is required where a Federal action would result in total direct and indirect emissions of a criteria pollutant or precursor originating in nonattainment or maintenance areas equaling or exceeding the rates specified in 40 CFR 93.153(b)(1) and (2). As noted in the NEPA discussion above, however, FMCSA expects a net decrease in air emissions as a result of this final rule. Consequently, approval of this action is exempt from the CAA's General Conformity Requirement since it does not affect direct or indirect emissions of criteria pollutants.

Under E.O. 12898, each Federal agency must identify and address, as appropriate, ''disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations'' in the United States, its possessions, and territories. FMCSA evaluated the environmental justice effects of this rule in accordance with the Executive Order, and has determined that no environmental justice issue is associated with this rule, nor is there any collective environmental impact that would result from its promulgation.

List of Subjects

49 CFR Part 380

Administrative practice and procedure, Highway safety, Motor carriers, Reporting and recordkeeping requirements.

49 CFR Part 383

Administrative practice and procedure, Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

49 CFR Part 384

Administrative practice and procedure, Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

For the reasons set forth in the preamble, FMCSA amends 49 CFR parts 380, 383, and 384 as follows:

PART 380—SPECIAL TRAINING REQUIREMENTS

■ 1. The authority citation for part 380 is revised to read as follows:

Authority: 49 U.S.C. 31133, 31136, 31305, 31307, 31308, and 31502; sec. 4007(a) and (b) of Pub. L. 102–240 (105 Stat. 2151–2152); sec. 32304 of Pub. L. 112–141; and 49 CFR 1.87.

Subpart E—Entry-Level Driver Training Requirements Before February 7, 2020

■ 2. Revise subpart E to read as set forth above.

■ 3. Add subpart F to read as follows:

Subpart F—Entry-Level Driver Training Requirements On and After February 7, 2020

Sec.

§ 380.600 Compliance date for training requirements for entry-level drivers.

Compliance with the provisions of this subpart is required on or after February 7, 2020.

§ 380.601 Purpose and scope.

This subpart establishes training requirements for entry-level drivers, as defined in this subpart, and minimum content for theory and Behind-the-Wheel (BTW) training curricula. Entry-level driver training, as defined in this subpart, applies only to those individuals who apply for a commercial driver's license (CDL) or a CDL upgrade or endorsement and does not otherwise amend substantive CDL requirements in part 383 of this chapter.

§ 380.603 Applicability.

(a) The rules in this subpart apply to all entry-level drivers, as defined in this subpart, who intend to drive CMVs as defined in § 383.5 of this chapter in interstate and/or intrastate commerce, except:

(1) Drivers excepted from the CDL requirements under § 383.3(c), (d), and (h) of this chapter;

(2) Drivers applying for a restricted CDL under § 383.3(e) through (g) of this chapter;

(3) Veterans with military CMV experience who meet all the requirements and conditions of § 383.77 of this chapter; and

(4) Drivers applying for a removal of a restriction in accordance with § 383.135(b)(7).

(b) Drivers who hold a valid Class A or Class B CDL, or a passenger (P), school bus (S), or hazardous materials (H) endorsement, issued before February 7, 2020, are not required to comply with this subpart pertaining to that CDL or endorsement.

(c)(1) Individuals who obtain a CLP before February 7, 2020, are not required to comply with this subpart if they obtain a CDL before the CLP or renewed CLP expires.

(2) Individuals who obtain a CLP on or after February 7, 2020, are required to comply with this subpart.

(3) Except for individuals seeking the H endorsement, individuals must complete the theory and BTW (range and public road) portions of entry-level driver training within one year of completing the first portion.

§ 380.605 Definitions.

(a) The definitions in parts 383 and 384 of this subchapter apply to this subpart, except as stated below.

(b) As used in this subpart:

Behind-the-wheel (BTW) instructor means an individual who provides BTW training involving the actual operation of a CMV by an entry-level driver on a range or a public road and meets one of these qualifications:

(i) Holds a CDL of the same (or higher) class and with all endorsements necessary to operate the CMV for which training is to be provided and has at least two years of experience driving a CMV requiring a CDL of the same or higher class and/or the same endorsement and meets all applicable State qualification requirements for CMV instructors; or

(ii) Holds a CDL of the same (or higher) class and with all endorsements necessary to operate the CMV for which training is to be provided and has at least two years of experience as a BTW CMV instructor and meets all applicable State qualification requirements for CMV instructors.

Exception: A BTW instructor who provides training solely on a range which is not a public road is not required to hold a CDL of the same (or higher) class and with all endorsements

necessary to operate the CMV for which training is to be provided, as long as the instructor previously held a CDL of the same (or higher) class and with all endorsements necessary to operate the CMV for which training is to be provided, and complies with the other requirements set forth in paragraphs (1), (2), or (3) of this definition.

(iii) If an instructor's CDL has been cancelled, suspended, or revoked due to any of the disqualifying offenses identified in § 383.51, the instructor is prohibited from engaging in BTW instruction for two years following the date his or her CDL is reinstated.

Behind-the-wheel (BTW) range training means training provided by a BTW instructor when an entry-level driver has actual control of the power unit during a driving lesson conducted on a range. BTW range training does not include time an entry-level driver spends observing the operation of a CMV when he or she is not in control of the vehicle.

Behind-the-wheel (BTW) public road training means training provided by a BTW instructor when an entry-level driver has actual control of the power unit during a driving lesson conducted on a public road. BTW public road training does not include the time that an entry-level driver spends observing the operation of a CMV when he or she is not in control of the vehicle.

Entry-level driver means an individual who must complete the CDL skills test requirements under § 383.71 prior to receiving a CDL for the first time, upgrading to a Class A or Class B CDL, or obtaining a hazardous materials, passenger, or school bus endorsement for the first time. This definition does not include individuals for whom States waive the CDL skills test under § 383.77 or individuals seeking to remove a restriction in accordance with § 383.135(b)(7).

Entry-level driver training means training an entry-level driver receives from an entity listed on FMCSA's Training Provider Registry prior to:

(i) Taking the CDL skills test required to receive the Class A or Class B CDL for the first time;

(ii) Taking the CDL skills test required to upgrade to a Class A or Class B CDL; or

(iii) Taking the CDL skills test required to obtain a passenger and/or school bus endorsement for the first time or the CDL knowledge test required to obtain a hazardous materials endorsement for the first time.

Range means an area that must be free of obstructions, enables the driver to maneuver safely and free from interference from other vehicles and hazards, and has adequate sight lines.

Theory instruction means knowledge instruction on the operation of a CMV and related matters provided by a theory instructor through lectures, demonstrations, audio-visual presentations, computer-based instruction, driving simulation devices, online training, or similar means.

Theory instructor means an individual who provides knowledge instruction on the operation of a CMV and meets one of these qualifications:

(i) Holds a CDL of the same (or higher) class and with all endorsements necessary to operate the CMV for which training is to be provided and has at least two years of experience driving a CMV requiring a CDL of the same (or higher) class and/or the same endorsement and meets all applicable State qualification requirements for CMV instructors; or

(ii) Holds a CDL of the same (or higher) class and with all endorsements necessary to operate the CMV for which training is to be provided and has at least two years of experience as a BTW CMV instructor and meets all applicable State qualification requirements for CMV instructors.

Exception: An instructor is not required to hold a CDL of the same (or higher) class and with all endorsements necessary to operate the CMV for which training is to be provided, if the instructor previously held a CDL of the same (or higher) class and complies with the other requirements set forth in paragraphs (1), (2), and (3) of this definition.

(iii) If an instructor's CDL has been cancelled, suspended, or revoked due to any of the disqualifying offenses identified in § 383.51, the instructor is prohibited from engaging in theory instruction for two years following the date his or her CDL is reinstated.

(iv) *Exception.* Training providers offering online content exclusively are not required to meet State qualification requirements for theory instructors.

Training provider means an entity that is listed on the FMCSA Training Provider Registry, as required by subpart G of this part. Training providers include, but are not limited to, training schools, educational institutions, rural electric cooperatives, motor carriers, State/local governments, school districts, joint labor management programs, owner-operators, and individuals.

§ 380.609 General entry-level driver training requirements.

(a) An individual who applies, for the first time, for a Class A or Class B CDL, or who upgrades to a Class A or B CDL, must complete driver training from a provider listed on the Training Provider Registry (TPR), as set forth in subpart G.

(b) An individual seeking to obtain a passenger (P), school bus (S), or hazardous materials (H) endorsement for the first time, must complete the training related to that endorsement from a training provider listed on the TPR, as set forth in subpart G.

■ 5. Subpart G is added to read as follows:

Subpart G—Registry of Entry-Level Driver Training Providers

Sec.

§ 380.700 Scope.

The rules in this subpart establish the eligibility requirements for listing on FMCSA's Training Provider Registry (TPR). In order to provide entry-level driver training in compliance with this part, training providers must be listed on the TPR.

§ 380.703 Requirements for listing on the training provider registry (TPR).

(a) To be eligible for listing on the TPR, an entity must:

(1) Follow a curriculum that meets the applicable criteria set forth in appendices A through E of part 380,

(2) Utilize facilities that meet the criteria set forth in § 380.709;

(3) Utilize vehicles that meet the criteria set forth in § 380.711;

(4) Utilize driver training instructors that meet the criteria set forth in § 380.713;

(5)(i) Be licensed, certified, registered, or authorized to provide training in accordance with the applicable laws and regulations of any State where in-person training is conducted.

(ii) *Exception:* State qualification requirements otherwise applicable to theory instruction do not apply to providers offering such instruction only online.

(6) Allow FMCSA or its authorized representative to audit or investigate the

training provider's operations to ensure that the provider meets the criteria set forth in this section.

(7) Electronically transmit an Entry-Level Driver Training Provider Registration Form through the TPR Web site maintained by FMCSA, which attests that the training provider meets all the applicable requirements of this section, to obtain a unique TPR number. If a training provider has more than one campus or training location, the training provider must electronically transmit an Entry-Level Driver Training Provider Registration Form for each campus or training location in order to obtain a unique TPR number for each location.

(b) When a provider meets the requirements of §§ 380.703 and 380.707, FMCSA will issue the provider a unique TPR number and, as applicable, add the provider's name and/or contact information to the TPR Web site.

§ 380.707 Entry-level training provider.

(a) Training providers must require all accepted applicants for behind-the-wheel (BTW) training to certify that they will comply U.S. Department of Transportation regulations in parts 40, 382, 383, and 391, as well as State and/or local laws, related to controlled substances testing, age, medical certification, licensing, and driving record. Training providers must verify that all accepted BTW applicants hold a valid commercial learner's permit or commercial driver's license, as applicable.

(b) Training providers offering online training must ensure that the content is prepared and/or delivered by a theory instructor, as defined in § 380.605.

(c) Separate training providers may deliver the theory and BTW portions of the training, but both portions (range and public road) of the BTW training must be delivered by the same training provider.

§ 380.709 Facilities.

The training provider's classroom and range facilities must comply with all applicable Federal, State, and/or local statutes and regulations.

§ 380.711 Equipment.

(a) All vehicles used in the behind-the-wheel training must comply with applicable Federal and State safety requirements.

(b) Training vehicles must be in the same group and type that driver-trainees intend to operate for their CDL skills test.

§ 380.713 Instructor requirements.

(a) Theory training providers must utilize instructors who are a theory instructor as defined in § 380.605.

(b) BTW training providers must utilize instructors who are a BTW instructors as defined in § 380.605.

§ 380.715 Assessments.

(a) Training providers must use assessments (in written or electronic format) to determine driver-trainees' proficiency in the knowledge objectives in the theory portion of each unit of instruction in appendices A through E of part 380, as applicable. The driver-trainee must receive an overall minimum score of 80 percent on the theory assessment.

(b) Training instructors must evaluate and document a driver-trainee's proficiency in BTW skills in accordance with the curricula in appendices A through D of part 380, as applicable.

§ 380.717 Training certification.

After an individual completes training administered by a provider listed on the TPR, that provider must, by midnight of the second business day after the driver-trainee completes the training, electronically transmit training certification information through the TPR Web site including the following:

(a) Driver-trainee name, number of driver's license/commercial learner's permit/commercial driver's license, as applicable, and State of licensure;

(b) Commercial driver's license class and/or endorsement and type of training (theory and/or BTW) the driver-trainee completed;

(c) Total number of clock hours the driver-trainee spent to complete BTW training, as applicable;

(d) Name of the training provider and its unique TPR identification number; and

(e) Date(s) of successful training completion.

§ 380.719 Requirements for continued listing on the training provider registry (TPR).

(a) To be eligible for continued listing on the TPR, a provider must:

(1) Meet the requirements of this subpart and the applicable requirements of § 380.703.

(2) Biennially update the Entry-Level Driver Training Provider Registration Form.

(3) Report to FMCSA changes to key information, as identified in paragraph (a)(3)(i) of this section, within 30 days of the change.

(i) Key information is defined as training provider name, address, phone number, type(s) of training offered, training provider status, and, if applicable, any change in State licensure, certification, or accreditation status.

(ii) Changes must be reported by electronically transmitting an updated Entry-Level Driver Training Provider Registration Form.

(4) Maintain documentation of State licensure, registration, or certification verifying that the provider is authorized to provide training in that State, if applicable.

(5) Allow an audit or investigation of the training provider to be completed by FMCSA or its authorized representative, if requested.

(6) Ensure that all required documentation, as set forth in § 380.725, is available to FMCSA or its authorized representative, upon request. The provider must submit this documentation within 48 hours of the request.

(b) [Reserved]

§ 380.721 Removal from training provider registry: factors considered.

FMCSA may remove a provider from the TPR when a provider fails to meet or maintain any of the qualifications established by this subpart or the requirements of other State and Federal regulations applicable to the provider. If FMCSA removes a provider from the TPR, any training conducted after the removal date will be considered invalid.

(a) The factors FMCSA may consider for removing a provider from the TPR include, but are not limited to, the following:

(1) The provider fails to comply with the requirements for continued listing on the TPR, as described in § 380.719.

(2) The provider denies FMCSA or its authorized representatives the opportunity to conduct an audit or investigation of its training operations.

(3) The audit or investigation conducted by FMCSA or its authorized representatives identifies material deficiencies, pertaining to the training provider's program, operations, or eligibility.

(4) The provider falsely claims to be licensed, certified, registered, or authorized to provide training in accordance with the applicable laws and regulations in any State where in-person training is provided.

(5) The State-administered CDL skills examination passage rate for applicants for the Class A CDL, Class B CDL, passenger endorsement, and/or school bus endorsement who complete the provider's training and the CDL knowledge test passage rate for applicants for the hazardous materials endorsement who complete the provider's training.

(b) In instances of fraud or other criminal behavior by a training provider in which driver-trainees have

knowingly participated, FMCSA reserves the right, on a case-by-case basis, to retroactively invalidate training conducted under this subpart .

§ 380.723 Removal from training provider registry: procedure.

(a) *Voluntary removal.* To be voluntarily removed from the Training Provider Registry (TPR), a provider must submit written notice to FMCSA's Director, Office of Carrier, Driver, and Vehicle Safety Standards (Director). Upon receiving the written notice, FMCSA will remove the training provider from the TPR. On and after the date of issuance of a notice of proposed removal from the TPR issued in accordance with paragraph (b) of this section, such a voluntary removal notice will not be effective.

(b) *Involuntary removal; Notice of proposed removal.* Except as provided by paragraphs (a) and (e) of this section, FMCSA initiates the process for involuntary removal of a provider from the TPR by issuing a written notice to the provider, stating the reasons for the proposed removal and setting forth any corrective actions necessary for the provider to remain listed on the TPR. If a notice of proposed removal is issued, the provider must notify current driver-trainees and driver-trainees scheduled for future training of the proposed removal. If a notice of proposed removal is issued to a training provider listed on the TPR Web site, FMCSA will note on the TPR Web site that such notice has been issued. FMCSA will remove the notation if the notice is withdrawn.

(c) *Response to notice of proposed removal and corrective action.* A training provider that has received a notice of proposed removal and wishes to remain on the TPR must submit a written response to the Director no later than 30 days after the date of issuance of the notice explaining why it believes that decision is not proper, as described in paragraph (c)(1) of this section. Alternatively, the provider will set forth corrective actions taken in response to FMCSA's notice of proposed removal, as described in paragraph (c)(2) of this section.

(1) *Opposing a notice of proposed removal.* If the provider believes FMCSA has relied on erroneous information in proposing removal from the TPR, the provider must explain the basis for that belief and provide supporting documentation. The Director will review the explanation.

(i) If the Director finds that FMCSA has relied on erroneous information to propose removal of a training provider from the TPR, the Director will withdraw the notice of proposed removal and notify the provider of the withdrawal in writing.

(ii) If the Director finds that FMCSA has not relied on erroneous information in proposing removal, the Director will affirm the notice of proposed removal and notify the provider in writing of the determination. No later than 60 days after the date the Director affirms the notice of proposed removal, or as otherwise agreed to by the provider and the Director, the provider must comply with this subpart and correct the deficiencies identified in the notice of proposed removal as described in paragraph (c)(2) of this section.

(iii) If the provider does not respond in writing within 30 days of the date of issuance of a notice of proposed removal, the removal becomes effective immediately and the provider will be removed from the TPR. Any training conducted after the removal date is invalid.

(2) *Corrective action.* (i) The provider must comply with this subpart and complete the corrective actions specified in the notice of proposed removal no later than 60 days after either the date of issuance of the notice of proposed removal or the date the Director subsequently affirms or modifies the notice of proposed removal. The provider must provide documentation of completion of the corrective action(s) to the Director. The Director may conduct an investigation and request any documentation necessary to verify that the provider has complied with this subpart and completed the required corrective action(s). The Director will notify the provider in writing whether it has met the requirements for continued listing on the TPR.

(ii) If the provider fails to complete the proposed corrective action(s) within the 60-day period, the provider will be removed from the TPR. The Director will notify the provider in writing of the removal.

(d) *Request for administrative review.* If a provider has been removed from the TPR under paragraph (c)(1)(iii), (c)(2)(ii), or (e) of this section, the provider may request an administrative review. The request must be submitted in writing to the FMCSA Associate Administrator for Policy (Associate Administrator) no later than 30 days after the effective date of the removal. The request must explain the alleged error(s) committed in removing the provider from the TPR, and include all factual, legal, and procedural issues in dispute, as well as any supporting documentation.

(1) *Additional procedures for administrative review.* The Associate Administrator may ask the provider to submit additional information or attend a conference to discuss the removal. If the provider does not provide the information requested, or does not attend the scheduled conference, the Associate Administrator may dismiss the request for administrative review.

(2) *Decision on administrative review.* The Associate Administrator will complete the administrative review and notify the provider in writing of the decision. The decision constitutes final Agency action. If the Associate Administrator deems the removal to be invalid, FMCSA will reinstate the provider's listing on the TPR.

(e) *Emergency removal.* In cases of fraud, criminal behavior, or willful disregard of the regulations in this subpart or in which public health, interest, or safety requires, the provisions of paragraph (b) of this section are not applicable. In these cases, the Director may immediately remove a provider from the TPR. In instances of fraud or other criminal behavior by a training provider in which driver-trainees have knowingly participated, FMCSA reserves the right to retroactively invalidate training conducted under this subpart. A provider who has been removed under the provisions of this paragraph may request an administrative review of that decision as described under paragraph (d) of this section.

(f) *Reinstatement to the Training Provider Registry.* (1) Any time after a training provider's voluntary removal from the TPR, the provider may apply to the Director to be reinstated.

(2) No sooner than 30 days after the date of a provider's involuntary removal from the TPR, the provider may apply to the Director to be reinstated. The provider must submit documentation showing completion of any corrective action(s) identified in the notice of proposed removal or final notice of removal, as applicable.

§ 380.725 Documentation and record retention.

(a) *Applicability.* The documentation and retention of records required by this subpart apply to entities that meet the requirements of subpart F of this part and are eligible for listing on the Training Provider Registry (TPR).

(b) *Document retention.* All training providers on the TPR must retain the following:

(1) Self-certifications by all accepted applicants for behind-the-wheel (BTW) training attesting that they will comply with U.S. Department of Transportation regulations in parts 40, 382, 383 and 391, as well as State and/or local laws,

related to alcohol and controlled substances testing, age, medical certification, licensing, and driver records, as required in 380.707(a). (2) A copy of the driver-trainee's commercial learner's permit(s) or commercial driver's license, as applicable, as required in 380.707(a).

(3) Instructor qualification documentation indicating driving and/or training experience, as applicable, for each instructor and copies of commercial driver's licenses and applicable endorsements held by BTW instructors or theory instructors, as applicable.

(4) The Training Provider Registration Form submitted to the TPR.

(5) The lesson plans for theory and BTW (range and public road) training curricula, as applicable.

(6) Records of individual entry-level driver training assessments as described in § 380.715.

(c) *Retention of records.* Training providers listed on the TPR must retain the records identified in paragraph (b) of this section for a minimum of three years from the date each required record is generated or received, unless a record, such as a BTW instructor's CDL, has expired or been canceled, in which case the most recent, valid CDL should be retained, if applicable. The provisions of this part do not affect a training provider's obligation to comply with any other local, State, or Federal requirements prescribing longer retention periods for any category of records described herein.

Appendix to Part 380 [Redesignated as Appendix F to Part 380]

■ 6. The appendix to part 380 is redesignated as appendix F to part 380.

■ 7. Add appendices A through E to part 380 to read as follows:

Appendix A to Part 380—Class A—CDL Training Curriculum

Class A CDL applicants must complete the Class A CDL curriculum outlined in this Appendix. The curriculum for Class A applicants pertains to combination vehicles (Group A) as defined in 49 CFR 383.91(a)(1). There is no required minimum number of instruction hours for theory training, but the training instructor must cover all topics set forth in the curriculum. There is no required minimum number of instruction hours for BTW (range and public road) training, but the training instructor must cover all topics set forth in the BTW curriculum. BTW training must be conducted in a CMV for which a Class A CDL is required. The instructor must determine and document that each driver-trainee has demonstrated proficiency in all elements of the BTW curriculum, unless otherwise noted. Consistent with the definitions of BTW range training and BTW public road training in § 380.605, a simulation device cannot be used to conduct such training or to demonstrate proficiency. Training instructors must document the total number of clock hours each driver-trainee spends to complete the BTW curriculum. The Class A curriculum must, at a minimum, include the following:

Theory Instruction

Section A1.1 Basic Operation

This section must cover the interaction between driver-trainees and the CMV. Driver-trainees will receive instruction in the Federal Motor Carrier Safety Regulations (FMCSRs) and will be introduced to the basic CMV instruments and controls. Training providers will teach driver-trainees the basic operating characteristics of a CMV. This section must also teach driver-trainees how to properly perform vehicle inspections, control the motion of CMVs under various road and traffic conditions, employ shifting and backing techniques, and properly couple and uncouple combination vehicles. Driver-trainees must familiarize themselves with the basic operating characteristics of a CMV.

Unit A1.1.1 Orientation

This unit must introduce driver-trainees to the combination vehicle driver training curriculum and the components of a combination vehicle. The training providers must teach the safety fundamentals, essential regulatory requirements (*e.g.,* overview of FMCSRs and Hazardous Materials Regulations), and driver-trainees' responsibilities not directly related to CMV driving, such as proper cargo securement. This unit must also cover the ramifications, including driver disqualification provisions and fines, for non-compliance with parts 380, 382, 383, and 390 through 399 of the FMCSRs. This unit must also include an overview of the applicability of State and local laws relating to the safe operation of the CMV, stopping at weigh stations/scales, hazard awareness of vehicle size and weight limitations, low clearance areas (*e.g.,* CMV height restrictions), and bridge formulas.

Unit A1.1.2 Control Systems/Dashboard

This unit must introduce driver-trainees to vehicle instruments, controls, and safety components. The training providers must teach driver-trainees to read gauges and instruments correctly and the proper use of vehicle safety components, including safety belts and mirrors. The training providers must teach driver-trainees to identify, locate, and explain the function of each of the primary and secondary controls including those required for steering, accelerating, shifting, braking systems (*e.g.,* ABS, hydraulic, air), as applicable, and parking.

Unit A1.1.3 Pre- and Post-Trip Inspections

This unit must teach the driver-trainees to conduct pre-trip and post-trip inspections as specified in §§ 392.7 and 396.11, including appropriate inspection locations. Instruction must also be provided on enroute vehicle inspections.

Unit A1.1.4 Basic Control

This unit must introduce basic vehicular control and handling as it applies to combination vehicles. This unit must include instruction addressing basic combination vehicle controls in areas such as executing sharp left and right turns, centering the vehicle, maneuvering in restricted areas, and entering and exiting the interstate or controlled access highway.

Unit A1.1.5 Shifting/Operating Transmissions

This unit must introduce shifting patterns and procedures to driver-trainees to prepare them to safely and competently perform basic shifting maneuvers. This unit must include training driver-trainees to execute up and down shifting techniques on multi-speed dual range transmissions, if appropriate. The training providers must teach the importance of increased vehicle control and improved fuel economy achieved by utilizing proper shifting techniques.

Unit A1.1.6 Backing and Docking

This unit must teach driver-trainees to back and dock the combination vehicle safely. This unit must cover ''Get Out and Look'' (GOAL), evaluation of backing/loading facilities, knowledge of backing set ups, as well as instruction in how to back with the use of spotters.

Unit A1.1.7 Coupling and Uncoupling

This unit must provide instruction for driver-trainees to develop the skills necessary to conduct the procedures for safe coupling and uncoupling of combination vehicle units, as applicable.

Section A1.2 Safe Operating Procedures

This section must teach the practices required for safe operation of the combination vehicle on the highway under various road, weather, and traffic conditions. The training providers must teach driver-trainees the Federal rules governing the proper use of seat belt assemblies (§ 392.16).

Unit A1.2.1 Visual Search

This unit must teach driver-trainees to visually search the road for potential hazards and critical objects, including instruction on recognizing distracted pedestrians or distracted drivers.

Unit A1.2.2 Communication

This unit must instruct driver-trainees on how to communicate their intentions to other road users. Driver-trainees must be instructed in techniques for different types of communication on the road, including proper use of headlights, turn signals, four-way flashers, and horns. This unit must cover instruction in proper utilization of eye contact techniques with other drivers, bicyclists, and pedestrians.

Unit A1.2.3 Distracted Driving

This unit must instruct driver-trainees in FMCSRs related to distracted driving and other key driver distraction driving issues, including improper cell phone use, texting, and use of in-cab technology (*e.g.,* §§ 392.80 and 392.82). This instruction will include training in the following aspects: visual attention (keeping eyes on the road); manual control (keeping hands on the wheel); and cognitive awareness (keeping mind on the task and safe operation of the CMV).

Unit A1.2.4 Speed Management

This unit must teach driver-trainees how to manage speed effectively in response to various road, weather, and traffic conditions. The instruction must include methods for calibrating safe following distances taking into account CMV braking distances under an array of conditions including traffic, weather, and CMV weight and length.

Unit A1.2.5 Space Management

This unit must teach driver-trainees about the importance of managing the space surrounding the vehicle under various traffic and road conditions.

Unit A1.2.6 Night Operation

This unit must instruct driver-trainees in the factors affecting the safe operation of CMVs at night and in darkness. Additionally, driver-trainees must be instructed in changes in vision, communications, speed space management, and proper use of lights, as needed, to deal with the special problems night driving presents.

Unit A1.2.7 Extreme Driving Conditions

This unit must teach driver-trainees about the specific problems presented by extreme driving conditions. The training provide will emphasize the factors affecting the operation of CMVs in cold, hot, and inclement weather and on steep grades and sharp curves. The training provider must teach proper tire chaining procedures.

Section A1.3 Advanced Operating Practices

This section must introduce higher-level skills that can be acquired only after the more fundamental skills and knowledge taught in the prior two sections have been mastered. The training providers must teach driver-trainees about the advanced skills necessary to recognize potential hazards and must teach the driver-trainees the procedures needed to handle a CMV when faced with a hazard.

Unit A1.3.1 Hazard Perception

The unit must teach driver-trainees to recognize potential hazards in the driving environment in order to reduce the severity of the hazard and neutralize possible emergency situations. The training providers must teach driver-trainees to identify road conditions and other road users that are a potential threat to the safety of the combination vehicle and suggest appropriate adjustments. The instruction must emphasize hazard recognition, visual search, adequate surveillance, and response to possible emergency-producing situations encountered by CMV drivers in various traffic situations. The training providers must teach driver-trainees to recognize potential dangers and the safety procedures that must be utilized while driving in construction/work zones.

Unit A1.3.2 Skid Control/Recovery, Jackknifing, and Other Emergencies

This unit must teach the causes of skidding and jackknifing and techniques for avoiding and recovering from them. The training providers must teach the importance of maintaining directional control and bringing the CMV to a stop in the shortest possible distance while operating over a slippery surface. This unit must provide instruction in appropriate responses when faced with CMV emergencies. This instruction must include evasive steering, emergency braking, and off-road recovery, as well as the proper response to brake failures, tire blowouts, hydroplaning, and rollovers. The instruction must include a review of unsafe acts and the role the acts play in producing or worsening hazardous situations.

Unit A1.3.3 Railroad-Highway Grade Crossings

This unit must teach driver-trainees to recognize potential dangers and the appropriate safety procedures to utilize at railroad (RR)-highway grade crossings. This instruction must include an overview of various Federal/State RR grade crossing regulations, RR grade crossing environments, obstructed view conditions, clearance around the tracks, and rail signs and signals. The training providers must instruct driver-trainees that railroads have personnel available (''Emergency Notification Systems'') to receive notification of any information relating to an unsafe condition at the RR-highway grade crossing or a disabled vehicle or other obstruction blocking a railroad track at the RR-highway grade crossing.

Section A1.4 Vehicle Systems and Reporting Malfunctions

This section must provide entry-level driver-trainees with sufficient knowledge of the combination vehicle and its systems and subsystems to ensure that they understand and respect their role in vehicle inspection, operation, and maintenance and the impact of those factors upon highway safety and operational efficiency.

Unit A1.4.1 Identification and Diagnosis of Malfunctions

This unit must teach driver-trainees to identify major combination vehicle systems. The goal is to explain their function and how to check all key vehicle systems, (*e.g.,* engine, engine exhaust auxiliary systems, brakes, drive train, coupling systems, and suspension) to ensure their safe operation. Driver-trainees must be provided with a detailed description of each system, its importance to safe and efficient operation, and what is needed to keep the system in good operating condition.

Unit A1.4.2 Roadside Inspections

This unit must instruct driver-trainees on what to expect during a standard roadside inspection conducted by authorized personnel. The training providers must teach driver-trainees on what vehicle and driver violations are classified as out-of-service (OOS), including the ramifications and penalties for operating a CMV when subject to an OOS order as defined in section 390.5.

Unit A1.4.3 Maintenance

This unit must introduce driver-trainees to the basic servicing and checking procedures for various engine and vehicle components and to help develop their ability to perform preventive maintenance and simple emergency repairs.

Section A1.5 Non-Driving Activities

This section must teach driver-trainees the activities that do not involve actually operating the CMV.

Unit A1.5.1 Handling and Documenting Cargo

This unit must teach the basic theory of cargo weight distribution, cargo securement on the vehicle, cargo covering, and techniques for safe and efficient loading/unloading. The training providers must teach driver-trainees the basic cargo security/cargo theft prevention procedures. The training provider must teach driver-trainees the basic information regarding the proper handling and documentation of HM cargo.

Unit A1.5.2 Environmental Compliance Issues

This unit must teach driver-trainees to recognize environmental hazards and issues related to the CMV and load, and also make the driver-trainee aware that city, county, State, and Federal requirements may apply to such circumstances.

Unit A1.5.3 Hours of Service Requirements

This unit must teach driver-trainees to understand that there are different hours-of-service (HOS) requirements applicable to different industries. The training providers must teach driver-trainees all applicable HOS regulatory requirements. The training providers must teach driver-trainees to complete a Driver's Daily Log (electronic and paper), timesheet, and logbook recap, as appropriate. The training providers must teach driver-trainees the consequences (safety, legal, and personal) of violating the HOS regulations, including the fines and penalties imposed for these types of violations.

Unit A1.5.4 Fatigue and Wellness Awareness

This unit must teach driver-trainees about the issues and consequences of chronic and acute driver fatigue and the importance of staying alert. The training providers must teach driver-trainees wellness and basic health maintenance information that affect a driver's ability to safely operate a CMV.

Unit A1.5.5 Post-Crash Procedures

This unit must teach driver-trainees appropriate post-crash procedures, including the requirement that the driver, if possible, assess his or her physical condition immediately after the crash and notify authorities or assign the task to other individuals at the crash scene. The training providers must teach driver-trainees how to protect the area; obtain emergency medical assistance; move on-road vehicles off the road in minor crashes so as to avoid subsequent crashes or injuries; engage flashers; place reflective triangles and other warning devices for stopped vehicles; and properly use a fire extinguisher, if necessary. The training providers must instruct driver-trainees in post-crash testing requirements related to controlled substances and alcohol.

Unit A1.5.6 External Communications

This unit must teach driver-trainees in the value of effective interpersonal communication techniques/skills to interact

with enforcement officials. The training providers must teach driver-trainees the specifics of the roadside vehicle inspection process, and what to expect during this activity. Driver-trainees who are not English speakers must be instructed in FMCSA English language proficiency requirements. The training providers must teach driver-trainees the impact that violating Federal and state regulations has on their driving records and their employing motor carrier's records.

Unit A1.5.7 Whistleblower/Coercion

This unit must teach the driver-trainees about the right of an employee to question the safety practices of an employer without incurring the risk of losing a job or being subject to reprisals simply for stating a safety concern. The training providers must instruct driver-trainees in the whistleblower protection regulations in 29 CFR part 1978. The training providers must teach the procedures for reporting to FMCSA incidents of coercion from motor carriers, shippers, receivers, or transportation intermediaries.

Unit A1.5.8 Trip Planning

This unit must address the importance of and requirements for planning routes and trips. This instruction must address planning the safest route, planning for rest stops, heavy traffic areas, railroad-highway grade crossing safe clearance and ground clearance (*i.e.,* ''high center''), the importance of Federal and State requirements on the need for permits, and vehicle size and weight limitations. The training providers must teach driver-trainees in the correct identification of restricted routes, the pros and cons of Global Positioning System (GPS)/trip routing software, and the importance of selecting fuel-efficient routes.

Unit A1.5.9 Drugs/Alcohol

This unit must teach driver-trainees the rules applicable to controlled substances (including prescription drugs) and alcohol use and testing related to the operation of a CMV.

Unit A1.5.10 Medical Requirements

This unit must teach driver-trainees the Federal rules on medical certification, medical examination procedures, general qualifications, responsibilities, and disqualifications based on various offenses, orders, and loss of driving privileges (49 CFR part 391, subparts B and E).

Behind-the-Wheel—Range

BTW range training must teach driving exercises related to basic vehicle control skills and mastery of basic maneuvers, as covered in §§ 383.111 and 383.113 of this chapter, necessary to operate the vehicle safely. The training providers will teach activities in this unit on a driving range as defined in § 380.605. The training provider must teach ''Get Out and Look'' (GOAL) to the driver-trainee as it applies to units A2.2–2.6.

Unit A2.1 Vehicle Inspection Pre-Trip/Enroute/Post-Trip

Driver-trainees must demonstrate proficiency in conducting pre-trip and post-trip inspections as specified in §§ 392.7 and 396.11, including appropriate inspection locations. Instruction must also be provided on enroute vehicle inspections.

Unit A2.2 Straight Line Backing

Driver-trainees must demonstrate proficiency in proper techniques for performing various straight line backing maneuvers to appropriate criteria/acceptable tolerances.

Unit A2.3 Alley Dock Backing (45/90 Degree)

Driver-trainees must demonstrate proficiency in proper techniques for performing 45/90 degree alley dock maneuvers to appropriate criteria/acceptable tolerances.

Unit A2.4 Off-Set Backing

Driver-trainees must demonstrate proficiency in proper techniques for performing off-set right and left backing maneuvers to appropriate criteria/acceptable tolerances.

Unit A2.5 Parallel Parking Blind Side

Driver-trainees must demonstrate proficiency in proper techniques for performing parallel parking blind side positions/maneuvers to appropriate criteria/acceptable tolerances.

Unit A2.6 Parallel Parking Sight Side

Driver-trainees must demonstrate proficiency in proper techniques for performing sight side parallel parking maneuvers to appropriate criteria/acceptable tolerances.

Unit A2.7 Coupling and Uncoupling

Driver-trainees must demonstrate proficiency in proper techniques for coupling, inspecting, and uncoupling combination vehicle units, as applicable.

Behind-the-Wheel—Public Road

The instructor must engage in active two-way communication with the driver-trainees during all active BTW public road training sessions. Skills described in paragraphs A3.8 through 3.12 of this section must be discussed during public road training, but not necessarily performed. Driver-trainees are not required to demonstrate proficiency in the skills described in paragraphs A3.8 through 3.12.

Unit A3.1 Vehicle Controls Including: Left Turn, Right Turns, Lane Changes, Curves at Highway Speeds, and Entry and Exit on the Interstate or Controlled Access Highway

Driver-trainees must demonstrate proficiency in proper techniques for initiating vehicle movement, executing left and right turns, changing lanes, navigating curves at speed, entry and exit on the interstate or controlled access highway, and stopping the vehicle in a controlled manner.

Unit A3.2 Shifting/Transmission

Driver-trainees must demonstrate proficiency in proper techniques for performing safe and fuel-efficient shifting.

Unit A3.3 Communications/Signaling

Driver-trainees must demonstrate proficiency in proper techniques for signaling intentions and effectively communicating with other drivers.

Unit A3.4 Visual Search

Driver-trainees must demonstrate proficiency in proper techniques for visually searching the road for potential hazards and critical objects.

Unit A3.5 Speed and Space Management

Driver-trainees must demonstrate proficiency in proper habits and techniques for adjusting and maintaining vehicle speed, taking into consideration various factors such as traffic and road conditions. Driver-trainees must demonstrate proficiency in maintaining proper speed to keep appropriate spacing between the driver-trainee's CMV and other vehicles. Instruction must include methods for calibrating safe following distances under an array of conditions including traffic, weather, and CMV weight and length.

Unit A3.6 Safe Driver Behavior

Driver-trainees must demonstrate proficiency in safe driver behavior during their operation of the CMV.

Unit A3.7 Hours of Service (HOS) Requirements

Driver-trainees must demonstrate proficiency in the basic activities required by the HOS regulations, such as completing a Driver's Daily Log (electronic and paper), timesheet, and logbook recap, as appropriate.

Unit A3.8 Hazard Perception

Driver-trainees must demonstrate their ability to recognize potential hazards in the driving environment in time to reduce the severity of the hazard and neutralize possible emergency situations. Driver-trainees must demonstrate the ability to identify road conditions and other road users that are a potential threat to the safety of the combination vehicle and suggest appropriate adjustments.

Unit A3.9 Railroad (RR)-Highway Grade Crossing

Driver-trainees must demonstrate the ability to recognize potential dangers and to demonstrate appropriate safety procedures when RR-highway grade crossings are reasonably available.

Unit A3.10 Night Operation

Driver-trainees must be familiar with how to operate a CMV safely at night. Training providers must teach driver-trainees that night driving presents specific circumstances that require heightened attention on the part of the driver. Driver-trainees must be taught special requirements for night vision, communications, speed, space management, and proper use of lights.

Unit A3.11 Extreme Driving Conditions

Driver-trainees must be familiar with the special risks created by, and the heightened precautions required by, driving CMVs under extreme driving conditions, such as heavy rain, high wind, high heat, fog, snow, ice, steep grades, and sharp curves. Driver-trainees must demonstrate their ability to recognize the changes in basic driving habits needed to deal with the specific challenges

presented by these extreme driving conditions.

Unit A3.12 Skid Control/Recovery, Jackknifing, and Other Emergencies

Driver-trainees must know the causes of skidding and jackknifing and techniques for avoiding and recovering from them. Driver-trainees must know how to maintain directional control and bring the CMV to a stop in the shortest possible distance while operating over a slippery surface. Driver-trainees must be familiar with proper techniques for responding to CMV emergencies, such as evasive steering, emergency braking, and off-road recovery. They must also know how to prevent or respond to brake failures, tire blowouts, hydroplaning, and rollovers.

Appendix B to Part 380—Class B—CDL Training Curriculum

Class B CDL applicants must complete the Class B CDL curriculum outlined in this Appendix. The curriculum for Class B applicants pertains to heavy straight vehicles (Group B) as defined in 49 CFR 383.91(a)(2). There is no required minimum number of instruction hours for theory training, but the training instructor must cover all the topics in curriculum. There is no required minimum number of instruction hours required for BTW (range and public road) training, but the training instructor must cover all topics set forth in the BTW curriculum. BTW training must be conducted in a CMV for which a Class B CDL is required. The instructor must determine and document that each driver-trainee has demonstrated proficiency in all elements of the BTW curriculum unless otherwise noted. Consistent with the definitions of BTW range training and BTW public road training in § 380.605, a simulation device cannot be used to conduct such training or to demonstrate proficiency. Training instructors must document the total number of clock hours each driver-trainee spends to complete the BTW curriculum. The Class B curriculum must, at a minimum, include the following:

Theory Instruction

Section B1.1 Basic Operation

This section must cover the interaction between driver-trainees and the CMV. Driver-trainees will receive instruction in the Federal Motor Carrier Safety Regulations (FMCSRs) and will be introduced to the basic CMV instruments and controls. This section must also teach driver-trainees how to perform vehicle inspections, control the CMVs under various road and traffic conditions, employ shifting and backing techniques, and couple and uncouple, as applicable. Driver-trainees must familiarize themselves with the basic operating characteristics of a CMV.

Unit B1.1.1 Orientation

This unit must introduce driver-trainees to the commercial motor vehicle driver training curriculum and the components of a commercial motor vehicle. The training providers must teach driver-trainees the safety fundamentals, essential regulatory requirements (*i.e.,* overview of FMCSRs/hazardous materials (HM) regulations), and driver-trainees' responsibilities not directly related to driving. This unit must also cover the ramifications and driver disqualification provisions and fines for non-compliance with parts 380, 382, 383, and 390 through 399 of the FMCSRs. This unit must also include an overview of the applicability of State and local laws relating to the safe operation of the CMV, stopping at weigh stations/scales, hazard awareness of vehicle size and weight limitations, low clearance areas (*e.g.,* CMV height restrictions), and bridge formulas.

Unit B1.1.2 Control Systems/Dashboard

This unit must introduce driver-trainees to vehicle instruments, controls, and safety components. The training providers must teach driver-trainees to read gauges and instruments correctly and the proper use of vehicle safety components, including safety belts and mirrors. The training providers must teach driver-trainees to identify, locate, and explain the function of each of the primary and secondary controls including those required for steering, accelerating, shifting, braking systems (*e.g.,* ABS, hydraulic, air), as applicable, and parking.

Unit 1.3 Pre- and Post-Trip Inspections

The training provider must teach the driver-trainees to conduct pre-trip and post-trip inspections as specified in §§ 392.7 and 396.11, including appropriate inspection locations. Instruction must also be provided on enroute vehicle inspections.

Unit B1.1.4 Basic Control

This unit must introduce basic vehicular control and handling as it applies to commercial motor vehicles. This unit must include instruction addressing basic CMV controls in areas such as executing sharp left and right turns, centering the vehicle, maneuvering in restricted areas, and entering and exiting the interstate or controlled access highway.

Unit B1.1.5 Shifting/Operating Transmissions

This unit must introduce shifting patterns and procedures to driver-trainees to prepare them to safely and competently perform basic shifting maneuvers. This unit must teach driver-trainees to execute up and down shifting techniques on multi-speed dual range transmissions, if appropriate. The training providers must teach driver-trainees the importance of increased fuel economy achieved by utilizing proper shifting techniques.

Unit B1.1.6 Backing and Docking

This unit must teach driver-trainees to back and dock the combination vehicle safely. This unit must cover ''Get Out and Look'' (GOAL), evaluation of backing/loading facilities, knowledge of backing set ups, as well as instruction in how to back with use of spotters.

Section B1.2 Safe Operating Procedures

This section must teach the practices required for safe operation of the CMV on the highway under various road, weather, and traffic conditions. The training providers must teach driver-trainees the Federal rules governing the proper use of seat belt assemblies (§ 392.16).

Unit B1.2.1 Visual Search

This unit must teach driver-trainees to visually search the road for potential hazards and critical objects, including instruction on recognizing distracted pedestrians or distracted drivers. This unit must include instruction in how to ensure a driver-trainee's personal security/general awareness in common surroundings such as truck stops and/or rest areas and at shipper/receiver locations.

Unit B1.2.2 Communication

This unit must teach driver-trainees how to communicate their intentions to other road users. Driver-trainees must be instructed in techniques for different types of communication on the road, including proper use of headlights, turn signals, four-way flashers, and horns. This unit must cover instruction in proper utilization of eye contact techniques with other drivers, bicyclists, and pedestrians.

Unit B1.2.3 Distracted Driving

This unit must instruct driver-trainees in FMCSRs related to distracted driving and other key driver distraction driving issues, including improper cell phone use, texting, and use of in-cab technology (*e.g.,* §§ 392.80 and 392.82). This instruction will include training in the following aspects: Visual attention (keeping eyes on the road); manual control (keeping hands on the wheel); and cognitive awareness (keeping mind on the task and safe operation of the CMV).

Unit B1.2.4 Speed Management

This unit must teach driver-trainees how to manage speed effectively in response to various road, weather, and traffic conditions. The instruction must include methods for calibrating safe following distances under an array of conditions including traffic, weather and CMV weight and length.

Unit B1.2.5 Space Management

This unit must teach driver-trainees about the importance of managing the space surrounding the vehicle under various traffic and road conditions.

Unit B1.2.6 Night Operation

This unit must instruct driver-trainees in the factors affecting the safe operation of CMVs at night and in darkness. Additionally, driver-trainees must be instructed in changes in vision, communications, speed, space management, and proper use of lights, as needed, to deal with the special problems night driving presents.

Unit B1.2.7 Extreme Driving Conditions

This unit must teach driver-trainees the specific problems presented by extreme driving conditions. The training will emphasize the factors affecting the operation of CMVs in cold, hot, and inclement weather and on steep grades and sharp curves. The training providers must teach driver-trainees the proper tire chaining procedures in this unit.

Section B1.3 Advanced Operating Practices

This section must introduce higher-level skills that can be acquired only after the more fundamental skills and knowledge taught in the prior two sections have been mastered.

The training providers must teach driver-trainees the advanced skills necessary to recognize potential hazards and must teach driver-trainees the procedures needed to handle a CMV when faced with a hazard.

Unit B1.3.1 Hazard Perception

The unit must provide instruction for recognizing potential hazards in the driving environment in order to reduce the severity of the hazard and neutralize possible emergency situations. The training providers must teach driver-trainees to identify road conditions and other road users that are a potential threat to the safety of the CMV and suggest appropriate adjustments. The instruction must emphasize hazard recognition, visual search, adequate surveillance, and response to possible emergency-producing situations encountered by CMV drivers in various traffic situations. The training providers must also teach driver-trainees to recognize potential dangers and the safety procedures that must be utilized while driving in construction/work zones.

Unit B1.3.2 Skid Control/Recovery, Jackknifing, and Other Emergencies

This unit must teach the causes of skidding and jackknifing and techniques for avoiding and recovering from them. The training providers must teach the importance of maintaining directional control and bringing the CMV to a stop in the shortest possible distance while operating over a slippery surface. This unit must provide instruction in appropriate responses when faced with CMV emergencies. This instruction must include evasive steering, emergency braking, and off-road recovery, as well as the proper response to brake failures, tire blowouts, hydroplaning, and rollovers. The instruction must include a review of unsafe acts and the role the acts play in producing or worsening hazardous situations.

Unit B1.3.3 Railroad-Highway Grade Crossings

This unit must teach driver-trainees to recognize potential dangers and appropriate safety procedures to utilize at railroad (RR)-highway grade crossings. This instruction must include an overview of various Federal/State RR grade crossing regulations, RR grade crossing environments, obstructed view conditions, clearance around the tracks, and rail signs and signals. The training providers must instruct driver-trainees that railroads have personnel available (''Emergency Notification Systems'') to receive notification of any information relating to an unsafe condition at the RR-highway grade crossing or a disabled vehicle or other obstruction blocking a railroad track at the RR-highway grade crossing.

Section B1.4 Vehicle Systems and Reporting Malfunctions

This unit must provide entry-level driver-trainees with sufficient knowledge of the CMV and its systems and subsystems to ensure that they understand and respect their role in vehicle inspection, operation, and maintenance and the impact of those factors upon highway safety and operational efficiency.

Unit B1.4.1 Identification and Diagnosis of Malfunctions

This unit must teach driver-trainees to identify major vehicle systems. The goal is to explain their function and how to check all key vehicle systems, as appropriate (*e.g.,* engine, engine exhaust auxiliary systems, brakes, drive train, coupling systems, and suspension) to ensure their safe operation. Driver-trainees must be provided with a detailed description of each system, its importance to safe and efficient operation, and what is needed to keep the system in good operating condition.

Unit B1.4.2 Roadside Inspections

This unit must instruct driver-trainees on what to expect during a standard roadside inspection conducted by authorized personnel. The training providers must teach driver-trainees on what vehicle and driver violations are classified as out-of-service (OOS), including the ramifications and penalties for operating a CMV when subject to an OOS order as defined in section 390.5.

Unit B1.4.3 Maintenance

This unit must introduce driver-trainees to the basic servicing and checking procedures for various engine and vehicle components and to help develop their ability to perform preventive maintenance and simple emergency repairs.

Section B1.5 Non-Driving Activities

This section must teach driver-trainees activities that do not involve actually operating the CMV, *e.g.,* proper cargo securement.

Unit B1.5.1 Handling and Documenting Cargo

This unit must teach driver-trainees the basic theory of cargo weight distribution, cargo securement on the vehicle, cargo covering, and techniques for safe and efficient loading/unloading. The training providers must also teach driver-trainees the basic cargo security/cargo theft prevention procedures. The training providers must teach driver-trainees the basic information regarding the proper handling and documentation of HM cargo.

Unit B1.5.2 Environmental Compliance Issues

This unit must teach driver-trainees to recognize environmental hazards and issues related to the CMV and load, and also make aware that city, county, State, and Federal requirements may apply to such circumstances.

Unit B1.5.3 Hours of Service Requirements

This unit must teach driver-trainees to understand that there are different hours-of-service (HOS) requirements applicable to different industries. The training providers must teach driver-trainees all applicable HOS regulatory requirements. The training providers must teach driver-trainees to complete a Driver's Daily Log (electronic and paper), timesheet, and logbook recap, as appropriate. The training providers must teach driver-trainees the consequences (safety, legal, and personal) of violating the HOS regulations, including the fines and penalties imposed for these types of violations.

Unit B1.5.4 Fatigue and Wellness Awareness

The issues and consequences of chronic and acute driver fatigue and the importance of staying alert will be covered in this unit. The training providers must teach driver-trainees about wellness and basic health maintenance information that affect a driver's ability to safely operate a CMV.

Unit B1.5.5 Post-Crash Procedures

This unit must teach driver-trainees the appropriate post-crash procedures, including the requirement that the driver, if possible, assess his or her physical condition immediately after the crash and notify authorities, or assign the task to other individuals at the crash scene. The training providers must teach driver-trainees how to protect the area; obtain emergency medical assistance; move on-road vehicles off the road in minor crashes so as to avoid subsequent crashes or injuries; engage flashers; place reflective triangles and other warning devices for stopped vehicles; and properly use a fire extinguisher, if necessary. The training providers must instruct driver-trainees in post-crash testing requirements related to controlled substances and alcohol.

Unit B1.5.6 External Communications

This unit must instruct driver-trainees in the value of effective interpersonal communication techniques/skills to interact with enforcement officials. The training providers must teach driver-trainees the specifics of the roadside vehicle inspection process, and what to expect during this activity. Driver-trainees who are not native English speakers must be instructed in FMCSA English language proficiency requirements and the consequences for violations. The training providers must teach driver-trainees the implications of violating Federal and state regulations will have on their driving records and their employing motor carrier's records.

Unit B1.5.7 Whistleblower/Coercion

This unit must teach the driver-trainees about the right of an employee to question the safety practices of an employer without incurring the risk of losing a job or being subject to reprisals simply for stating a safety concern. The training providers must instruct driver-trainees in the whistleblower protection regulations in 29 CFR part 1978. The training providers must teach driver-trainees the procedures for reporting to FMCSA incidents of coercion from motor carriers, shippers, receivers, or transportation intermediaries.

Unit B1.5.8 Trip Planning

This unit must address the importance of and requirements for planning routes and trips. This instruction must address planning the safest route, planning for rest stops, heavy traffic areas, railroad-highway grade crossing safe clearance and ground clearance (*i.e.,* ''high center''), the importance of Federal and State requirements on the need for permits, and vehicle size and weight limitations. The training providers must teach driver-trainees the correct

identification of restricted routes, the pros and cons of Global Positioning System (GPS)/trip routing software, and the importance of selecting fuel-efficient routes.

Unit B1.5.9 Drugs/Alcohol

This unit must teach driver-trainees the rules applicable to controlled substances (including prescription drugs) and alcohol use and testing related to the operation of a CMV.

Unit B1.5.10 Medical Requirements

This unit must teach driver-trainees the Federal rules on medical certification, medical examination procedures, general qualifications, responsibilities, and disqualifications based on various offenses, orders, and loss of driving privileges (49 CFR part 391, subparts B and E).

Behind-the-Wheel Range

This unit must teach driving exercises related to basic vehicle control skills and mastery of basic maneuvers, as covered in §§ 383.111 and 383.113 of this chapter necessary to operate the vehicle safely. The training providers must teach driver-trainees activities in this unit on a driving range as defined in § 380.605. The training provider must teach ''Get Out and Look'' (GOAL) to the driver-trainee as it applies to units B2.2–2.6.

Unit B2.1 Vehicle Inspection Pre-Trip/Enroute/Post-Trip

Driver-trainees must demonstrate proficiency in conducting pre-trip and post-trip inspections as specified in §§ 392.7 and 396.11, including appropriate inspection locations. Instruction must also be provided on enroute vehicle inspections.

Unit B2.2 Straight Line Backing

Driver-trainees must demonstrate proficiency in proper techniques for performing various straight line backing maneuvers to appropriate criteria/acceptable tolerances.

Unit B2.3 Alley Dock Backing (45/90 Degree)

Driver-trainees must demonstrate proficiency in proper techniques for performing 45/90 degree alley dock maneuvers to appropriate criteria/acceptable tolerances.

Unit B2.4 Off-Set Backing

Driver-trainees must demonstrate proficiency in proper techniques for performing off-set backing maneuvers to appropriate criteria/acceptable tolerances.

Unit B2.5 Parallel Parking Blind Side

Driver-trainees must demonstrate proficiency in proper techniques for performing parallel parking blind side positions/maneuvers to appropriate criteria/acceptable tolerances.

Unit B2.6 Parallel Parking Sight Side

Driver-trainees must demonstrate proficiency in proper techniques for performing sight side parallel parking maneuvers to appropriate criteria/acceptable tolerances.

Behind-the-Wheel Public Road

The instructor must engage in active two-way communication with the driver-trainees during all active BTW public road training sessions. Skills described in paragraphs B3.8 through 3.12 of this section must be discussed during public road training, but not necessarily performed. Driver-trainees are not required to demonstrate proficiency in the skills described in paragraphs B3.8 through 3.12.

Unit B3.1 Vehicle Controls Including: Left Turns, Right Turns, Lane Changes, Curves at Highway Speeds, and Entry and Exit on the Interstate or Controlled Access Highway

Driver-trainees must demonstrate proficiency in proper techniques for initiating vehicle movement, executing left and right turns, changing lanes, navigating curves at speed, exiting and entering the interstate, and stopping the vehicle in a controlled manner.

Unit B3.2 Shifting/Transmission

Driver-trainees must demonstrate proficiency in proper techniques for performing safe and fuel-efficient shifting.

Unit B3.3 Communications/Signaling

Driver-trainees must demonstrate proficiency in proper techniques for signaling intentions and effectively communicating with other drivers.

Unit B3.4 Visual Search

Driver-trainees must demonstrate proficiency in proper techniques for visually searching the road for potential hazards and critical objects.

Unit B3.5 Speed and Space Management

Driver-trainees must demonstrate proficiency in proper habits and techniques for adjusting and maintaining vehicle speed, taking into consideration various factors such as traffic and road conditions. Driver-trainees must demonstrate proficiency in maintaining proper speed to keep appropriate spacing between the driver-trainee's CMV and other vehicles. Instruction must include methods for calibrating safe following distances under an array of conditions including traffic, weather, and CMV weight and length.

Unit B3.6 Safe Driver Behavior

Driver-trainees must demonstrate proficiency in safe driver behavior during their operation of the CMV.

Unit B3.7 Hours of Service (HOS) Requirements

Driver-trainees must demonstrate proficiency in the basic activities required by the HOS regulations, such as completing a Driver's Daily Log (electronic and paper), timesheet, and logbook recap, as appropriate.

Unit B3.8 Hazard Perception

Driver-trainees must demonstrate their ability to recognize potential hazards in the driving environment in time to reduce the severity of the hazard and neutralize possible emergency situations. Driver-trainees must demonstrate the ability to identify road conditions and other road users that are a potential threat to vehicle safety and suggest appropriate adjustments.

Unit B3.9 Railroad (RR)-Highway Grade Crossing

Driver-trainees must demonstrate the ability to recognize potential dangers and to demonstrate appropriate safety procedures when RR-highway grade crossings are reasonably available.

Unit B3.10 Night Operation

Driver-trainees must be familiar with how to operate a CMV safely at night. Training providers must teach driver-trainees that night driving presents specific circumstances that require heightened attention on the part of the driver. Driver-trainees must be taught special requirements for night vision, communications, speed, space management, and proper use of lights.

Unit B3.11 Extreme Driving Conditions

Driver-trainees must be familiar with the special risks created by, and the heightened precautions required by, driving CMVs under extreme driving conditions, such as heavy rain, high wind, high heat, fog, snow, ice, steep grades, and curves. Training providers must teach driver-trainees the basic driving habits needed to deal with the specific challenges presented by these extreme driving conditions.

Unit B3.12 Skid Control/Recovery, Jackknifing, and Other Emergencies

Driver-trainees must know the causes of skidding and jackknifing and techniques for avoiding and recovering from them. Driver-trainees must know how to maintain directional control and bring the CMV to a stop in the shortest possible distance while operating over a slippery surface. Driver-trainees must be familiar with proper techniques for responding to CMV emergencies, such as evasive steering, emergency braking, and off-road recovery. They must also know how to prevent or respond to brake failures, tire blowouts, hydroplaning, and rollovers.

Appendix C to Part 380—Passenger Endorsement Training Curriculum

Passenger (P) endorsement applicants must complete the curriculum outlined in this section, which applies to driver-trainees who expect to operate CMVs in the any of the vehicle groups defined in § 383.91(a)(1)–(3) for which a P endorsement is required.

There is no required minimum number of instruction hours for theory training, but the training provider must cover all the topics set forth in the curriculum. There is no required minimum number of instruction hours for BTW training, but training providers must determine whether driver-trainees have demonstrated proficiency in all elements of the BTW curriculum. Training instructors must document the total number of clock hours each driver-trainee spends to complete the BTW curriculum. The training must be conducted in a passenger vehicle of the same vehicle group as the applicant intends to drive. The passenger endorsement training must, at a minimum, contain the following:

Theory Instruction

Unit C1.1 Post-Crash Procedures

This unit must teach driver-trainees appropriate post-crash procedures, including the requirement that the driver, if possible, assess his or her physical condition immediately after the crash and notify authorities, or assign the task to a passenger or other individuals at the crash scene. Also, training providers must teach driver-trainees how to obtain emergency medical assistance; move on-road vehicles off the road in minor crashes so as to avoid subsequent crashes or injuries; engage flashers, reflective triangles and other warning devices for stopped vehicles; and properly use a fire extinguisher if necessary.

Unit C1.2 Other Emergency Procedures

This unit must instruct driver-trainees in managing security breaches, on-board fires, emergency exit and passenger evacuation training, medical emergencies, and emergency stopping procedures including the deployment of various emergency hazard signals. Instruction must also include procedures for dealing with mechanical breakdowns and vehicle defects while enroute.

Unit C1.3 Vehicle Orientation

This unit must teach driver-trainees the basic physical and operational characteristics of passenger-carrying CMV (*e.g.* bus and motor coach), including overall height, length, width, ground clearances, rear overhang, Gross Vehicle Weight and Gross Vehicle Weight Rating, axle weights, wheels and rims, tires, tire ratings, mirrors, steer wheels, lighting, windshield, windshield wipers, engine compartments, basic electrical system, brake systems, as applicable, and spare tire storage. Additionally, training providers must instruct driver-trainees in techniques for proper driver seat and mirror adjustments.

Unit C1.4 Pre-Trip, Enroute, and Post-Trip Inspection

This unit must teach the driver-trainee the importance of pre-trip, enroute, and post-trip inspections; and provide instruction in techniques for conducting such inspections as stated in §§ 392.7 and 396.11, and demonstrate their ability to inspect the following:

(1) Emergency exits;

(2) Passenger-carrying CMV interiors (including passenger seats as applicable);

(3) Restrooms and associated environmental requirements;

(4) Temperature controls (for maintaining passenger comfort);

(5) Driver and passenger seat belts.

Additionally, training providers must instruct driver-trainees in procedures, as applicable, in security-related inspections, including inspections for unusual wires or other abnormal visible materials, interior and exterior luggage compartments, packages or luggage left behind, and signs of cargo or vehicle tampering. Finally, training providers must instruct driver-trainees in cycling-accessible lifts and procedures for inspecting them for functionality and defects.

Unit C1.5 Fueling

This unit must instruct driver-trainees on the significance of avoiding refueling a bus while passengers are onboard and the imperative of avoiding refueling in an enclosed space.

Unit C1.6 Idling

This unit must teach driver-trainees the importance of compliance with State and local laws and regulations, including for example, idling limits, fuel savings; and the consequences of non-compliance, including adverse health effects and penalties.

Unit C1.7 Baggage and/or Cargo Management

In this unit, training providers must teach driver-trainees:

(1) Proper methods for handling and securing passenger baggage and containers, as applicable.

(2) Procedures for identifying and inspecting baggage and containers for prohibited items, such as hazardous materials.

(3) Proper handling and securement of devices associated with the Americans with Disabilities Act (ADA) compliance, including oxygen, wheeled mobility devices, and other associated apparatuses.

Unit C1.8 Passenger Safety Awareness Briefing

This unit must teach driver-trainees how to brief passengers on safety topics including fastening seat belts, emergency exits, emergency phone contact information, fire extinguisher location, safely walking in the aisle when the bus is moving, and restroom emergency push button or switch.

Unit C1.9 Passenger Management

In this unit, training providers must teach driver-trainees:

(1) Proper procedures for safe loading and unloading of passengers prior to departure, including rules concerning standing passengers and the standee line.

(2) Procedures for dealing with disruptive passengers.

Unit C1.10 Americans With Disabilities Act (ADA) Compliance

Along with addressing the proper operation of accessibility equipment (*e.g.,* lifts), this must teach driver-trainees the applicable regulations and proper procedures for engaging persons with disabilities or special needs under the ADA. Training must cover passengers with mobility issues, engaging passengers with sight, hearing, or cognitive impairments, and recognizing the permitted use of service animals.

Unit C1.11 Hours of Service (HOS) Requirements

This unit must teach driver-trainees the HOS regulations that apply to drivers for interstate passenger carriers. Training providers must teach driver-trainees the basic activities required by the HOS regulations, such as completing a Driver's Daily Log (electronic and paper), timesheet, and logbook recap, as appropriate. Training providers must teach driver-trainees how to recognize the signs of fatigue and basic fatigue countermeasures as a means to avoid crashes.

Unit C1.12 Safety Belt Safety

This unit must teach driver-trainees the Federal rules governing the proper use of safety restraint systems by CMV drivers, as set forth in § 392.16.

Unit C1.13 Distracted Driving

This unit must teach driver-trainees FMCSA regulations that prohibit drivers from texting or using hand-held mobile phones while operating their vehicles (*e.g.,* §§ 392.80 and 392.82); and must teach the serious consequences of violations, including crashes, heavy fines, and impacts on a motor carrier's and/or driver's safety records, such as driver disqualification.

Unit C1.14 Railroad (RR)-Highway Grade Crossings and Drawbridges

This unit must instruct driver-trainees in applicable regulations, techniques, and procedures for navigating RR-highway grade crossings and drawbridges appropriate to passenger buses.

Unit C1.15 Weigh Stations

This unit must teach driver-trainees the weigh-station regulations that apply to buses.

Unit C1.16 Security and Crime

This unit must teach driver-trainees the basic techniques for recognizing and minimizing physical risks from criminal activities.

Unit C1.17 Roadside Inspections

This unit must teach driver-trainees what to expect during a standard roadside inspection conducted by authorized personnel. Training providers must teach driver-trainees what passenger-carrying vehicle and driver violations are classified as out-of-service (OOS), including the ramifications and penalties for operating a CMV when subject to an OOS order as defined in § 390.5.

Unit C1.18 Penalties and Fines

This unit must teach driver-trainees the potential consequences of violating driver-related regulations, including impacts on driver and motor carrier safety records, adverse impacts on the driver's Pre-employment Screening Program record; financial penalties for both the driver and carrier; and possible loss of CMV driving privileges.

Behind the Wheel—Range and Public Road

This BTW training consists of exercises related to basic vehicle control skills and mastery of basic maneuvers necessary to operate the vehicle safely. Activities in this unit will take place on a driving range or a public road as defined in § 380.605. The instructor must engage in active communication with the driver-trainees during all BTW training sessions.

Unit C2.1 Vehicle Orientation

Driver-trainees must demonstrate their familiarity with basic passenger-carrying CMV physical and operational characteristics including overall height, length, width,

ground clearances, rear overhang, gross vehicle weight and gross vehicle weight rating, axle weights, wheels and rims, tires, tire ratings, mirrors, steer wheels, lighting, windshield, windshield wipers, engine compartments, basic electric system, and spare tire storage. Additionally, driver-trainees must demonstrate techniques for proper driver's seat and mirror adjustments.

Unit C2.2 Pre-Trip, Enroute, and Post-Trip Inspection

Driver-trainees must demonstrate proficiency in conducting such pre-trip, enroute and post-trip inspections of buses and key components of §§ 392.7 and 396.11, and demonstrate their ability to inspect the following:

(1) Emergency exits;

(2) Passenger-carrying CMV interiors (including passenger seats as applicable);

(3) Restrooms and associated environmental requirements;

(4) Temperature controls (for maintaining passenger comfort); and

(5) Driver and passenger seat belts.

Additionally, driver-trainees must demonstrate their knowledge of procedures, as applicable, in security-related inspections, including inspections for unusual wires or other abnormal visible materials, interior and exterior luggage compartments, packages or luggage left behind, and signs of cargo or vehicle tampering. Driver-trainees must be familiar with the operation of cycling-accessible lifts and the procedures for inspecting them for functionality and defects. For passenger-carrying vehicles equipped with said lifts and tie-down positions, trainee must demonstrate their ability to operate the cycling-accessible lifts.

Unit C2.3 Baggage and/or Cargo Management

In this unit, driver-trainees must demonstrate their ability to:

(1) Properly handle passenger baggage and containers to avoid worker, passenger, and non-passenger related injuries and property damage;

(2) Visually inspect baggage and containers for prohibited items, such as hazardous materials and identify such items;

(3) Properly handle and secure devices associated with ADA compliance including oxygen, wheeled mobility devices, and other associated apparatuses.

Unit C2.4 Passenger Safety Awareness Briefing

Driver-trainees must demonstrate their ability to brief passengers on safety on topics including: Fastening seat belts, emergency exits, emergency phone contact information, fire extinguisher location, safely walking in the aisle when the bus is moving, and restroom emergency push button or switch.

Unit C2.5 Passenger Management

In this unit, driver-trainees must demonstrate their ability to safely load and unload passengers prior to departure and to deal with disruptive passengers.

Unit C2.6 Railroad-Highway Grade Crossings

Driver-trainees must demonstrate proper procedures for safely navigating railroad-highway grade crossings in a passenger-carrying CMV.

Appendix D to Part 380—School Bus Endorsement Training Curriculum

School bus (S) endorsement applicants must complete the curriculum outlined in this section, which applies to driver-trainees who expect to operate a ''school bus'' as defined in § 383.5. There is no required minimum number of instruction hours for theory training, but the training provider must cover all the topics set forth in the curriculum. There is no required minimum number of instruction hours for BTW training, but the training provider must determine whether driver-trainees have demonstrated proficiency in all elements of the BTW curriculum. Training instructors must document the total number of clock hours each driver-trainee spends to complete the BTW curriculum. The training must be conducted in a school bus of the same vehicle group as the applicant intends to drive. The school bus endorsement training must, at a minimum, include the following:

Theory Instruction

Unit D1.1 Danger Zones and Use of Mirrors

This unit must teach driver-trainees the danger zones that exist around the school bus and the techniques to ensure the safety of those around the bus. These techniques include correct mirror adjustment and usage. The types of mirrors and their use must be discussed, as well as the requirements found in Federal Motor Vehicle Safety Standard (FMVSS) 111 (49 CFR 571.111). Training providers must teach driver-trainees the dangers of ''dart-outs.'' Training providers must teach driver-trainees the importance of training students how to keep out of the danger zone when around school buses and the techniques for doing so.

Unit D1.2 Loading and Unloading

This unit must be instruct driver-trainees on the laws and regulations for loading and unloading, as well as the required procedures for students waiting at a bus stop and crossing the roadway at a bus stop. Special dangers involved in loading and unloading must be specifically discussed, including procedures to ensure the danger zone is clear and that no student has been caught in the doorway prior to moving the vehicle. Instruction also must be included on the proper use of lights, stop arms, crossing gates, and safe operation of the door during loading and unloading; the risks involved with leaving students unattended on a school bus; and the proper techniques for checking the bus for sleeping children and lost items at the end of each route.

Unit D1.3 Vehicle Orientation

This unit must teach driver-trainees the basic physical and operational characteristics of school buses, including overall height, length, width, ground clearances, rear overhang, Gross Vehicle Weight and Gross Vehicle Weight Rating, axle weights, wheels and rims, tires, tire ratings, mirrors, steer wheels, lighting, windshield, windshield wipers, engine compartments, basic electrical system, brake systems, as applicable, and spare tire storage. Additionally, the training providers must instruct driver-trainees in techniques for proper driver seat and mirror adjustments.

Unit D1.4 Post-Crash Procedures

This unit must instruct driver-trainees on the proper procedures following a school bus crash. The instruction must include use of fire extinguisher(s), first aid kit(s), tending to injured passengers, post-crash vehicle securement, notification procedures, deciding whether to evacuate the bus, data gathering, and interaction with law enforcement officials.

Unit D1.5 Emergency Exit and Evacuation

This unit must teach driver-trainees their role in safely evacuating the bus in an emergency and planning for an emergency in advance. Training must include proper evacuation methods and procedures, such as the safe evacuation of students on field and activity trips who only occasionally ride school buses and thus may not be familiar with the procedures.

Unit D1.6 Railroad-Highway Grade Crossings

This unit must teach driver-trainees the dangers trains present and the importance of the school bus driver and students strictly following railroad crossing procedures. Instruction must be given on the types of crossings, warning signs and devices, and State and local procedures and regulations for school buses when crossing railroad-highway grade crossings.

Unit D1.7 Student Management

This unit must teach driver-trainees how to manage student behavior on the bus to ensure that safety is maintained and the rights of others are respected. Specific student management techniques must be discussed, including warning signs of bullying and the techniques for managing student behavior and administering discipline. Training providers must teach driver-trainees to avoid becoming distracted by student behavior while driving, especially when crossing railroad tracks and during loading and unloading.

Unit D1.8 Special Safety Considerations

This unit must teach the driver-trainees the special safety considerations and equipment in school bus operations. Topics discussed must include use of strobe lights, driving in high winds, safe backing techniques, and preventing tail swing crashes.

Unit D1.9 Pre- and Post-Trip Inspections

This unit must teach the driver-trainees the importance of pre-trip, enroute, and post-trip inspections; and provide instruction in techniques for conducting such inspections of buses as stated in §§ 392.7 and 396.11, and additionally demonstrate their ability to inspect the following:

(1) Stop arms,

(2) Crossing arms,

(3) Emergency exits,
(4) Fire extinguishers,
(5) Passenger seats,
(6) First aid kits,
(7) Interior lights, and
(8) Temperature control (for maintaining passenger comfort).

Training providers must instruct driver-trainees in State and local requirements, as applicable, for inspection of school bus equipment.

Unit D1.10 School Bus Security

This unit must teach driver-trainees the security issues facing school bus drivers. Training providers must also teach driver-trainees potential security threats, techniques for preventing and responding to security threats, how to recognize and report suspicious behavior, and what to do in the event of a hijacking or attack on a school bus.

Unit D1.11 Route and Stop Reviews

This unit must teach driver-trainees the importance of planning their routes prior to beginning driving in order to avoid distraction while on the road. The training provider must also teach driver-trainees the techniques for reviewing routes and stops, as well as State and local procedures for reporting hazards along the route and at bus stops.

Behind the Wheel—Range and Public Road

This unit must consist of exercises related to basic vehicle control skills and mastery of basic maneuvers. Activities in this unit will take place on a driving range or a public road as defined in § 380.605. The instructor must engage in active communication with the driver-trainees during all active training sessions.

Unit D2.1 Danger Zones and Use of Mirrors

Driver-trainees must demonstrate the techniques necessary to ensure the safety of persons in the danger zone around the bus. Driver-trainees must practice mirror adjustment and usage. The types of mirrors and their use are shown, and cones used to demonstrate the requirements of 49 CFR 571.111.

Unit D2.2 Loading and Unloading

Driver-trainees must demonstrate the loading and unloading techniques learned in the theory portion of the training. Driver-trainees must demonstrate checking the vehicle for sleeping children and lost items at the end of the route.

Unit D2.3 Emergency Exit and Evacuation

Driver-trainees must demonstrate their role in safely evacuating the bus in an emergency.

Unit D2.4 Special Safety Considerations

Driver-trainees must demonstrate safe backing techniques and demonstrate their ability to avoid tail swing crashes by using reference points when making turns.

Unit D2.5 Pre- and Post-Trip Inspections

Driver-trainees must demonstrate proficiency in conducting pre-and post-trip inspections, as stated in §§ 392.7 and 396.11, and of school bus-specific equipment, such as mirrors, stop arms, crossing arms, emergency exits, fire extinguishers, passenger seats, first aid kits, interior lights, and temperature control.

Unit D2.6 Railroad-Highway Grade Crossings

Driver-trainees must demonstrate proper procedures for safely navigating railroad-highway grade crossings in a school bus.

Appendix E to Part 380—Hazardous Materials Endorsement Training Curriculum

Hazardous materials (H) endorsement applicants must complete the Hazardous materials curriculum, which apply to driver-trainees who intend to operate CMVs used in the transportation of hazardous materials (HM) as defined in § 383.5. Driver-trainees seeking an H endorsement, as defined in § 383.93(c)(4), must complete this curriculum in order to take the State-administered knowledge test for the H endorsement. There is no required minimum number of instruction hours for theory training, but the training provider must cover all the topics in the curriculum. The HM curriculum must, at a minimum, include the following:

Theory Instruction

Unit E1.1 Basic Introductory HM Requirements

This unit must teach driver-trainees the basic HM competencies, including applicable FMCSR requirements when HM is being transported. The training provider must also teach driver-trainees HM communication requirements including: Shipping paper requirements, marking, labeling, placarding, emergency response information, and shipper's responsibilities.

Unit E1.2 Operational HM Requirements

This unit must teach driver-trainees the basic competencies for transportation of HM.

Unit E1.3 Reporting HM Crashes and Releases

The unit must teach driver-trainees the proper procedures and contacts for the immediate notification related to certain HM incidents, including instruction in the proper completion and submission of HM Incident Reports.

Unit E.4 Tunnels and Railroad (RR)-Highway Grade Crossing Requirements

This unit must teach driver-trainees the proper operation of an HM vehicle at RR-highway grade crossings and in vehicular tunnels.

Unit E1.5 Loading and Unloading HM

This unit must teach driver-trainees the proper loading and unloading procedures for hazardous material cargo. Training providers must also teach driver-trainees the requirements for proper segregation and securement of HM, and the prohibitions on transporting certain solid and liquid poisons with foodstuffs.

Unit E1.6 HM on Passenger Vehicles

This unit must teach driver-trainees the various requirements for vehicles transporting passengers and property, and the types and quantities of HM that can and cannot be transported in these vehicles/situations.

Unit E1.7 Bulk Packages

This unit must teach driver-trainees the specialized requirements for transportation of cargo in bulk packages, including cargo tanks, intermediate bulk containers, bulk cylinders and portable tanks. The unit must include training in the operation of emergency control features, special vehicle handling characteristics, rollover prevention, and the properties and hazards of the HM transported. Training providers must teach driver-trainees methods specifically designed to reduce cargo tank rollovers including, but not limited to, vehicle design and performance, load effects, highway factors, and driver factors.

Unit E1.8 Operating Emergency Equipment

This unit must teach driver-trainees the applicable requirements of the FMCSRs and the procedures necessary for the safe operation of the motor vehicle. This includes training in special precautions for fires, loading and unloading, operation of cargo tank motor vehicle equipment, and shut-off/shut-down equipment.

Unit E1.9 Emergency Response Procedures

This unit must teach driver-trainees the proper procedures and best practices for handling an emergency response and post-response operations, including what to do in the event of an unintended release of an HM. All training, preparation, and response efforts must focus on the hazards of the materials that have been released and the protection of people, property, and the environment.

Unit E1.10 Engine (Fueling)

This unit must teach driver-trainees the procedures for fueling a vehicle that contains HM.

Unit E1.11 Tire Check

This unit must teach driver-trainees the proper procedures for checking the vehicle tires at the start of a trip and each time the vehicle is parked.

Unit E1.12 Routes and Route Planning

This unit must teach driver-trainees the proper routing procedures that they are required to follow for the transportation of radioactive and non-radioactive HM.

Unit E1.13 Hazardous Materials Safety Permits (HMSP)

This unit must teach driver-trainees the proper procedures and operational requirements including communications, constant attendance, and parking that apply to the transportation of HM for which an HMSP is required.

PART 383—COMMERCIAL DRIVER'S LICENSE STANDARDS; REQUIREMENTS AND PENALTIES

■ 8. The authority citation for part 383 is revised to read as follows:

Authority: 49 U.S.C. 521, 31136, 31301 *et seq.,* and 31502; secs. 214 and 215 of Pub. L.

106–159, 113 Stat. 1748, 1766, 1767; sec. 1012(b) of Pub. L. 107–56, 115 Stat. 272, 297, sec. 4140 of Pub. L. 109–59, 119 Stat. 1144, 1746; sec. 32934 of Pub. L. 112–141, 126 stat. 405, 830; and 49 CFR 1.87.

■ 9. Amend § 383.71 by adding paragraphs (a)(3) and (b)(11), revising paragraphs (e)(3) and (4), and adding paragraph (e)(5) to read as follows:

§ 383.71 Driver application and certification procedures.

(a) * * *

(3) Beginning on February 7, 2020, a person must complete the training prescribed in subpart F of part 380 of this chapter before taking the skills test for a Class A or B CDL for the first time, or a skills test for a passenger (P) or school bus (S) endorsement for the first time, or the knowledge test for a hazardous materials (H) endorsement for the first time. The training must be administered by a provider listed on the Training Provider Registry.

(b) * * *

(11) Beginning on February 7, 2020, a person must complete the training prescribed in subpart F of part 380 of this chapter before taking the skills test for a Class A or B CDL, a passenger (P) or school bus (S) endorsement for the first time or the knowledge test for a hazardous materials (H) endorsement for the first time. The training must be administered by a provider listed on the Training Provider Registry.

* * * * *

(e) * * *

(3) Comply with the requirements specified in paragraph (b)(8) of this section to obtain a hazardous materials endorsement;

(4) Surrender the previous CDL; and

(5) Beginning on February 7, 2020, a person must complete the training prescribed in subpart F of part 380 of this chapter before taking the skills test for upgrading to a Class A or B for the first time; or adding a passenger or school bus endorsement to a CDL for the first time; or knowledge test for hazardous materials endorsement for the first time. The training must be administered by a provider on the Training Provider Registry.

* * * * *

■ 10. Amend § 383.73 by revising paragraph (b)(3) introductory text and paragraph (b)(3)(ii) and by adding paragraphs (b)(10), (e)(8), and (p) to read as follows:

§ 383.73 State procedures.

* * * * *

(b) * * *

(3) Initiate and complete a check of the applicant's driving record to ensure that the person is not subject to any disqualification under § 383.51, or any license disqualification under State law, does not have a driver's license from more than one State or jurisdiction, and has completed the required training prescribed in subpart F of part 380 of this subchapter. The record check must include, but is not limited to, the following:

* * * * *

(ii) A check with the CDLIS to determine whether the driver applicant already has been issued a CDL, whether the applicant's license has been disqualified, or if the applicant has been disqualified from operating a commercial motor vehicle; and beginning February 7, 2020, before an applicant is issued a Class A or Class B CDL, or a passenger (P), school bus (S), or hazardous materials (H) endorsement, whether the applicant has completed the training required by subpart F of part 380 of this subchapter;

* * * * *

(10) Beginning on February 7, 2020, not conduct a skills test of an applicant for a Class A or Class B CDL, or a passenger (P) or school bus (S) endorsement until the State verifies electronically that the applicant completed the training prescribed in subpart F of part 380 of this subchapter.

* * * * *

(e) * * *

(8) Beginning on February 7, 2020, not issue an upgrade to a Class A or Class B CDL, or a passenger (P), school bus (S), or hazardous materials (H) endorsement, unless the applicant has completed the training required by subpart F of part 380 of this subchapter.

* * * * *

(p) After February 7, 2020, the State must notify FMCSA that a training provider in the State does not meet applicable State requirements for CMV instruction.

PART 384—STATE COMPLIANCE WITH COMMERCIAL DRIVER'S LICENSE PROGRAM

■ 11. The authority citation for part 384 is revised to read as follows:

Authority: 49 U.S.C. 31136, 31301, *et seq.,* and 31502; secs. 103 and 215 of Pub. L. 106–59, 113 Stat. 1753, 1767; sec. 32934 of Pub. L. 112–141, 126 stat. 405, 830 and 49 CFR 1.87.

■ 12. Add § 384.230 to read as follows:

§ 384.230 Entry-level driver certification.

(a) Beginning on February 7, 2020, a State must comply with the requirements of § 383.73(b)(3)(ii), (b)(10), and (e)(8) to verify that the applicant completed the training prescribed in subpart F of part 380.

(b)(1) A State may issue a CDL to individuals who obtain a CLP before February 7, 2020, who have not complied with subpart F of part 380 of this subchapter so long as they obtain a CDL before the CLP or renewed CLP expires.

(2) A State may not issue a CDL to individuals who obtain a CLP on or after February 7, 2020, unless they comply with subpart F of part 380 of this subchapter.

■ 13. Add § 384.235 to subpart B to read as follows:

§ 384.235 Entry-level driver training provider notification.

The State must meet the entry-level driver training provider notification requirement of § 383.73(p).

■ 14. In § 384.301, add paragraph (j) to read as follows:

§ 384.301 Substantial compliance—general requirements.

* * * * *

(j) A State must come into substantial compliance with the requirements of subpart B of this part and part 383 of this chapter in effect as of February 6, 2017, but not later than February 7, 2020.

Issued under the authority of delegation in 49 CFR 1.87: November 16, 2016.

T.F. Scott Darling, III,

Administrator.

[FR Doc. 2016–28012 Filed 12–7–16; 8:45 am]

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Part III

Department of the Treasury

Internal Revenue Service

26 CFR Parts 1 and 602
Income and Currency Gain or Loss With Respect to a Section 987 QBU; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 9794]

RIN 1545–AM12

Income and Currency Gain or Loss With Respect to a Section 987 QBU

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that provide guidance under section 987 of the Internal Revenue Code (Code) regarding the determination of the taxable income or loss of a taxpayer with respect to a qualified business unit (QBU) subject to section 987, as well as the timing, amount, character, and source of any section 987 gain or loss. Taxpayers affected by these regulations are corporations and individuals that own QBUs subject to section 987. In addition, published elsewhere in this issue of the **Federal Register**, temporary and proposed regulations (the temporary regulations) are being issued under section 987 to address aspects of the application of section 987 not addressed in these final regulations.

DATES: *Effective date:* These regulations are effective on December 7, 2016.

Applicability dates: For dates of applicability, see § 1.987–11.

FOR FURTHER INFORMATION CONTACT: Sheila Ramaswamy at (202) 317–6938 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–2265. Responses to this collection of information are mandatory.

The collection of information in these final regulations is in §§ 1.987–1(b)(2)(ii), 1.987–1(c)(1)(ii), 1.987–1(c)(1)(iii), 1.987–1(g)(3)(i)(A), 1.987–1(g)(3)(i)(B), 1.987–1(g)(3)(i)(C), 1.987–1(g)(3)(i)(D), 1.987–3(c)(2)(iv)(B), 1.987–9, and 1.987–10(e). This collection of information is required to establish the taxable income or loss of a taxpayer with respect to a QBU subject to section 987, as well as the timing, amount, character, and source of any section 987 gain or loss and the exchange rates used for foreign currency translation purposes.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books and records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains final regulations relating to the determination of the taxable income or loss of a taxpayer with respect to a QBU subject to section 987 of the Code, as well as the timing, amount, character, and source of any section 987 gain or loss. The final regulations also amend existing regulations under sections 861, 985, 988, and 989.

On September 6, 2006, the Treasury Department and the IRS published a notice of proposed rulemaking (REG–208270–86, 71 FR 52876) that proposed new regulations under section 987 (the 2006 proposed regulations) and withdrew proposed regulations under section 987 published on September 25, 1991 (INTL–965–86, 56 FR 48457) (the 1991 proposed regulations). The Treasury Department and the IRS received many written comments in response to the 2006 proposed regulations. After consideration of all the comments, the 2006 proposed regulations, as revised by this Treasury decision, are adopted as final regulations. Temporary regulations (*TD 9795*) and proposed regulations (REG–128276–12) under section 987 are being published contemporaneously with these final regulations.

Summary of Comments and Explanation of Revisions

I. Background

Section 987 generally provides that, when a taxpayer owns one or more QBUs with a functional currency other than the U.S. dollar and such functional currency is different than that of the taxpayer, the taxable income or loss of the taxpayer with respect to each QBU is determined by computing the taxable income or loss of each QBU separately in its functional currency and translating such income or loss at the appropriate exchange rate. Section 987 further requires the taxpayer to make ''proper adjustments'' (as prescribed by the Secretary) for transfers of property between QBUs having different functional currencies, including by treating post-1986 remittances from each such QBU as made on a pro rata basis out of post-1986 accumulated earnings and by treating section 987 gain or loss as ordinary income or loss and sourcing such gain or loss by reference to the source of the income giving rise to post-1986 accumulated earnings.[1] Section 989(b)(4) provides that, ''[e]xcept as provided in regulations,'' the appropriate exchange rate with respect to a QBU means ''the average exchange rate for the taxable year'' of the QBU. Additionally, section 989(c)(5) directs the Secretary to ''prescribe such regulations as may be necessary or appropriate to carry out the purposes of [subpart J], including regulations . . . providing for the appropriate treatment of related party transactions (including transactions between qualified business units of the same taxpayer) . . . .''

A. 1991 Proposed Regulations

The 1991 proposed regulations generally provided that the net income of a QBU with a functional currency other than that of the taxpayer was determined annually. Such determination was based on the profit and loss appearing on the QBU's books and records, adjusted to conform to U.S. tax principles, and translated into the functional currency of the taxpayer using the weighted average exchange rate for the taxable year. The 1991 proposed regulations also provided for the recognition of exchange gain or loss upon a remittance from the QBU's equity pool. In general, the equity pool consisted of the contributed capital and earnings of the QBU, reduced by remittances, determined in the QBU's functional currency. The 1991 proposed regulations also provided for a basis pool, which consisted of the basis of the capital and earnings in the equity pool, expressed in the functional currency of the taxpayer. The portion of the basis pool that was attributable to a remittance generally was determined according to the following formula:

[1] The legislative history of section 987 is discussed extensively in the preamble to the 2006 proposed regulations. *See* 71 FR 52876.

$$\frac{\text{Amount remitted in the QBU's functional currency}}{\text{Equity pool in the QBU's functional currency}} \times \text{Basis pool in the taxpayer's functional currency}$$

Under the 1991 proposed regulations, section 987 gain or loss was the difference between the value of the remittance from the QBU, translated into the taxpayer's functional currency at the spot rate on the date of the remittance, and the basis associated with the remittance.

One important consequence of the equity pool paradigm was that all branch equity gave rise to exchange gain or loss, regardless of whether the equity was invested in assets that actually exposed the QBU's owner to currency fluctuations. For example, both cash denominated in the QBU's functional currency and mobile equipment equally gave rise to exchange gain or loss. As a result, under the 1991 proposed regulations, exchange rate changes that, at most, had only an uncertain and remote effect on the economic results experienced by the owner of a QBU gave rise to substantial exchange gains and losses that taxpayers selectively could recognize by strategically timing remittances or causing a termination of the QBU. Given these distortions, the Treasury Department and the IRS withdrew the 1991 proposed regulations and proposed new regulations on September 6, 2006.

B. 2006 Proposed Regulations

The 2006 proposed regulations adopted a different paradigm referred to as the foreign exchange exposure pool (FEEP) method. In general, the FEEP method provides that, as under the 1991 proposed regulations, the income of a QBU that is subject to section 987 (a section 987 QBU) is determined by reference to the items of income, gain, deduction, and loss booked to the section 987 QBU in its functional currency, adjusted to reflect U.S. tax principles. Items of income and deduction generally are translated, consistent with the 1991 proposed regulations, into the functional currency of the section 987 QBU's owner at the average exchange rate for the year. However, the basis of certain ''historic assets'' and the deductions for depreciation, depletion, and amortization of such assets are translated at the historic rates for such assets. Translating these items at historic rates represents a major difference from the 1991 proposed regulations and prevents the imputation of foreign currency gains or losses to such assets. Additionally, the 2006 proposed regulations required the adjusted basis and amount realized with respect to marked assets to be translated using a spot rate, which for assets acquired in a prior taxable year would be the spot rate for the closing balance sheet of the prior taxable year.

Consistent with the 1991 proposed regulations, the FEEP method uses a balance sheet approach to determine exchange gain or loss, which is not recognized until the section 987 QBU makes a remittance. Under the FEEP method, exchange gain or loss with respect to ''marked items'' is determined annually but is pooled and deferred until a remittance is made. A marked item generally is defined under the 2006 proposed regulations as an asset (marked asset) or liability (marked liability) that would generate section 988 gain or loss if such asset or liability were held or entered into directly by the owner of the section 987 QBU. The balance sheet approach, together with the use of historic rates for historic items (generally defined as an asset or liability that is not a marked item), allows taxpayers and the IRS to distinguish between items whose value is highly responsive to changes in the functional currency of the owner and items for which exchange rate changes have no effect on value, or only an uncertain or remote effect that is more appropriately recognized upon a realization event with respect to the item.

The 2006 proposed regulations define a remittance as a net transfer of amounts from a section 987 QBU to its owner during a taxable year, determined in the owner's functional currency. When a section 987 QBU makes a remittance, a portion of the pooled exchange gain or loss is recognized. In general, the amount taken into account equals the section 987 QBU's net unrecognized exchange gain or loss multiplied by the owner's remittance proportion. The owner's remittance proportion generally equals the amount of the remittance divided by the aggregate basis of the section 987 QBU's gross assets reflected on its year-end balance sheet, determined in the owner's functional currency, without reduction for the remittance.

II. Summary of Comments and Changes

Many comments were received in response to the 2006 proposed regulations. This Part II discusses those comments and the changes made in response to them. Certain comments received in response to the 2006 proposed regulations are addressed in the temporary regulations and are discussed in the preamble to the temporary regulations rather than in this preamble.

A. General Comments Regarding the FEEP Method, Including Regarding Administrability

A number of comments suggested that the FEEP method, in particular §§ 1.987–3 and –4 of the 2006 proposed regulations, would be difficult to administer. Some of those comments expressed a preference to more closely align regulations under section 987 with the financial accounting rules under Accounting Standards Codification, Foreign Currency Matters, section 830 (ASC 830).[2]

ASC 830 adopts a functional currency paradigm in which assets, liabilities, and operations of a foreign entity are measured using the entity's functional currency[3] and then translated into the reporting currency (generally, the U.S. dollar) of a U.S. enterprise using a current exchange rate.[4] Thus, revenues, expenses, gains, and losses of the foreign entity, translated into U.S. dollars using a weighted average exchange rate for the reporting period, are included in the consolidated profit and loss statement of the U.S. enterprise,[5] and the assets and liabilities of the foreign entity, translated into U.S. dollars using the spot rate on the balance sheet date, are included in the consolidated balance sheet of the U.S. enterprise.[6] Foreign currency ''translation'' gain or loss of a foreign entity with a functional currency other than the U.S. dollar is determined with respect to all assets and liabilities on the entity's balance sheet at the end of a

[2] ASC 830 codifies Financial Accounting Standard No. 52.

[3] The functional currency of a foreign entity is defined in ASC 830 as the currency of the primary economic environment in which the entity operates.

[4] ASC 830–30–45–3.

[5] ASC 830–10–55–10–11,830–30–45–3.

[6] ASC 830–30–45–3.

reporting period and reported in the cumulative translation adjustment (CTA) account. The CTA account is a sub-account in the equity section of the balance sheet.[7] It is not reflected in profit or loss until the occurrence of a sale or a complete or substantially complete liquidation of the entity.[8] ASC 830 [9] explains the rationale for accounting for translation gain or loss in equity and not income:

> Translation adjustments are solely a result of the translation process and have no direct effect on reporting currency cash flows. Exchange rate changes have an indirect effect on the net investment that may be realized upon sale or liquidation, but that effect is related to the net investment and not to the operations of the investee. Prior to sale or liquidation, that effect is so uncertain and remote as to require that translation adjustments arising currently should not be reported as part of operating results.

The treatment of translation gains and losses can be contrasted with the financial accounting treatment of transactions denominated in a currency other than the entity's functional currency. Changes in exchange rates between the functional currency of the foreign entity and the currency in which such transactions are denominated give rise to changes in expected cash flows in the functional currency, resulting in ''transaction'' gains or losses. The financial accounting rules require the inclusion of transaction gains and losses in net income for the period in which the exchange rate changes occur.[10] The category of foreign currency transactions that give rise to transaction gains and losses under generally accepted accounting principles overlaps considerably with the definition of a section 988 transaction for tax purposes.

Some comments suggested that, in enacting section 987, Congress intended to substantially adopt the financial accounting rules for foreign currency translation for tax purposes. The Treasury Department and the IRS do not find support for this position in the legislative history to section 987 and, to the contrary, find the position belied by the significant discontinuities between section 987 and the financial accounting rules, particularly regarding the recognition of foreign currency gains and losses. Under Financial Accounting Standard No. 52 (FAS 52), translation gain or loss is deferred in an equity account until a sale or liquidation of the foreign entity, at which point the economic effects of the aggregate translation gain or loss can be measured against a real economic event. The ''equity pool'' paradigm of the 1991 proposed regulations determined the amount of section 987 gain or loss in a manner that was similar to the determination of translation gain or loss under FAS 52 by imputing foreign currency gain or loss to all assets and liabilities on the balance sheet. In contrast with the accounting rules under FAS 52, however, the translation gain or loss was not sequestered in an equity account but rather was included in income upon a remittance as required by the section 987 statute, making the consequences of imputing foreign currency gain or loss to all assets and liabilities substantially greater.

As expressed in the preamble to the 2006 proposed regulations, the administrative convenience achieved by generally adopting the FAS 52 computational methodology in the 1991 proposed regulations gave rise to many cases in which the section 987 gain or loss taken into account on a remittance deviated substantially from the economic results experienced by the QBU. For example, currency loss was imputed with respect to assets (such as a commercial building or an oil rig) for which, due to the mobility of investment capital or the assets themselves, exchange rate fluctuations would have, at most, only a remote and uncertain effect on asset value. Moreover, because remittances could be funded from other assets, such loss could be recognized without regard to any realization event with respect to the assets that gave rise to the speculative or noneconomic section 987 loss.

Given the inappropriate economic and timing results attributable to adopting the FAS 52 translation methodology in the 1991 proposed regulations and the significant differences between the purposes of the FAS 52 computation of CTA and the computation of unrecognized section 987 gain or loss, the Treasury Department and the IRS remain of the view that the FAS 52 model is not appropriate for tax purposes. Similarly, the Treasury Department and the IRS have determined that an approach based on consistency with FAS 52 computations modified to address abuses, as suggested in some comments, is inappropriate because such a system would impute foreign currency gain or loss to all assets and liabilities on the balance sheet and generally allow for the recognition of such gains and losses based on remittances without regard to the owner's actual economic exposure to the QBU's functional currency. Rather, the Treasury Department and the IRS have determined that an approach premised on consistency with section 988, modified to take into account administrability and policy considerations unique to section 987, will carry out the purposes of section 987 most appropriately.

Other comments recommended a hybrid approach that would combine the methodology of the 1991 proposed regulations for computing a section 987 QBU's net income with the methodology of the 2006 proposed regulations for computing section 987 gain or loss. Under the proposed hybrid approach, section 987 gain or loss generally would be determined under the method of the 2006 proposed regulations, but taxable income or loss would be translated into the owner's functional currency at the yearly average exchange rate without any adjustments. A consequence of this hybrid approach is that a different exchange rate would be used to translate recovered basis with respect to historic assets in determining taxable income or loss than would be used to translate such basis to determine section 987 gain or loss. These comments generally favored the FEEP method for determining section 987 gain or loss because it avoids imputing section 987 gain or loss to all assets and liabilities on the balance sheet, as under the 1991 proposed regulations, but asserted that determining taxable income or loss in the functional currency of the section 987 QBU and translating that amount into the owner's functional currency at the yearly average exchange rate without any adjustments is more administrable and more consistent with sections 987(1) and (2) and the legislative history of section 987.

The Treasury Department and the IRS have concluded that the proposed hybrid approach would not achieve the goal of ensuring remittances trigger only ''exchange gain or loss inherent in accumulated earnings or branch capital,'' as contemplated by Congress, and inappropriately would cause offsetting exchange rate effects to be reflected in section 987 taxable income or loss and in the FEEP. (H.R. Conf. Rep. No. 99–841, at 675 (1986)). Although a hybrid approach would simplify the calculation of section 987 taxable income or loss, the simplification would cause basis recovery deductions with respect to depreciable and amortizable assets that are included in section 987 taxable income or loss to reflect exchange rate fluctuations with respect to the asset (for which exchange rate fluctuations may have, at most, only a remote and uncertain effect on value). If the asset is retained on the closing

[7] ASC 830–30–45–12.

[8] ASC 830–30–40–1.

[9] ASC 830–230–45–1.

[10] ASC 830–20–35–1.

balance sheet, the FEEP would reflect equal and offsetting exchange rate fluctuations with respect to the asset, to the extent of any accumulated depreciation or amortization that was included in taxable income and translated at current exchange rates. This is because, in determining section 987 gain or loss under § 1.987–4 of the 2006 proposed regulations, section 987 taxable income or loss is subtracted from the change in the owner functional currency net value (OFCNV) of the section 987 QBU, which is determined using historic exchange rates for historic items. Accordingly, the distortion in the determination of section 987 taxable income or loss with respect to historic assets would cause an offsetting distortion in the FEEP.

An example illustrates the equal and offsetting exchange rate effects that can arise with respect to a historic asset under the hybrid approach. Consider the situation of a section 987 QBU (euro QBU) that has the euro as its functional currency and that has an owner that has the dollar as its functional currency. If euro QBU acquires depreciable equipment for €100 on the last day of year 1, when the historic exchange rate is €1 = $1, and takes into account €10 of depreciation with respect to the equipment in year 2, when the yearly average exchange rate is €1 = $1.50, the €10 of depreciation would be translated at the year 2 average exchange rate into $15 under the hybrid approach rather than $10, as would happen if depreciation were translated at the €1 = $1 historic rate under the 2006 proposed regulations. As a result, section 987 taxable income of euro QBU is $5 lower under the hybrid approach than it would be under the 2006 proposed regulations.

In this example, the FEEP, in turn, would be higher by $5 under the hybrid approach than it would be under the 2006 proposed regulations. This is because, in determining the change to the FEEP for a taxable year, section 987 taxable income is subtracted from the change in OFCNV of euro QBU, which is computed by translating the adjusted basis of historic assets using the historic exchange rate for each asset. For euro QBU, solely with reference to the depreciable equipment, year 2 depreciation causes a $10 reduction in OFCNV, because in computing the change in OFCNV, the €10 change in equipment basis during year 2 is translated at the €1 = $1 historic rate (year 2 closing balance sheet of $90 adjusted basis, less year 1 closing balance sheet of $100 adjusted basis). In order to compute the change to the FEEP for year 2 with respect to the depreciable equipment, section 987 taxable income with respect to the equipment is subtracted from the $10 reduction in OFCNV. Thus, the net effect of the depreciation in the FEEP is to increase section 987 gain reflected in the FEEP by $5 (negative $10 change in OFCNV, less $15 depreciation deduction).

Considering all of these effects together, under the hybrid approach, the appreciation of the euro decreases section 987 taxable income by $5 and increases section 987 gain reflected in the FEEP by $5. In other words, the FEEP reflects currency gain or loss with respect to the depreciable asset that is offset by an amount that was included in section 987 taxable income. This effect on the FEEP persists even after the asset is sold.

The Treasury Department and the IRS have determined that the offsetting effects in section 987 taxable income or loss and in the FEEP under the hybrid approach raise concerns similar to the concerns that Congress addressed, albeit in a different context, in enacting section 1092. In particular, section 1092 reflects a policy concern regarding inconsistent timing of recognition of gains and losses from offsetting positions. Under the hybrid approach, the exchange rate effect with respect to historic assets would be reflected in section 987 taxable income or loss to the extent of any cost recovery deductions with respect to those assets, but equal and offsetting amounts would be reflected in the FEEP and would not be recognized until there are remittances. Thus, offsetting effects arising from a single asset would be taken into account at different times. Accordingly, the Treasury Department and the IRS have determined that it would be inappropriate for regulations under section 987 to permit distortions to section 987 taxable income or loss, for the sake of enhancing administrability, that have the effect of causing offsetting amounts of gain or loss to be reflected in the FEEP with respect to the same asset, where the latter amounts would be recognized only upon voluntary remittances from the QBU. Rather, consistent with the discussion in the preamble to the 2006 proposed regulations, the Treasury Department and the IRS have determined that, in order to carry out the purposes of section 987(3) as indicated by the legislative history, as well as sections 987(1) and (2), and taking into account the authority granted in sections 989(b) and (c), it is appropriate to account for recovered basis for historic assets at the relevant historic rate in determining taxable income or loss of a section 987 QBU. This result could be accomplished by translating recovered basis at the historic rate in the first instance or by translating taxable income or loss determined in the section 987 QBU's functional currency at the yearly average exchange rate and adjusting that amount to properly account for recovered basis, as under the simplified inventory method described in Part II.A.3 of this preamble.

Nonetheless, the Treasury Department and the IRS acknowledge the observations about the complexity and administrability of the 2006 proposed regulations that underlie the recommendation of the hybrid approach. The concerns about offsetting amounts recognized at different times under the hybrid approach would not arise for taxpayers that make the deemed annual termination election set forth in § 1.987–8T(d) of the temporary regulations. Accordingly, as described in the preamble to the temporary regulations, a taxpayer that makes the deemed annual termination election may also elect under § 1.987–3T(d) to apply the hybrid approach. Additionally, the Treasury Department and the IRS have made several changes in these final regulations in response to comments expressing concern about the complexity and administrability of the 2006 proposed regulations.

In addition to the comments recommending a hybrid approach under which taxable income would be translated at a single exchange rate without any adjustments, other comments expressed more particular concerns regarding the complexity and administrability of the FEEP paradigm specifically with respect to inventory and certain other high-volume, low-value assets. Comments suggested that treating items that turn over quickly, such as inventory, or that have low value as marked items would facilitate administration and compliance while introducing little distortion into the FEEP calculation. The Treasury Department and the IRS do not agree with these specific recommendations to expand the scope of marked assets, because even assets that turn over quickly or have low-value individually could inappropriately give rise to significant amounts of section 987 gain or loss in the aggregate over time. The Treasury Department and the IRS do, however, acknowledge the general points about complexity and administrability reflected in these suggestions, which are similar to the concerns expressed in the comments recommending the hybrid approach.

In order to reduce complexity and improve administrability, the final

regulations modify the 2006 proposed regulations in several significant ways, including by permitting more items to be treated as section 987 marked items, simplifying the treatment of marked items so that net income attributable to such items is translated at the average exchange rate, and simplifying the adjustments that are required to translate basis recovery for historic items at the historic rate. These changes balance the administrability benefits of simplifying the final regulations and bringing them into closer conformity with financial accounting rules against the need to minimize the distortions that would result from permitting taxpayers to include uncertain and remote foreign currency gains and losses in taxable income. In particular, the final regulations allow taxpayers to (a) use the yearly average exchange rate as the historic rate, (b) treat prepaid expenses and liabilities for advance payments of unearned income as section 987 marked items, (c) apply a simplified method with respect to inventory, and (d) translate both basis recovery and amount realized with respect to marked assets at the yearly average exchange rate. Additionally, as described in the preamble to the temporary regulations, the temporary regulations treat certain section 988 transactions as marked items and permit taxpayers to elect to more closely conform the treatment of certain section 988 transactions entered into by a section 987 QBU with their treatment for financial accounting purposes.

1. Yearly Average Exchange Rate as the Historic Rate

Under §§ 1.987–1(c)(3)(i) and 1.987–2(d) of the 2006 proposed regulations, the historic rate used to translate the basis of historic assets was the spot rate on the date on which the asset was transferred to, or otherwise acquired by, a section 987 QBU. Thus, when assets were acquired by a section 987 QBU on multiple days during a single taxable year, the 2006 proposed regulations required taxpayers to track multiple historic spot rates. A comment observed that taxpayer systems often only identify the date an asset is placed in service and recommended that taxpayers be permitted to use a yearly average exchange rate in lieu of a spot rate in translating historic items.

The Treasury Department and the IRS agree that using the yearly average exchange rate rather than a spot rate to translate historic items would reduce complexity and improve administrability without introducing significant distortions into the determination of section 987 taxable income or loss or section 987 gain or loss. Accordingly, § 1.987–1(c)(3)(i) generally provides that the historic rate is the yearly average exchange rate for the taxable year when a historic asset is acquired, or a historic liability is incurred, by a section 987 QBU. Taxpayers that prefer to use the spot rate as the historic rate, as under the 2006 proposed regulations, may so elect under § 1.987–1(c)(1)(iii). A taxpayer that makes this election is deemed to also make the historic inventory election under § 1.987–3(c)(2)(iv)(B) that is described in Part II.A.3 of this preamble.

In addition, to further improve administrability, § 1.987–1(c)(3)(iii) permits a section 987 QBU that acquires depreciable or amortizable property in one year and places the asset in service in another year to determine the historic rate for the property based on the date the property is placed in service rather than the year the property was acquired, provided that this convention is consistently applied for all such property attributable to that section 987 QBU.

2. Prepaid Expenses and Liabilities Treated as Section 987 Marked Items

Comments suggested that prepaid expenses and liabilities for advance payments of unearned income should be treated as section 987 marked items because they typically have a short duration and often concern small amounts. The Treasury Department and the IRS have determined that treating these items as marked items generally would promote administrability without introducing significant distortions in the determination of section 987 gain or loss. Accordingly, the definition of marked item under § 1.987–1(d) includes prepaid expenses and liabilities for an advance payment of unearned income where such items have an original term of one year or less.

3. Cost of Goods Sold/Inventory

Under the 2006 proposed regulations, inventory was treated as a historic item. As a result, to determine section 987 taxable income or loss with respect to a section 987 QBU under proposed § 1.987–3, cost of goods sold (COGS) had to be translated at a historic spot rate that corresponded to the date the liquidated inventory was acquired or manufactured. A historic spot rate also had to be used to determine the OFCNV of the QBU under proposed § 1.987–4 with respect to inventory that was reflected on the section 987 QBU's year-end balance sheet. For these purposes, the cost basis of inventory purchased for resale generally would have been translated into the owner's functional currency at the spot rate on the date of purchase. With respect to inventory that was manufactured by the section 987 QBU, it would have been necessary to translate individually the various components of COGS at the appropriate historic spot rate for each cost component, resulting in an effective historic rate for manufactured inventory that was a blend of the historic rates applicable to such components. That is, labor, materials and other inventoriable costs would have been translated at the spot rate on the date the cost was incurred or, in the case of depreciation, the date the relevant depreciable asset was acquired. Comments suggested that translating inventoriable costs at their historic spot rates presented significant administrative difficulties. In addition to the comments requesting that certain high volume property be treated as a marked asset, one comment requested that a simplified method be provided to deal with the administrative difficulties in applying the 2006 proposed regulations to inventory.

In response to comments, these final regulations simplify the translation of COGS and ending inventory in two significant ways. First, the use under § 1.987–1(c)(3) of the yearly average exchange rate rather than a spot rate as the historic rate will significantly simplify the translation of COGS and ending inventory. This change makes it possible to translate all inventory purchased in a given year, and all costs incurred in the production of inventory in a given year (other than depreciation, which is always translated at the historic rate for the year the depreciated property was acquired or placed in service, regardless of whether it is an inventoriable cost), using a single exchange rate. Second, § 1.987–3(c)(2)(iv)(A) prescribes a simplified inventory method under which (i) COGS is translated into the functional currency of the section 987 QBU's owner at the yearly average exchange rate for the current taxable year with a requirement to make only two discrete adjustments to the translated COGS amount, and (ii) a simplified historic rate is used for purposes of determining the OFCNV under Reg. § 1.987–4 for inventory to which the simplified inventory method applies. A taxpayer that prefers the inventory method under the 2006 proposed regulations can elect under § 1.987–3(c)(2)(iv)(B) to translate inventoriable costs that are included in COGS or ending inventory at the historic rate for each such cost and, if they wish, can further elect under

§ 1.987–1(c)(1)(iii) to use the spot rate as the historic rate.

a. Translation of COGS Under the Simplified Inventory Method

Under the simplified inventory method, a section 987 QBU determines COGS in its functional currency and translates that amount at the yearly average exchange rate for the taxable year rather than translating each inventoriable cost at the appropriate historic rate. Taxpayers applying the simplified inventory method must make two adjustments to COGS described in § 1.987–3(c)(3). These adjustments mitigate the consequences of translating COGS at the yearly average exchange rate, as if inventory were a marked asset, rather than translating the inventoriable costs reflected in inventory sold during the taxable year at the appropriate historic rates, as under the 2006 proposed regulations. In particular, the adjustments generally prevent inventory from giving rise to section 987 gain or loss reflected in the FEEP. The adjustments also cause section 987 taxable income or loss to correspond over time to the section 987 taxable income or loss that would have resulted if inventoriable costs were translated at historic rates.

The first adjustment requires the translated COGS amount to be adjusted to reverse the effect of translating (as part of the translation of COGS) cost recovery deductions treated as inventoriable costs at the current yearly average exchange rate rather than at the appropriate historic rates. For a particular cost recovery deduction, this adjustment is calculated as the portion of the deduction treated as an inventoriable cost, computed in the functional currency of the QBU, multiplied by the amount (whether positive or negative) that is determined by subtracting the yearly average exchange rate at which COGS was translated from the historic rate applicable to the property whose cost is being recovered. For example, in a period in which the functional currency of a section 987 QBU has strengthened against its owner's functional currency, the adjustment would reduce the amount of COGS determined in the owner's functional currency to correspond to the amount that would have been determined if cost recovery deductions that are inventoriable costs had been translated at the historic rate, as other cost recovery deductions are translated. To enhance administrability and respond to comments received, this adjustment is taken into account in determining COGS in full in the taxable year in which the inventoriable cost recovery deductions are allowed, regardless of whether a portion of such costs is capitalized into ending inventory.

The second adjustment required under the simplified inventory method differs for inventory accounted for under the last-in, first-out (LIFO) method and for non-LIFO inventory, to reflect the different cost flow assumptions under these accounting methods. For both non-LIFO and LIFO inventory, the adjustment generally causes the amount of section 987 taxable income or loss taken into account by the owner of a section 987 QBU to correspond over time to the amount that would be taken into account if inventoriable costs were translated at their respective historic rates rather than at the yearly average exchange rate. For non-LIFO inventory, the adjustment is made on an annual basis with respect to beginning inventory. For LIFO inventory, the adjustment is made only when a LIFO layer is liquidated or partially liquidated.

i. Adjustment for Non-LIFO Inventory

For non-LIFO inventory, the second adjustment required under the simplified inventory method is an adjustment with respect to beginning inventory. The adjustment, which must be made annually, corrects the distortion that arises from translating beginning inventory at the current yearly average exchange rate as part of translating COGS, after the same inventory was translated in the immediately preceding year (when the inventory represented ending inventory in the cost of goods calculation) at the yearly average exchange rate for that year. This adjustment to COGS is calculated as the amount of beginning inventory, computed in the functional currency of the QBU, multiplied by the amount (whether positive or negative) that is determined by subtracting the yearly average exchange rate for the current taxable year from the yearly average exchange rate for the immediately preceding taxable year. For example, in a period in which the functional currency of a section 987 QBU has strengthened against the owner's functional currency, this adjustment would reduce the amount of COGS determined in the owner's functional currency by the difference between beginning inventory translated at the current yearly average exchange rate and at the yearly average exchange rate for the immediately preceding taxable year.

Over time, this adjustment generally causes the owner of a section 987 QBU to take into account the same amount of section 987 taxable income or loss as would have occurred under the 2006 proposed regulations if the yearly average exchange rate had been used as the historic rate. Additionally, because this adjustment is reflected in section 987 taxable income or loss, which is a component of the § 1.987–4 calculation of section 987 gain or loss with respect to the section 987 QBU, the adjustment ultimately has the effect of preventing non-LIFO inventory on the year-end balance sheet from giving rise to section 987 gain or loss, notwithstanding that the historic rate at which it is translated each year is the yearly average exchange rate.

ii. Adjustment for LIFO Inventory

For LIFO inventory, the second adjustment required under the simplified inventory method is an adjustment with respect to LIFO layers liquidated in whole or part during the year. The adjustment, which must be made only in taxable years in which a LIFO layer is partially or fully liquidated, compensates for the translation of COGS attributable to a liquidated LIFO layer at the current yearly average exchange rate rather than at the historic rate associated with the taxable year in which the inventory layer arose. The adjustment is calculated as the amount of each LIFO layer that has been fully or partially liquidated during the year multiplied by the amount (whether positive or negative) that is determined by subtracting the yearly average exchange rate for the current taxable year from the yearly average exchange rate for the taxable year to which the liquidated layer relates.

As a result of this adjustment, each LIFO layer is treated as having a single historic rate, which is the yearly average exchange rate for the taxable year in which the layer arose.

b. Determination of the OFCNV of Inventory Under the Simplified Method

For purposes of determining section 987 gain or loss under § 1.987–4 with respect to inventory that is reflected on the section 987 QBU's year-end balance sheet, § 1.987–1(c)(3)(i)(B) provides a simplified historic rate for inventory to which the simplified inventory method applies. Under § 1.987–1(c)(3)(i)(B), the simplified historic rate for inventory differs depending on whether the inventory is accounted for under the LIFO method. If the inventory is accounted for under the LIFO method, the historic rate is the average exchange rate for the taxable year in which the relevant LIFO layer arose. If the

inventory is accounted for under a non-LIFO method, the historic rate is the average exchange rate for the taxable year for which the determination of the historic rate is relevant. Accordingly, for purposes of determining section 987 gain or loss with respect to non-LIFO inventory reflected on a section 987 QBU's year-end balance sheet, the inventory is translated at the average exchange rate for that taxable year. Thus, although non-LIFO inventory subject to the simplified method is nominally a historic asset, it is translated at a current exchange rate each year similar to a marked asset, but using the yearly average exchange rate rather than the year-end spot rate.

4. Translation Rates Used for the Sale of a Marked Asset by a Section 987 QBU

The 2006 proposed regulations provided special rules for translating the adjusted basis and amount realized upon a disposition of a marked asset. For a marked asset that was held by a section 987 QBU on the first day of a taxable year, the required translation rate for the adjusted basis and amount realized with respect to the asset was the rate used to translate the basis of such asset from the section 987 QBU's functional currency into the owner's functional currency in determining the owner functional currency net value of the section 987 QBU for the preceding taxable year under § 1.987–4. For a marked asset acquired during the taxable year, the adjusted basis and amount realized were translated at the spot rate on the date the asset was acquired. In response to general comments on the complexity of administering the 2006 proposed regulations, and considering the relatively minor distortion that would arise from eliminating these special translation rules, the final regulations do not include a special rule for translating the adjusted basis or amount realized with respect to marked assets. Accordingly, the gain or loss on marked assets generally is determined in the functional currency of the section 987 QBU and translated into the owner's functional currency at the yearly average exchange rate for the year of disposition.

B. Excluded Entities

The 2006 proposed regulations provided that banks, insurance companies, and similar financial entities would not be subject to the regulations. In addition, the 2006 proposed regulations identified leasing companies, finance coordination centers, regulated investment companies, and real estate investment trusts as ''similar financial entities.'' A comment requested that the final regulations clarify the meaning of ''similar financial entities.'' Comments also suggested excluding entities from the scope of ''similar financial entity'' (and therefore making such entities subject to the final regulations) if they primarily engage in transactions with related parties that are not themselves financial entities. A comment noted that it would be anomalous to apply the final regulations with respect to all of the operating entities transacting with a related finance coordination center but not apply the final regulations to the center itself.

The Treasury Department and the IRS agree that the reference to ''similar financial entities'' in the 2006 proposed regulations is unclear and agree that entities primarily engaged in transactions with related persons that are not themselves financial entities should be subject to the final regulations. Accordingly, § 1.987–1(b)(1)(ii) omits the reference to ''similar financial entities,'' and replaces it with specific references to the entities that the 2006 proposed regulations explicitly identified as ''similar financial entities.'' Additionally, the exception from the application of the final regulations is revised based on the comment received to not apply (such that the final regulations do apply) to entities that engage in transactions primarily with persons that are related within the meaning of sections 267(b) or 707(b) and that are not themselves entities identified in § 1.987–1(b)(1)(ii).

The preamble to the 2006 proposed regulations requested comments on the application of the FEEP method to entities excluded from the scope of the 2006 proposed regulations. The Treasury Department and the IRS are still considering how section 987 should apply to excluded entities and request additional comments regarding the appropriate design of rules applying section 987 to excluded entities in light of the rules contained in these final regulations and the temporary regulations. Until regulations providing rules for applying section 987 with respect to such excluded entities are effective, the excluded entities must use a reasonable method to comply with section 987 and cannot rely on these final regulations.

C. Election To Apply Section 988 in Lieu of Section 987

A comment recommended allowing an owner of a section 987 QBU that has a relatively small amount of marked items to elect to not apply section 987 with respect to the QBU and instead to apply section 988 with respect to the items that would be considered marked items of the QBU if section 987 applied. The same comment recommended that the Treasury Department and the IRS consider providing such an election more generally without regard to the relative amount of marked items held by an eligible QBU. The Treasury Department and the IRS have determined that the proposed election would create substantial administrative difficulties for the IRS, particularly given that an electing QBU would maintain books and records in its functional currency but would determine tax consequences by reference to the functional currency of the owner. Accordingly, the recommendation to allow an election not to apply section 987 has not been adopted.

D. Definition of Portfolio Stock

Under § 1.987–2(b)(2) of the 2006 proposed regulations, stock other than portfolio stock is not attributed to an eligible QBU even if it is reflected on the books and records of the eligible QBU. For this purpose, the 2006 proposed regulations provided that stock is portfolio stock if the owner of the eligible QBU owns (directly, indirectly, or constructively) less than 10 percent of the voting power or value of all classes of stock of the corporation. A comment recommended that this rule be based solely on value because voting power should not be a relevant factor in determining whether items of income, gain, deduction, and loss arising from stock are included in section 987 taxable income or loss. The Treasury Department and the IRS agree with this recommendation, which is reflected in § 1.987–2(b)(2).

E. Consistency of Attribution Rules and QBU Concept Across Subpart J

A comment observed that the 2006 proposed regulations provide rules for attributing assets and liabilities, and items of income or expense, to an eligible QBU and that those rules should apply for purposes of sections 985, 987, and 989 to avoid inconsistencies across subpart J. Accordingly, § 1.989(a)–1(d)(3) is revised to provide that the principles of § 1.987–2(b) apply in determining whether an asset, liability, or item of income or expense is properly reflected on the books and records of a QBU.

To further enhance consistency, the definition of an eligible QBU in § 1.987–1(b)(3) is revised to cross-reference the QBU definition under § 1.989–1(a). The 1991 proposed regulations generally would have applied to a QBU within the

meaning of § 1.989(a)–1 that has a functional currency different than the functional currency of its owner. The 2006 proposed regulations, in contrast, did not refer directly to the § 1.989–1(a) QBU definition. Rather, the 2006 regulations generally defined an eligible QBU as activities that constitute a trade or business as defined in § 1.989(a)–1(c) for which a separate set of books and records are maintained. By relying on the definition of a QBU in § 1.989(a)–1, as the 1991 proposed regulations did, the final regulations avoid inadvertently introducing inconsistencies across subpart J in the definition of a QBU.

F. Offsetting Positions

Under § 1.987–2(b)(3)(iii)(C) of the 2006 proposed regulations, if a principal purpose of recording (or failing to record) an item on the books and records of an eligible QBU was the avoidance of U.S. tax under section 987, the Commissioner could reallocate any item between or among the eligible QBU, its owner, and other persons, entities, or eligible QBUs. One relevant factor identified in the 2006 proposed regulations as indicating tax avoidance as a principal purpose of recording (or failing to record) an item on the books and records of an eligible QBU was the presence or absence of an item on such books and records that results in the taxpayer (or a person related to the taxpayer as defined in section 267(b) or 707(b)) having offsetting positions in the functional currency of a section 987 QBU. The ''offsetting position'' concern might arise, for example, when a home office borrows funds denominated in the functional currency of a section 987 QBU and then onlends those funds to its section 987 QBU. Since the intra-taxpayer loan is not recognized, the funding transaction booked to the home office will be a section 988 transaction and the cash booked to the section 987 QBU derived from the funding transaction will be subject to section 987. A comment recommended that the Treasury Department and the IRS restrict the parameters of the ''offsetting position'' factor, particularly in the context of banks.

As discussed in Part II.B of this preamble, these regulations do not apply to banks. Accordingly, this comment will be reconsidered when regulations applying section 987 to banks and other financial entities are developed. Outside of the financial entity context, the Treasury Department and the IRS have determined that the ''offsetting position'' factor in § 1.987–2(b)(3)(iii)(C) is necessary to prevent the use of transactions involving offsetting gains and losses to selectively recognize losses without recognition of gain. Accordingly, the recommendation to restrict the parameters of the ''offsetting position'' factor has not been adopted.

G. Exclusion of Ordinary-Course Transactions From the Definition of a Transfer

Several comments recommended that transactions entered into between two section 987 QBUs of the same taxpayer, or by a section 987 QBU and its home office, in the ordinary course of business should not be considered ''transfers'' that are taken into account in determining the amount of a remittance. These comments noted the complexity associated with tracking a large number of ordinary-course transactions and contended that such transactions were not appropriate occasions to recognize section 987 gain or loss.

The Treasury Department and the IRS have determined that it is not feasible to define the parameters of an ordinary-course exception to the definition of a transfer with sufficient clarity to avoid abuse and permit effective enforcement given the potentially high volume and variety of transactions between a section 987 QBU and its home office. More significantly, determining the net transfer to or from a section 987 QBU, without regard to whether transfers occur in the ordinary course of business, is essential for appropriately determining section 987 gain or loss under § 1.987–4 because all transfers affect the OFCNV of the section 987 QBU. Furthermore, the Treasury Department and the IRS have determined that the annual netting convention of § 1.987–5, which simplifies the calculation of a remittance relative to the 1991 proposed regulations by taking into account only the net transfer to or from a section 987 QBU during a taxable year, appropriately limits the extent to which ordinary course transactions between a section 987 QBU and its home office give rise to a remittance. Accordingly, the recommendation to include an ordinary-course exception to the definition of transfer has not been adopted.

A comment also recommended that the final regulations permit taxpayers to elect to treat disregarded sales of property and services in the ordinary course of business as regarded transactions. The Treasury Department and the IRS have determined that this recommendation, which would result in income or loss recognition on intra-taxpayer transactions, is inconsistent with the paradigm of section 987 and the entity classification regulations under section 7701. Accordingly, the recommendation has not been adopted.

H. Extension of the Grouping Rules

Section 1.987–1(b)(2)(ii) of the 2006 proposed regulations allows a taxpayer to elect to treat all of its directly owned section 987 QBUs with the same functional currency as a single QBU for purposes of section 987. This rule, however, does not allow different members of a consolidated group to group their section 987 QBUs with the same currency into a single QBU. In the preamble to the 2006 proposed regulations, the Treasury Department and the IRS requested comments on whether a grouping election should be allowed with respect to section 987 QBUs owned by different members of a consolidated group and how this election should be technically effectuated.

Several comments recommended extending the grouping rules to corporations that file a consolidated return so that a consolidated group could make transfers among section 987 QBUs without causing a remittance. However, based on the comments received, the Treasury Department and the IRS have been unable to reconcile in a satisfactory manner the timing of section 987 gain or loss and section 987 taxable income or loss under the final regulations with the principles of § 1.1502–13, including separate entity accounting for consolidated group members. As a result, this recommendation has not been adopted in the final regulations. The Treasury Department and the IRS continue to welcome comments with specific recommendations regarding how grouping of section 987 QBUs owned by different consolidated group members could be achieved in a manner consistent with the consolidated return regulations.

A comment requested an election to group section 987 QBUs that are directly owned with section 987 QBUs that are indirectly owned through section 987 aggregate partnerships. The Treasury Department and the IRS have determined that allowing grouping of directly and indirectly owned section 987 QBUs would be inconsistent with the treatment of transactions between a partnership and its partner (and between eligible QBUs of the partnership and of the partner) as regarded transactions for Federal income tax purposes. Additionally, it is unclear how the treatment of directly and indirectly owned section 987 QBUs as a single section 987 QBU could be reconciled with the general requirement under sections 702 and 703 that a

partnership determine its income separately. Due to the uncertainties about how directly and indirectly owned section 987 QBUs could be grouped in a manner consistent with the principles of subchapter K, the recommendation has not been adopted.

A comment requested that an owner be permitted to elect to group less than all of its section 987 QBUs with the same functional currency. The Treasury Department and the IRS observe that it is possible for an owner to have section 987 gain with respect to some of its section 987 QBUs and section 987 loss with respect to other section 987 QBUs with the same functional currency. In light of this possibility, the Treasury Department and the IRS are concerned that the ability to group section 987 QBUs without the constraint of a consistency requirement for all section 987 QBUs with the same functional currency could inappropriately facilitate the recognition of section 987 losses coupled with the deferral of section 987 gains. Accordingly, the recommendation has not been adopted.

I. Adjustment of the Computation of Net Unrecognized Exchange Gain or Loss for Tax-Exempt Income and Non-Deductible Expenses

Section 1.987–4 of the 2006 proposed regulations provided a seven-step process for determining the unrecognized section 987 gain or loss of a section 987 QBU for a taxable year. Comments noted that this calculation did not take into account the effects of tax-exempt income and non-deductible expenses on a section 987 QBU's cash flows. The comments advised that this omission would introduce distortions into the calculation of unrecognized section 987 gain or loss for a taxable year since these items affect a section 987 QBU's balance sheet. In response to these comments, § 1.987–4(d) reflects additional steps in the calculation of unrecognized section 987 gain or loss that account for nondeductible expenses (Step 7) and tax-exempt income (Step 8). Step 7 also now explicitly accounts for foreign taxes claimed as a credit, which must be translated at the same rate at which such taxes were translated under section 986(a).

J. Clarification That the Rules of §§ 1.987–3 and –4 Apply for Determining the E&P of a Corporation

Comments indicated that the 2006 proposed regulations did not clearly specify whether the rules provided for determining section 987 taxable income or loss applied for purposes of determining the earnings and profits of a foreign corporation. Accordingly, § 1.987–3(a) clarifies that a foreign corporation that owns a section 987 QBU must apply § 1.987–3 in determining earnings and profits with respect to the section 987 QBU.

K. FEEP Annual Calculation Requirement

Section 1.987–4(a) of the 2006 proposed regulations required the determination of the net unrecognized section 987 gain or loss of a section 987 QBU by the owner annually. In addition, § 1.987–9 of the 2006 proposed regulations required the taxpayer to keep annual records that are sufficient to establish each section 987 QBU's section 987 gain or loss. A comment requested elimination of these annual calculations and recordkeeping requirements. The Treasury Department and the IRS remain of the view that the annual calculation and recordkeeping requirements are necessary for IRS examiners to verify taxpayer compliance with the final regulations. Based on its experience examining taxpayer positions that relate to events in prior years, the IRS has determined that contemporaneous recordkeeping and calculation requirements provide a significantly more reliable basis for verifying compliance than calculations performed years after the relevant events, which in many cases would be performed by individuals without direct access to the individuals most familiar with the underlying facts or responsible for producing and maintaining the records. Accordingly, the annual requirements have been retained.

L. Character and Source of Section 987 Gain or Loss

Consistent with the 1991 proposed regulations, the 2006 proposed regulations required the owner of a section 987 QBU to determine the character and source of section 987 gain or loss for all purposes of the Code, including for determining the extent to which section 987 gain or loss gives rise to subpart F income. In particular, § 1.987–6(b)(2) of the 2006 proposed regulations required the owner to use the asset method under § 1.861–9T(g) in the year of a remittance to characterize and source section 987 gain or loss for all purposes by reference to the assets of the section 987 QBU.

A comment recommended an exception that would allow a taxpayer to elect to trace identified amounts of section 987 gain or loss to particular assets or liabilities and to characterize such gain or loss by reference to the income or expense derived (or to be derived) from such items. The Treasury Department and the IRS have determined that tracing section 987 gain or loss to particular assets and liabilities is inconsistent with the FEEP method, which aggregates and pools section 987 gain and loss for all assets and liabilities and for all years prior to a remittance. Accordingly, the Treasury Department and the IRS decline to adopt this comment.

A comment questioned whether section 987(3), which refers to sourcing section 987 gain or loss by reference to post-1986 accumulated earnings, provided a sufficient basis for characterizing section 987 gain or loss as subpart F income. The comment recommended against treating section 987 gain as subpart F income but also recommended that, if it were so treated, the final regulations provide a business needs exception similar to that under section 954(c)(1)(D). Another comment acknowledged the Treasury Department's authority under section 989(c)(5) to characterize section 987 gain as subpart F income but questioned the consistency of the requirement in the 2006 proposed regulations to use the asset method of § 1.861–9T to characterize section 987 gain or loss with the reference in section 987(3) to sourcing section 987 gain or loss by reference to post-1986 accumulated earnings. The comment recommended that the character and source of section 987 gain or loss be determined by reference to post-1986 accumulated earnings.

The Treasury Department and the IRS have determined that sourcing and characterizing section 987 gain or loss with direct reference to post-1986 accumulated earnings would give rise to substantial complexity and compliance burdens, including the need to track earnings of a section 987 QBU in separate categories over a long period of time. This approach also presents conceptual difficulties, given that section 987 gain or loss arises from marked assets and liabilities rather than accumulated earnings, and allows for planning opportunities if there are deficits in post-1986 accumulated earnings. The Treasury Department and the IRS continue to believe that, as noted in the preamble to the 2006 proposed regulations, the average tax book value of assets is a reasonable proxy for post-1986 accumulated earnings in the context of section 987. For these reasons, the Treasury Department and the IRS decline to adopt this recommendation. Pursuant to sections 987(3) and 989(c)(5), these regulations follow the approach of the 2006 proposed regulations in requiring the owner to use the asset method of § 1.861–9T(g) to characterize and source

section 987 gain or loss. The final regulations, however, do clarify that in applying the asset method, an owner must consistently determine the value of a section 987 QBU's assets on the basis of either the tax book value or the fair market value of the assets.

Additionally, given the significant symmetry (other than timing) between the FEEP paradigm and section 988, the Treasury Department and the IRS have determined that, for purposes of determining the excess of foreign currency gains over foreign currency losses characterized as foreign personal holding company income under section 954(c)(1)(D), it is appropriate for taxpayers to treat section 987 gain or loss that is characterized by reference to assets that give rise to subpart F income as foreign currency gain or loss attributable to section 988 transactions not directly related to the business needs of the controlled foreign corporation (CFC). This policy, which has been adopted in § 1.987–6(b)(3), will allow taxpayers to offset a section 987 net loss characterized by reference to assets that give rise to subpart F income against a section 988 net gain, and vice versa, in determining subpart F income. Section 987 gain or loss characterized by reference to assets that give rise to subpart F income is treated as attributable to section 988 transactions not directly related to the business needs of the CFC because the Treasury Department and the IRS have determined that using the asset method of § 1.861–9T(g) to characterize and source section 987 gain or loss effectively carries out the purpose of the business needs exclusion of section 954(c)(1)(D). In particular, because the asset method characterizes section 987 gain or loss based on whether assets give rise to subpart F income, section 987 gain or loss will not enter into the determination of foreign personal holding company income to the extent assets of the section 987 QBU do not give rise to subpart F income.

M. Partnerships

The 2006 proposed regulations applied to all partnerships based on an approach (the aggregate approach) that treated a partnership as an aggregate of its partners, rather than as an entity separate from its partners. As explained in the preamble to the 2006 proposed regulations, the Treasury Department and the IRS proposed the aggregate approach because it appropriately determines section 987 gain or loss with respect to partnership assets and liabilities by reference to the functional currencies of the partners that ultimately bear the economic exposure to fluctuations in the exchange rate between their own functional currency and the functional currency of the activities of the partnership. Accordingly, under §§ 1.989(a)–1(b)(2)(i) of the 2006 proposed regulations, a partnership itself was not treated as a section 987 QBU, but certain activities of a partnership that constituted a trade or business could qualify as a QBU that is an eligible QBU of a partner. Thus, a partner generally was treated as owning an eligible QBU consisting of a share of the assets and liabilities held in the partnership's trade or business. Such an eligible QBU could qualify as a section 987 QBU if it had a functional currency different from that of the partner.

Comments requested that the Treasury Department and the IRS reconsider this aggregate approach and that final regulations instead treat a partnership as a separate entity with its own functional currency. The comments generally were premised on the concern that the aggregate approach was overly complex and that minority partners would not have the power to compel a partnership to provide them with the information needed to make the calculations required under the aggregate approach. One comment acknowledged the economic rationale for the aggregate approach but, in light of its complexity, recommended that it apply only in cases in which a partner's interest in partnership capital or profits exceeds a certain threshold, such as 10 percent.

The Treasury Department and the IRS acknowledge the concerns expressed about the complexity of applying the aggregate approach in the context of partnerships with partners that are unrelated to each other. Nonetheless, consistent with the comment recommending the aggregate approach for partners with substantial partnership interests, the Treasury Department and the IRS have determined that it is feasible to administer the aggregate approach with respect to a partnership that is wholly owned by related persons. Moreover, adopting the aggregate approach in that context is important for preventing planning opportunities that would arise if the interposition of a partnership within a group of related parties could significantly alter the results that the group otherwise would experience under section 987 without meaningfully altering the group's economic position. Accordingly, the final section 987 regulations retain the aggregate approach of the 2006 proposed regulations only for so-called ''section 987 aggregate partnerships,'' which are defined in § 1.987–1(b)(5) as partnerships for which all of the capital and profits interests are owned, directly or indirectly, by persons that are related within the meaning of section 267(b) or 707(b). The final regulations reflect a conforming amendment to the definition of a QBU at § 1.989(a)–1(b)(2)(i)(C), which now provides that a partnership, other than a section 987 aggregate partnership, is a QBU.

The 2006 proposed regulations provided a rule for determining a partner's share of the assets and liabilities of an eligible QBU owned indirectly through a partnership. Specifically, § 1.987–7(b) provided that a partner's share of assets and liabilities reflected on the books and records of the eligible QBU must be determined in a manner consistent with how the partners have agreed to share the economic benefits and burdens corresponding to partnership assets and liabilities, taking into account the rules and principles of subchapter K. One comment noted that this rule for allocating assets and liabilities to a partner's indirectly owned section 987 QBU was ambiguous and that the rules and principles of subchapter K do not provide sufficient guidance in this regard. Accordingly, as discussed in the preamble to the temporary regulations, the temporary regulations provide more specific rules for determining a partner's share of the assets and liabilities reflected on the books and records of an eligible QBU owned indirectly through a section 987 aggregate partnership.

As previously discussed in this section, comments recommended that the Treasury Department and the IRS consider adopting an entity approach with respect to partnerships. Under the recommended entity approach, a partnership would have its own functional currency and would apply section 987 with respect to each of its section 987 QBUs to determine its taxable income or loss and section 987 gain or loss in that functional currency. Each partner then would be required to take into account its share of the section 987 taxable income or loss and section 987 gain or loss of the partnership, translated into the partner's functional currency at the average exchange rate for the partner's taxable year.

Although the Treasury Department and the IRS have determined that the aggregate approach is appropriate for applying section 987 to section 987 aggregate partnerships, the Treasury Department and the IRS anticipate that regulations for applying section 987 to other partnerships (non-aggregate partnerships) will be developed under a separate project and may adopt a different approach. Accordingly, the

Treasury Department and the IRS request comments describing how an entity approach might apply to non-aggregate partnerships, including comments on (1) whether and how section 987 should apply to marked items denominated in the non-aggregate partnership's functional currency, (2) the information reporting that would be necessary to apply an entity approach, (3) whether a distinction should be made regarding how section 987 applies with respect to partnerships in which significant U.S. partners and CFCs together own more than 50 percent of the capital and profits interests in the partnership, and (4) the rules that would be needed to coordinate with subchapter K.

N. Terminations

Under the 2006 proposed regulations, a section 987 QBU terminates when the activities of the section 987 QBU cease, substantially all of the assets of the section 987 QBU are transferred to its owner, a CFC owner of a section 987 QBU ceases being a CFC, or the owner of the section 987 QBU ceases to exist in a transaction other than certain liquidations and reorganizations described in section 381(a). The preamble to the 2006 proposed regulations requested comments on whether transfers of some or all of the assets of a section 987 QBU from one member of a consolidated group to another member of the group should result in a remittance or termination, respectively. Several comments supported a rule under which a section 351 transfer of some or all of the assets of a section 987 QBU to other members of a consolidated group would not cause a remittance or termination where those assets continue to be held in a section 987 QBU following the transaction.

The Treasury Department and the IRS remain of the view that a transfer of substantially all of a section 987 QBU's assets and liabilities under section 351 should result in a termination under § 1.987–8(b)(2) because the owner ceases to be subject to section 987 with respect to the section 987 QBU and has no successor in a section 381(a) transaction. Nonetheless, the Treasury Department and the IRS agree that it is appropriate in certain circumstances to defer section 987 gain or loss that otherwise would be recognized as a result of certain transactions, including terminations, that result in deemed transfers from a section 987 QBU where some or all of the assets of the section 987 QBU continue to be reflected on the books and records of a section 987 QBU in the same controlled group. Additionally, the Treasury Department and the IRS have determined that combinations and separations of section 987 QBUs of the same owner generally should not result in recognition of section 987 gain or loss. As discussed in the preamble to the temporary regulations, the temporary regulations provide rules under which certain section 987 gain or loss that otherwise would be recognized upon a combination, separation, termination, or other event with respect to a section 987 QBU is deferred and recognized upon a subsequent event to the extent assets of the section 987 QBU continue to be reflected on the books and records of a section 987 QBU in the same controlled group. Under these rules, a section 351 transfer of some or all of the assets of a section 987 QBU within a consolidated group generally would not result in recognition of section 987 gain or loss, provided the transferred assets continue to be reflected on the books and records of a section 987 QBU.

Comments recommended eliminating the rule in the 2006 proposed regulations under which a section 987 QBU terminates upon its owner ceasing to be a CFC. The comments indicated that the rule is inconsistent with the policy of subpart F and section 1248. One of the comments questioned the authority under subpart J for such a rule. A comment also recommended that the final regulations eliminate the rule under which a section 987 QBU terminates when it is acquired by a non-CFC from a CFC owner in a reorganization in which the CFC owner goes out of existence but has a successor under section 381(a). The Treasury Department and the IRS acknowledge that the policy concern motivating these rules pertains primarily to situations in which a section 987 QBU ceases to be owned by a CFC but continues to be owned by related persons within the meaning of section 267(b). Accordingly, consistent with section 989(c)(5), a section 987 QBU will terminate under § 1.987–8(b)(3), (b)(4) and (c) only in that circumstance.

Comments indicated that it was unclear under the 2006 proposed regulations whether a check-the-box election to treat a foreign disregarded entity that legally owns a section 987 QBU as a corporation for U.S. tax purposes would cause the section 987 QBU to terminate. To provide greater clarity, *Example 6* in § 1.987–8(f) illustrates that when a foreign disregarded entity that legally owns a section 987 QBU elects to be treated as a corporation under the check-the-box regulations in § 301.7701–3, the section 987 QBU terminates due to the deemed transfer of assets from the section 987 QBU to the owner immediately prior to the deemed transfer of assets from the owner to the transferee corporation under section 351. Additionally, § 1.987–2(c)(2)(ii) clarifies that if an asset or liability of a section 987 QBU is sold or exchanged (including in a nonrecognition transaction) for an asset or liability that is not attributable to the section 987 QBU immediately after the exchange (for example, non-portfolio stock deemed to be received in a section 351 exchange), the exchanged asset is treated as transferred from the section 987 QBU to its owner in a disregarded transaction immediately before the exchange. This transfer would be taken into account in determining the amount of the remittance from the section 987 QBU under § 1.987–5.

Under the 2006 proposed regulations, a section 987 QBU terminates when its activities cease, such that it no longer meets the definition of an eligible QBU under § 1.987–1(b)(3). For administrative convenience, § 1.987–8(b)(1) reflects a new provision allowing the owner of a section 987 QBU that ceases its trade or business to continue to treat the section 987 QBU as a section 987 QBU for a reasonable period during the wind-up of the trade or business, which period may not exceed two years from the date the section 987 QBU ceases its activities carried on for profit.

O. Transition Rules

Under the 2006 proposed regulations, a taxpayer that used a reasonable method to comply with section 987 prior to transitioning to the final regulations could choose between the deferral transition method and the fresh start transition method. The deferral transition method generally preserved section 987 gain or loss determined under the taxpayer's prior method, whereas the fresh start method did not.

Under the deferral transition method, a taxpayer would determine section 987 gain or loss under the taxpayer's prior method as if all section 987 QBUs of the taxpayer terminated on the last day of the taxable year preceding the transition date. Such section 987 gain or loss was not recognized but rather was considered as net unrecognized section 987 gain or loss of new section 987 QBUs for purposes of applying section 987 to the taxable year that begins on the transition date. The owner of a section 987 QBU that was deemed terminated under this rule was treated as having transferred all of the assets and liabilities attributable to such section 987 QBU to the new section 987 QBU on the transition date. Exchange rates for translating the amounts of assets and liabilities transferred to the

new section 987 QBU were determined with reference to the historic spot rates for such assets and liabilities, adjusted to take into account gain or loss determined on the deemed termination.

Under the fresh start transition method, the same deemed transactions would be deemed to occur as under the deferral transition method, but no section 987 gain or loss would be determined upon the deemed termination. Exchange rates for translating the amounts of assets and liabilities deemed transferred to the new section 987 QBU were determined with reference to the historic spot rates for such assets and liabilities without adjustment. Accordingly, section 987 gain or loss determined under the owner's prior method was not taken into account. Except to the extent of any previously recognized section 987 gain or loss, the effect of the fresh start method is as if the assets and liabilities on the books and records of a section 987 QBU on the transition date had been the only assets and liabilities held by the QBU from its inception.

The Treasury Department and the IRS received several comments recommending changes to the transition rules under § 1.987–10 of the 2006 proposed regulations. One comment recommended that the deferral transition method be eliminated. The comment stated that the availability of two transition methods seemed overly generous to taxpayers and that the fresh start method was sufficient. The comment further noted that the effect of the elections made by taxpayers would be very one-sided in a manner detrimental to the fisc. Another comment recommended that taxpayers be permitted to elect a ''true fresh start'' method that would translate all assets and liabilities on the first opening balance sheet after the transition at the spot rate on the date of transition and therefore disregard any section 987 gain or loss attributable to the assets and liabilities of the QBU for periods prior to the transition date.

The Treasury Department and the IRS agree with the comment that suggested that the fresh start method is sufficient and that the availability of an election between two different transition methods is unnecessary and detrimental to the fisc. By requiring the translation of assets and liabilities of transitioning QBUs at historic rates, unlike the ''true fresh start'' method suggested by a comment, the fresh start transition method appropriately takes into account the applicability of section 987 prior to the issuance of final regulations. Allowing an election to use the deferral method would allow taxpayers with substantial overall section 987 losses determined under their prior method, which may not correspond to economic losses, to preserve those losses while taxpayers with substantial overall section 987 gains determined under their prior method could avoid taking some of those gains into account by using the fresh start method. Such an election effectively would operate as a one-time election for certain taxpayers to reduce Federal income tax liability. Additionally, the Treasury Department and the IRS have determined that there would be considerable administrative difficulty, as well as potential for opportunistic planning, associated with determining the appropriate translation rates for transitioning under the deferral method from a section 987 method other than the method of the 1991 proposed regulations. Accordingly, the final regulations do not include an election to use the deferral method. Additionally, the final regulations do not include an election to use a ''true fresh start'' method, since that method would fail to account in any way for the applicability of section 987 prior to the transition date with respect to assets and liabilities held by a section 987 QBU on the transition date.

A comment recommended that the final regulations provide further guidance on the application of the fresh start method where a taxpayer cannot trace historic spot exchange rates. In response to this comment, § 1.987–10(b)(3) provides that, if a taxpayer cannot reliably determine the historic rate for a particular asset or liability, the historic rate must be determined based on reasonable assumptions consistently applied. In addition, the general rules of § 1.987–1(c)(3)(i)(A) and (D) ease this burden by providing that the historic rate for assets and liabilities is the relevant yearly average exchange rate, rather than the spot rate.

A comment recommended that taxpayers be permitted to elect retroactively to apply the final regulations to all open years. Such an election effectively would operate as one-time election to reduce Federal income tax liability. Additionally, consistent with the discussion in Part II.K of this preamble about the need for contemporaneous recordkeeping, the Treasury Department and the IRS have determined that retroactive application of the final regulations would present significant administrative and compliance difficulties, given that it would be necessary in many cases to make determinations under the final regulations based on facts that may not be readily ascertainable or verifiable in hindsight. Accordingly, this recommendation has not been adopted.

A comment asserted that taxpayers that recognized section 987 gain or loss under the principles of the 1991 proposed regulations may be treated unfairly relative to taxpayers that did not follow those proposed regulations. To address this perceived unfairness, the comment recommended that taxpayers be permitted to elect to include a section 481(a) adjustment to account for the difference between the amount of section 987 gain or loss that was taken into account under the taxpayer's prior method and the amount that would have been determined under the method in the final regulations. As an initial matter, it is not evident to the Treasury Department and the IRS that any inequity could result from a taxpayer's chosen method of applying section 987, given that, in the absence of applicable regulations, taxpayers have been permitted to apply section 987 using any reasonable method. Regardless of any perceived inequity, however, as discussed earlier in this Part II.O of the preamble, the Treasury Department and the IRS have determined that the fresh start transition method is the appropriate method for transitioning section 987 QBUs to the final regulations. Under the fresh start transition method, unrecognized section 987 gain or loss determined under a prior section 987 method is not taken into account, and marked assets and liabilities reflected on a section 987 QBU's balance sheet on the transition date are translated using a historic rate. These rules, together with the requirement under § 1.987–10(d) to adjust unrecognized section 987 gain or loss to prevent double counting, have a similar effect as allowing a section 481(a) adjustment with respect to section 987 gain or loss arising from assets and liabilities reflected on a section 987 QBU's transition date balance sheet. Additionally, it is unclear how a section 481(a) adjustment could apply with respect to section 987 gain or loss arising from assets and liabilities that are no longer on the balance sheet on the transition date, absent a requirement to redetermine section 987 gain or loss as if the final regulations had applied from the inception of the QBU. For the reasons described in Part II.K of this preamble, the Treasury Department and the IRS have determined that such a requirement would be inadministrable. Furthermore, the Treasury Department and the IRS are concerned that an election to compute a full section 481(a) adjustment, like an election to use the

deferral method, effectively would operate as a one-time election to reduce Federal income tax liability. Accordingly, for the foregoing reasons, this recommendation has not been adopted.

The Treasury Department and the IRS recognize that certain taxpayers have adopted a section 987 method based on a reasonable application of the 2006 proposed regulations (2006 method). Taxpayers that adopted the 2006 method generally already transitioned to that method in accordance with the principles § 1.987–10 of the 2006 proposed regulations. Because the final regulations adopt the 2006 proposed regulations without fundamental changes, it is not necessary or appropriate for taxpayers to transition from the 2006 method to the final regulations under the fresh start method. However, § 1.987–10(c)(2) provides rules clarifying how net unrecognized section 987 gain or loss with respect to a QBU that was subject to the 2006 method is determined under the final regulations. Additionally, because the 2006 proposed regulations required the use of a spot rate for the historic rate and the final regulations specify as a general rule that the historic rate is the yearly average exchange rate, § 1.987–10(c)(3) permits taxpayers to use historic rates determined under their prior 2006 method for assets and liabilities reflected on the balance sheet of a transitioning QBU on the transition date.

P. Elections

Several elections have been included in the final regulations to mitigate potential complexity or administrative burden associated with complying with these regulations. Section 1.987–1(g) provides rules for making elections. As under the 2006 proposed regulations, elections must be made by the owner and must be made for the first taxable year in which the election is relevant in determining the section 987 taxable income or loss or section 987 gain or loss of the section 987 QBU. Elections may not be revoked or changed without the consent of the Commissioner or his delegate. A revocation will be considered if the taxpayer can demonstrate significantly changed circumstances or other circumstances that demonstrate a substantial non-tax business reason for revoking the election.

A comment recommended that the final regulations allow a taxpayer, without the consent of the Commissioner, to adopt or change the translation conventions for any section 987 QBU acquired from an unrelated person in a transaction that does not cause the QBU to terminate. The Treasury Department and the IRS have determined that requiring Commissioner consent to change an election in this circumstance promotes the ability of the IRS to administer the final regulations and does not create an undue burden. Accordingly, this recommendation has not been adopted.

With one exception, the elections under the final regulations are made on a QBU-by-QBU basis. As provided under the 2006 proposed regulations and described in Part II.H of this preamble, an owner must make the grouping election described in § 1.987–1(b)(2)(ii) with respect to all of its section 987 QBUs that have the same functional currency.

The 2006 proposed regulations described elections made under section 987 as methods of accounting but provided procedures for making and revoking such elections that were inconsistent with treating the elections as methods of accounting. This inconsistency is resolved in the final regulations, which do not follow the 2006 proposed regulations in identifying all section 987 elections as methods of accounting and clarify at § 1.987–1(g)(4) that an election under section 987 is not governed by the general rules concerning changes in methods of accounting.

Under § 1.987–1(f) of the 2006 proposed regulations, an election was made by attaching a statement to the timely filed tax return for the first taxable year in which the owner intends the election to be effective. If the owner failed to make an election in a timely manner, the owner was considered to have satisfied the timeliness requirement if (1) the owner was able to demonstrate that the failure was due to reasonable cause and not willful neglect; and (2) once the owner became aware of the failure, the owner attached the election as well as a written statement setting forth the reasons for the failure to timely comply to an amended tax return. The Director of Field Operations had 120 days following the filing to respond if it determined that the failure to comply was not due to reasonable cause or if additional time was needed to make a determination. If the Director did not respond to the taxpayer within 120 days of filing, the owner was deemed to have demonstrated that such failure to timely file was due to reasonable cause.

The Treasury Department and the IRS have determined, in part based on the experience of the IRS in administering other regulations, that the procedures described in the 2006 proposed regulations may inappropriately shift to the IRS a burden that arises in the first instance as a result of a taxpayer's failure to make a timely election. Accordingly, those procedures are not included in the final regulations, and taxpayers who fail to make a timely election may seek relief in accordance with the general rules described in § 301.9100–1 for requesting an extension of time to make an election.

Q. Other Changes

The final regulations reflect other modifications to the language and structure of the 2006 proposed regulations, as well as the inclusion of additional examples, to enhance clarity. The Treasury Department and the IRS do not intend these changes to be interpreted as substantive changes to the 2006 proposed regulations.

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (5 U.S.C. chapter 6). Accordingly, a regulatory flexibility analysis is not required. This certification is based on the fact that these regulations will primarily affect U.S. corporations that have foreign operations, which tend to be larger businesses. Pursuant to section 7805(f) of the Internal Revenue Code, the NPRM preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these final regulations are Mark E. Erwin, Steven D. Jensen and Sheila Ramaswamy of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendment to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 987, 989(c), and 7805 * * *

■ **Par. 2.** Section 1.861–9T is amended by revising paragraph (g)(2)(ii)(A)(*1*) and adding paragraph (g)(2)(vi) to read as follows:

§ 1.861–9T Allocation and apportionment of interest expense (temporary).

* * * * *

(g) * * *

(2) * * *

(ii) * * *

(A) * * *

(*1*) *Section 987 QBU.* In the case of a section 987 QBU (as defined in § 1.987–1(b)(2)), the tax book value shall be determined by applying the rules of paragraphs (g)(2)(i) and (g)(3) of this section to the beginning-of-year and end-of-year functional currency amount of assets. The beginning-of-year functional currency amount of assets shall be determined by reference to the functional currency amount of assets computed under § 1.987–4(d)(1)(i)(B) and (e) on the last day of the preceding taxable year. The end-of-year functional currency amount of assets shall be determined by reference to the functional currency amount of assets computed under § 1.987–4(d)(1)(i)(A) and (e) on the last day of the current taxable year. The beginning-of-year and end-of-year functional currency amount of assets, as so determined within each grouping, must then be averaged as provided in paragraph (g)(2)(i) of this section.

* * * * *

(vi) *Effective/applicability date.* Generally, paragraph (g)(2)(ii)(A)(*1*) of this section shall apply to taxable years beginning on or after one year after the first day of the first taxable year following December 7, 2016. If pursuant to § 1.987–11(b) a taxpayer applies §§ 1.987–1 through 1.987–11 beginning in a taxable year prior to the earliest taxable year described in § 1.987–11(a), then paragraph (g)(2)(ii)(A)(*1*) of this section shall apply to taxable years beginning on or after the first day of such prior taxable year.

* * * * *

■ **Par 3.** Section 1.985–5 is revised to read as follows:

§ 1.985–5 Adjustments required upon change in functional currency.

(a) *In general.* This section applies in the case of a taxpayer or qualified business unit (QBU) (including a section 987 QBU (as defined in § 1.987–1(b)(2)) changing from one functional currency (old functional currency) to another functional currency (new functional currency). A taxpayer or QBU subject to the rules of this section shall make the adjustments set forth in the 3-step procedure described in paragraphs (b) through (e) of this section. Except as otherwise provided in this section, the adjustments shall be made on the last day of the last taxable year ending before the year of change (as defined in § 1.481–1(a)(1)). Gain or loss required to be recognized under paragraphs (b), (d)(2), (e)(2), and (e)(4)(iii) of this section is not subject to section 481 and, therefore, the full amount of the gain or loss must be included in income on the last day of the last taxable year ending before the year of change.

(b) *Step 1—Taking into account exchange gain or loss on certain section 988 transactions.* The taxpayer or QBU shall recognize or otherwise take into account for all purposes of the Internal Revenue Code the amount of any unrealized exchange gain or loss attributable to a section 988 transaction (as defined in section 988(c)(1)(A) through (C)) that, after applying section 988(d), is denominated in terms of or determined by reference to the new functional currency. The amount of such gain or loss shall be determined without regard to the limitations of section 988(b) (that is, whether any gain or loss would be realized on the transaction as a whole). The character and source of such gain or loss shall be determined under section 988.

(c) *Step 2—Determining the new functional currency basis of property and the new functional currency amount of liabilities and any other relevant items.* Except as otherwise provided in this section, the new functional currency adjusted basis of property and the new functional currency amount of liabilities and any other relevant items (for example, items described in section 988(c)(1)(B)(iii)) shall equal the product of the old functional currency adjusted basis or liability and the new functional currency/old functional currency spot rate on the last day of the last taxable year ending before the year of change.

(d) *Step 3A—Additional adjustments that are necessary when a QBU changes functional currency*—(1) *QBU changing to a functional currency other than the owner's functional currency*—(i) *Rule.* If a QBU changes its functional currency, and after the change the QBU is a section 987 QBU that is subject to §§ 1.987–1 through 1.987–11 pursuant to § 1.987–1(b)(1), then the adjustments described in either paragraph (d)(1)(ii) or (d)(1)(iii) of this section shall be taken into account for purposes of section 987.

(ii) *QBU and the owner had different functional currencies prior to the change.* If the QBU and the owner of the QBU had different functional currencies prior to the change and as a result the QBU was a section 987 QBU prior to the change, then the adjustments described in paragraphs (d)(1)(ii)(A) and (d)(1)(ii)(B) of this section shall be taken into account.

(A) *Determining new historic rates.* The historic rate (as defined in § 1.987–1(c)(3)) for the year of change and subsequent taxable years with respect to a historic item (as defined in § 1.987–1(e)) reflected on the balance sheet of the section 987 QBU immediately prior to the year of change shall be equal to the historic rate prior to the year of change (that is, a rate that translates the section 987 QBU's old functional currency into the owner's functional currency) divided by the spot rate (as defined in § 1.987–1(c)(1)) for translating an amount denominated in the section 987 QBU's old functional currency into the section 987 QBU's new functional currency on the last day of the last taxable year ending before the year of change. For example, if a taxpayer with a U.S. dollar (USD) functional currency owns a section 987 QBU that changes from a British pound (GBP) functional currency to a euro (EUR) functional currency, the historic rate for translating a specific historic item of this section 987 QBU from GBP to USD is 1.50, and the spot rate for translating GBP to EUR on the last day of the last taxable year before the change is 1.30, then the new historic rate for translating this historic item from EUR to USD is 1.15 (1.50/1.30).

(B) *Determining the owner functional currency net value of the QBU on the last day of the last taxable year ending before the year of change under § 1.987–4(d)(1)(i)(B).* For purposes of determining the owner functional currency net value of the section 987 QBU on the last day of the last taxable year ending before the year of change under § 1.987–4(d)(1)(i)(B) and § 1.987–4(e), the section 987 QBU's marked items (as defined in § 1.987–1(d)) shall be translated from the section 987 QBU's old functional currency into the owner's functional currency using the spot rate on the last day of the last taxable year ending before the year of change.

(iii) *QBU and the taxpayer had the same functional currency prior to the change.* If a QBU that has the same functional currency as a taxpayer changes its functional currency to a new functional currency that is different

than the functional currency of the taxpayer, and as a result the taxpayer becomes an owner of a section 987 QBU (see § 1.987–1), the taxpayer and section 987 QBU will become subject to section 987 for the year of change and subsequent years.

(2) *QBU changing to the owner's functional currency.* If a section 987 QBU changes its functional currency to the functional currency of its owner, the section 987 QBU shall be treated as if it terminated on the last day of the last taxable year ending before the year of change. See §§ 1.987–5 and 1.987–8 for the effect of a termination of a section 987 QBU that is subject to §§ 1.987–1 through 1.987–11.

(e) *Step 3B—Additional adjustments that are necessary when a taxpayer/owner changes functional currency*—(1) *Corporations.* The amount of a corporation's new functional currency earnings and profits and the amount of its new functional currency paid-in capital shall equal the old functional currency amounts of such items multiplied by the spot rate for translating an amount denominated in the corporation's old functional currency into the corporation's new functional currency on the last day of the last taxable year ending before the year of change. The foreign income taxes and accumulated profits or deficits in accumulated profits of a foreign corporation that were maintained in foreign currency for purposes of section 902 and that are attributable to taxable years of the foreign corporation beginning before January 1, 1987, also shall be translated into the new functional currency at the spot rate.

(2) *Collateral consequences to a United States shareholder of a corporation changing to the United States dollar as its functional currency.* A United States shareholder (within the meaning of section 951(b) or section 953(c)(1)(A)) of a controlled foreign corporation (within the meaning of section 957 or section 953(c)(1)(B)) changing its functional currency to the dollar shall recognize foreign currency gain or loss computed under section 986(c) as if all previously taxed earnings and profits, if any, (including amounts attributable to pre-1987 taxable years that were translated from dollars into functional currency in the foreign corporation's first post-1986 taxable year) were distributed immediately prior to the change.

(3) *Taxpayers that are not corporations.* [Reserved].

(4) *Adjustments to a section 987 QBU's balance sheet and net accumulated unrecognized section 987 gain or loss when an owner changes functional currency*—(i) *Owner changing to a functional currency other than the section 987 QBU's functional currency.* If an owner of a section 987 QBU, subject to §§ 1.987–1 through 1.987–11 pursuant to § 1.987–1(b)(1), changes to a functional currency other than the functional currency of the section 987 QBU, the adjustments described in paragraphs (e)(4)(i)(A) through (C) of this section shall be taken into account for purposes of section 987.

(A) *Determining new historic rates.* The historic rate (as defined in § 1.987–1(c)(3)) for the year of change and subsequent taxable years with respect to a historic item (as defined in § 1.987–1(e)) reflected on the balance sheet of the section 987 QBU immediately prior to the year of change shall be equal to the historic rate prior to the year of change (that is, a rate that translates the section 987 QBU's functional currency into the owner's old functional currency) divided by the spot rate for translating an amount denominated in the owner's new functional currency into the owner's old functional currency on the last day of the last taxable year ending before the year of change. For example, if a taxpayer that owns a section 987 QBU with a British pound functional currency changes from a U.S. dollar functional currency to a euro functional currency, and the historic rate for translating a specific item of the section 987 QBU from GBP to USD is 1.50 and the spot rate for translating EUR to USD on the last day of the last taxable year before the change is 1.10, then the new historic rate for translating this historic item from GBP to EUR is 1.36 (1.50/1.10).

(B) *Determining the owner functional currency net value of the section 987 QBU on the last day of the last taxable year ending before the year of change under § 1.987–4(d)(1)(i)(B).* For purposes of determining the change in the owner functional currency net value of the section 987 QBU on the last day of the last taxable year preceding the year of change under §§ 1.987–4(d)(1)(i)(B) and 1.987–4(e), the section 987 QBU's marked items shall be translated into the owner's new functional currency at the spot rate on the last day of the last taxable year ending before the year of change.

(C) *Translation of net accumulated unrecognized section 987 gain or loss.* Any net accumulated unrecognized section 987 gain or loss determined under § 1.987–4 shall be translated from the owner's old functional currency into the owner's new functional currency using the spot rate for translating an amount denominated in the owner's old functional currency into the owner's new functional currency on the last day of the last taxable year ending before the year of change.

(ii) *Taxpayer with the same functional currency as its QBU changing to a different functional currency.* If a taxpayer with the same functional currency as its QBU changes to a new functional currency and as a result the taxpayer becomes an owner of a section 987 QBU (see § 1.987–1), the taxpayer and the section 987 QBU shall become subject to section 987 for the year of change and subsequent years.

(iii) *Owner changing to the same functional currency as the section 987 QBU.* If an owner changes its functional currency to the functional currency of its section 987 QBU, the section 987 QBU shall be treated as if it terminated on the last day of the last taxable year ending before the year of change. See §§ 1.987–5 and 1.987–8 for the consequences of a termination of a section 987 QBU that is subject to §§ 1.987–1 through 1.987–11.

(f) *Example.* The provisions of this section are illustrated by the following example:

Example. (i) *Facts.* FC, a foreign corporation, owns all of the stock of DC, a domestic corporation. The Commissioner granted permission to change FC's functional currency from the British pound to the euro beginning January 1, 2020. The EUR/GBP exchange rate on December 31, 2019, is €1:£0.50.

(ii) *Determining new functional currency basis of property and liabilities.* The following table shows how FC must convert the items on its balance sheet from the British pound to the euro on December 31, 2019.

	GBP	EUR
Assets:		
Cash on hand	£40,000	€80,000
Accounts Receivable	10,000	20,000
Inventory	100,000	200,000
€100,000 Euro Bond (£100,000 historical basis)	50,000	100,000
Fixed assets:		

	GBP	EUR
Property	200,000	400,000
Plant	500,000	1,000,000
Accumulated Depreciation	(200,000)	(400,000)
Equipment	1,000,000	2,000,000
Accumulated Depreciation	(400,000)	(800,000)
Total Assets	1,300,000	2,600,000
Liabilities:		
Accounts Payable	50,000	100,000
Long-term Liabilities	400,000	800,000
Paid-in-Capital	800,000	1,600,000
Retained Earnings	50,000	100,000
Total Liabilities and Equity	1,300,000	2,600,000

(iii) *Exchange gain or loss on section 988 transactions.* Under paragraph (b) of this section, FC will recognize a £50,000 loss (£50,000 current value minus £100,000 historical basis) on the Euro Bond resulting from the change in functional currency because, after the change, the Euro Bond will no longer be an asset denominated in a non-functional currency. The amount of FC's retained earnings on its December 31, 2019, balance sheet reflects the £50,000 loss on the Euro Bond.

(g) *Effective/applicability date.* Generally, this regulation shall apply to taxable years beginning on or after one year after the first day of the first taxable year following December 7, 2016. If pursuant to § 1.987–11(b) a taxpayer applies §§ 1.987–1 through 1.987–11 beginning in a taxable year prior to the earliest taxable year described in § 1.987–11(a), then this section shall apply to taxable years of the taxpayer beginning on or after the first day of such prior taxable year.

■ **Par. 4.** Section 1.987–0 is added and §§ 1.987–1 through 1.987–5 are revised to read as follows:

* * * * *

Sec.

* * * * *

§ 1.987–0 Section 987; table of contents.

This section lists captioned paragraphs contained in §§ 1.987–1 through 1.987–11.

§ 1.987–1 Scope, definitions, and special rules.

(a) *In general.* These regulations under section 987 (§§ 1.987–1 through 1.987–11) provide rules for determining the taxable income or loss of a taxpayer with respect to a section 987 QBU (as defined in paragraph (b)(2) of this section). Further, these regulations provide rules for determining the timing, amount, character, and source of section 987 gain or loss recognized with respect to a section 987 QBU. This section addresses the scope of these regulations and provides certain definitions, special rules, and the procedures for making the elections provided for in the regulations. Section 1.987–2 provides rules for attributing assets and liabilities and items of income, gain, deduction, and loss to an eligible QBU. It also provides rules regarding the translation of items transferred to a section 987 QBU. Section 1.987–3 provides rules for determining and translating the taxable income or loss of a taxpayer with respect to a section 987 QBU. Section 1.987–4 provides rules for determining net unrecognized section 987 gain or loss. Section 1.987–5 provides rules regarding the recognition of section 987 gain or loss. It also provides rules for determining an owner's basis in assets transferred from a section 987 QBU. Section 1.987–6 provides rules regarding the character and source of section 987 gain or loss. Section 1.987–7 provides rules with respect to section 987 aggregate partnerships. Section 1.987–8 provides rules regarding the termination of a section 987 QBU. Section 1.987–9 provides rules regarding the recordkeeping required under section 987. Section 1.987–10 provides transition rules. Section 1.987–11 provides the effective/applicability date of these regulations.

(b) *Scope of section 987 and definitions*—(1) *Taxpayers subject to section 987*—(i) *In general.* Except as provided in paragraphs (b)(1)(ii) and (b)(6) of this section, an individual or corporation is subject to these regulations under section 987 if such person is an owner (as defined in paragraph (b)(4) of this section) of an eligible QBU (as defined in paragraph (b)(3) of this section) that is a section 987 QBU (as defined in paragraph (b)(2) of this section).

(ii) *Inapplicability to certain entities.* Except as otherwise provided in paragraph (b)(1)(iii) of this section, these regulations under section 987 do not apply to specified entities described in this paragraph (b)(1)(ii), other than specified entities that engage in transactions primarily with related persons within the meaning of section 267(b) or section 707(b) that are not themselves specified entities. For this purpose, specified entities means banks, insurance companies, leasing companies, finance coordination centers, regulated investment companies, or real estate investment trusts. Further, except as otherwise provided in paragraph (b)(1)(iii) of this section, these regulations do not apply to trusts, estates, S corporations, and partnerships other than section 987 aggregate partnerships (as defined in paragraph (b)(5) of this section).

(iii) [Reserved].

(2) *Definition of a section 987 QBU*—(i) *In general.* A section 987 QBU is an eligible QBU (as defined in paragraph (b)(3) of this section) that has a functional currency different from its direct owner. A section 987 QBU also includes the assets and liabilities of an eligible QBU that are considered under paragraph (b)(5)(ii) of this section to be a section 987 QBU of a partner in a section 987 aggregate partnership (as defined in paragraph (b)(5) of this section). A section 987 QBU will continue to be treated as a section 987 QBU of the owner until a sale or other termination of the section 987 QBU as described in § 1.987–8(b). Except as provided in paragraph (b)(2)(ii) of this section, the functional currency of an eligible QBU shall be determined under § 1.985–1.

(ii) *Section 987 QBU grouping election*—(A) *In general.* Except as provided in paragraph (b)(2)(ii)(B) of this section, an owner may elect to treat, solely for purposes of section 987, all section 987 QBUs with the same functional currency that it directly owns as a single section 987 QBU.

(B) *Special grouping rules for section 987 QBUs owned indirectly through a section 987 aggregate partnership.* An owner may elect to treat all section 987 QBUs with the same functional currency owned indirectly through a single section 987 aggregate partnership (as defined in paragraph (b)(5) of this section) as a single section 987 QBU. An owner may not treat section 987 QBUs as a single section 987 QBU if such QBUs are owned indirectly through different section 987 aggregate partnerships. Additionally, an owner may not treat section 987 QBUs that are owned both directly and indirectly through a section 987 aggregate partnership as a single section 987 QBU.

(3) *Definition of an eligible QBU*—(i) *In general.* Eligible QBU means a qualified business unit, as defined in § 1.989(a)–1, that is not subject to the Dollar Approximate Separate Transactions Method rules of § 1.985–3.

(ii) *Exclusion of certain entities.* A corporation, partnership, trust, estate, or entity disregarded as an entity separate from its owner for Federal income tax purposes as described in § 301.7701–2(c)(2) (hereafter referred to as a ''DE'') is not an eligible QBU (even though such an entity may have activities that qualify as an eligible QBU).

(4) *Definition of owner.* For purposes of these regulations under section 987, an owner is any person having direct or indirect ownership in an eligible QBU. Only an individual or corporation may be an owner of an eligible QBU. The term *owner* for section 987 purposes does not include an eligible QBU. For example, a section 987 QBU (QBU1) is not an owner of another section 987 QBU (QBU2) even if QBU1 owns the stock of QBU2.

(i) *Direct ownership.* An individual or a corporation is a direct owner of an eligible QBU if the individual or corporation is the owner for Federal income tax purposes of the assets and liabilities of the eligible QBU.

(ii) *Indirect ownership.* An individual or corporation that is a partner in a section 987 aggregate partnership (as defined in paragraph (b)(5) of this section) and is allocated, under § 1.987–7, all or a portion of the assets and liabilities of an eligible QBU of such partnership is an indirect owner of the eligible QBU.

(5) *Section 987 aggregate partnership*—(i) *In general.* A partnership is a section 987 aggregate partnership if:

(A) All of the interests in partnership capital and profits are owned, directly or indirectly, by persons related to each other within the meaning of sections 267(b) or 707(b). For purposes of this paragraph (b)(5), ownership of an interest in partnership capital or profits is determined in accordance with the rules for constructive ownership provided in section 267(c), other than section 267(c)(3); and

(B) The partnership has one or more eligible QBUs, at least one of which would be a section 987 QBU with respect to a partner if the partner owned the eligible QBU directly.

(ii) *Section 987 QBU of a partner.* The assets and liabilities of an eligible QBU owned through a section 987 aggregate partnership and allocated to a partner under the principles of § 1.987–7(b) are considered to be a section 987 QBU of such partner if the partner has a functional currency different from that of the eligible QBU.

(iii) *Certain unrelated partners disregarded.* In determining whether a partnership is a section 987 aggregate partnership, the interest of an unrelated partner shall be disregarded if the acquisition of such interest has as a principal purpose the avoidance of this paragraph (b)(5).

(6) [Reserved].

(7) *Examples illustrating paragraph (b) of this section.* The following examples illustrate the principles of paragraph (b) of this section. U.S. Corp is a domestic corporation, has the U.S. dollar as its functional currency, and uses the calendar year as its taxable year. Except as otherwise provided, (i) Business A and Business B are eligible QBUs and have the euro and the Japanese yen, respectively, as their functional currencies and (ii) DE1 and DE2 are DEs, have no assets or liabilities, and conduct no activities.

Example 1. (i) *Facts.* U.S. Corp owns Business A and all of the interests in DE1. DE1 maintains a separate set of books and records that are kept in British pounds. DE1 owns pounds and all of the stock of a foreign corporation, FC. DE1 is liable to a lender on a pound-denominated obligation that was incurred to acquire the stock of FC. The FC stock, the pounds, and the liability incurred to acquire the FC stock are recorded on DE1's separate books and records. DE1 has no other assets or liabilities and conducts no activities (other than holding the FC stock and servicing its liability).

(ii) *Analysis.* (A) Pursuant to paragraph (b)(4)(i) of this section, U.S. Corp is the direct owner of Business A because it is the owner of the assets and liabilities of Business A. Because Business A is an eligible QBU with a functional currency that is different from the functional currency of its owner, U.S. Corp, Business A is a section 987 QBU (as defined in paragraph (b)(2) of this section). As a result, U.S. Corp and its section 987 QBU, Business A, are subject to section 987.

(B) Holding the stock of FC and pounds and servicing a liability does not constitute a trade or business within the meaning of § 1.989(a)–1(c). Because the activities of DE1 do not constitute a trade or business within the meaning of § 1.989(a)–1(c), such activities are not an eligible QBU. In addition, pursuant to paragraph (b)(3)(ii) of this section, DE1 itself is not an eligible QBU. As a result, neither DE1 nor its activities qualify as a section 987 QBU of U.S. Corp. Therefore, neither the activities of DE1 nor DE1 itself is subject to section 987. For the foreign currency treatment of payments on DE1's pound-denominated liability, see § 1.988–2(b).

Example 2. (i) *Facts.* U.S. Corp owns all of the interests in DE1. DE1 owns Business A and all of the interests in DE2. The only activities of DE1 are Business A activities and holding the interests in DE2. DE2 owns Business B and Business C. For purposes of this example, Business B does not maintain books and records that are separate from its owner, DE2. Instead, the activities of Business B are reflected on the books and records of DE2, which are maintained in Japanese yen. In addition, Business C has the U.S. dollar as its functional currency, maintains books and records that are separate from the books and records of DE2, and is an eligible QBU.

(ii) *Analysis.* (A) Pursuant to paragraph (b)(3)(ii) of this section, DE1 and DE2 are not eligible QBUs. Pursuant to paragraph (b)(3)(i) of this section, the Business B and Business C activities of DE2, and the Business A activities of DE1, are eligible QBUs. Moreover, pursuant to paragraph (b)(4) of this section, DE1 is not the owner of the Business A, Business B, or Business C eligible QBUs, and DE2 is not the owner of the Business B or Business C eligible QBUs. Instead, pursuant to paragraph (b)(4)(i) of this section, U.S. Corp is the direct owner of the Business A, Business B, and Business C eligible QBUs.

(B) Because Business A and Business B are eligible QBUs with functional currencies that are different than the functional currency of U.S. Corp, Business A and Business B are section 987 QBUs (as defined in paragraph (b)(2) of this section).

(C) The Business C eligible QBU has the same functional currency as U.S. Corp. Therefore, the Business C eligible QBU is not a section 987 QBU.

Example 3. (i) *Facts.* U.S. Corp owns all of the interests in DE1. DE1 owns Business A and Business B. For purposes of this example, assume Business B has the euro as its functional currency.

(ii) *Analysis.* (A) Pursuant to paragraph (b)(3)(ii) of this section, DE1 is not an eligible QBU. Moreover, pursuant to paragraph (b)(4) of this section, DE1 is not the owner of the Business A or Business B eligible QBUs. Instead, pursuant to paragraph (b)(4)(i) of this section, U.S. Corp is the direct owner of the Business A and Business B eligible QBUs.

(B) Business A and Business B constitute two separate eligible QBUs, each with the euro as its functional currency. Accordingly, Business A and Business B are section 987 QBUs of U.S. Corp. U.S. Corp may elect to treat Business A and Business B as a single section 987 QBU pursuant to paragraph (b)(2)(ii)(A) of this section. If such election is made, pursuant to paragraph (b)(4)(i) of this section, U.S. Corp would be the direct owner

of the Business AB section 987 QBU that would include the activities of both the Business A section 987 QBU and the Business B section 987 QBU. In addition, pursuant to paragraph (b)(4) of this section, DE1 would not be treated as the owner of the Business AB section 987 QBU.

Example 4. (i) *Facts.* U.S. Corp owns all the stock of Y, a U.S. corporation that is a member of U.S. Corp's consolidated group. U.S. Corp also owns all the stock of CFC, a controlled foreign corporation (as defined in section 957(a)) of U.S. Corp with the Japanese yen as its functional currency. Y and CFC are the only partners in P, a foreign partnership. P owns DE1 and Business A. DE1 owns Business B.

(ii) *Analysis.* (A) Under paragraph (b)(5)(i) of this section, P is a section 987 aggregate partnership because Y and CFC own all the interests in partnership capital and profits, Y and CFC are related within the meaning of section 267(b), and the requirements of § 1.987–1(b)(5)(i)(B) are satisfied. Pursuant to paragraph (b)(3)(ii) of this section, P and DE1 are not eligible QBUs. Moreover, pursuant to paragraph (b)(4) of this section, for purposes of section 987, neither P nor DE1 is the owner of the Business B eligible QBU, and P is not the owner of the Business A eligible QBU. Instead, pursuant to paragraph (b)(4)(ii) of this section, Y and CFC are indirect owners of the Business A eligible QBU and the Business B eligible QBU to the extent they are allocated the assets and liabilities of such businesses under § 1.987–7.

(B) Because Business A and Business B are eligible QBUs with different functional currencies than Y, the portions of Business A and Business B allocated to Y under § 1.987–7 are section 987 QBUs of Y.

(C) Because the Business A eligible QBU has a different functional currency than CFC, the portion of Business A that is allocated to CFC under § 1.987–7 is a section 987 QBU, and CFC and its section 987 QBU are subject to section 987. Because the Business B eligible QBU has the same functional currency as CFC, the portion of Business B that is allocated to CFC under § 1.987–7 is not a section 987 QBU of CFC.

Example 5. (i) *Facts.* U.S. Corp owns all of the interests in DE1. DE1 owns Business A and all of the interests in DE2. DE2 owns Business B and all of the interests in DE3, an entity disregarded as an entity separate from its owner. DE3 owns Business C, which is an eligible QBU with the Russian ruble as its functional currency.

(ii) *Analysis.* Pursuant to paragraph (b)(3)(ii) of this section, DE1, DE2, and DE3 are not eligible QBUs, and the Business A, Business B, and Business C activities are eligible QBUs. Pursuant to paragraph (b)(4) of this section, an eligible QBU is not an owner of another eligible QBU. Accordingly, the Business A eligible QBU is not the owner of the Business B eligible QBU, and the Business B eligible QBU is not the owner of the Business C eligible QBU. Instead, pursuant to paragraph (b)(4) of this section, U.S. Corp is the direct owner of the Business A, Business B, and Business C eligible QBUs. Because each of the Business A, Business B, and Business C eligible QBUs has a different functional currency than U.S. Corp, such eligible QBUs are section 987 QBUs of U.S. Corp.

(c) *Exchange rates.* Solely for purposes of section 987, the following definitions shall apply.

(1) *Spot rate*—(i) *In general.* Except as otherwise provided in this section, the spot rate means the rate determined under the principles of § 1.988–1(d)(1), (2), and (4) on the relevant date.

(ii) *Election to use a spot rate convention*—(A) *In general—spot rate convention.* An owner may elect to use a spot rate convention that reasonably approximates the spot rate determined in paragraph (c)(1)(i) of this section in lieu of such spot rate. A spot rate convention may be determined with respect to a spot rate at the beginning of a reasonable period, the end of a reasonable period, as an average of spot rates for a reasonable period, or by reference to spot and forward rates for a reasonable period. For this purpose, a reasonable period shall not exceed three months. For example, in lieu of the spot rate determined in paragraph (c)(1)(i) of this section, the spot rate for all transactions during a monthly period can be determined pursuant to one of the following conventions: The spot rate at the beginning of the current month or at the end of the preceding month; the monthly average of daily spot rates for the current or preceding month; or an average of the beginning and ending spot rates for the current or preceding month. Similarly, in lieu of the spot rate determined in paragraph (c)(1)(i) of this section, the spot rate can be determined pursuant to an average of the spot rate and the 30-day forward rate on a day of the preceding month. Use of a spot rate convention that is consistent with the convention used for financial accounting purposes is presumed to reasonably approximate the rate in paragraph (c)(1)(i) of this section. The Commissioner can rebut this presumption if the Commissioner determines that the use of the convention would not clearly reflect income based on the facts and circumstances available at the time of the election.

(B) [Reserved].

(iii) *Election to use spot rates in lieu of yearly average exchange rates.* A taxpayer may elect under this paragraph (c)(1)(iii) to use spot rates in lieu of yearly average exchange rates (as defined in paragraph (c)(2) of this section) for certain purposes. In particular, a taxpayer that makes this election must use the spot rate for purposes of determining the historic rate, as provided in paragraph (c)(3)(ii) of this section, and for purposes of translating items of income, gain, deduction, or loss of a section 987 QBU into the owner's functional currency, as described in § 1.987–3(c)(1). Additionally, a taxpayer that makes this election will be deemed also to elect to use the historic inventory method described in § 1.987–3(c)(2)(iv)(B).

(2) *Yearly average exchange rate.* For purposes of section 987, the yearly average exchange rate is a rate that represents an average exchange rate for the taxable year (or, if the relevant period is less than a full taxable year, such portion of the taxable year) computed under any reasonable method. For example, an owner may determine the yearly average exchange rate based on a daily, monthly or quarterly averaging convention, whether weighted or unweighted, and may take into account forward rates for a period not to exceed three months. Use of an averaging convention that is consistent with the convention used for financial accounting purposes is presumed to be a reasonable method. The Commissioner can rebut this presumption if the Commissioner determines that the use of the convention would not have been expected to clearly reflect income based on the facts and circumstances available at the time of the election.

(3) *Historic rate*—(i) *In general.* Except as otherwise provided in these regulations, the historic rate is determined as described in paragraphs (c)(3)(i)(A) through (E) of this section.

(A) *Assets generally.* In the case of an asset other than inventory that is acquired by a section 987 QBU (including through a transfer), the historic rate is the yearly average exchange rate applicable to the year of acquisition.

(B) *Inventory under the simplified inventory method.* In the case of inventory with respect to which a taxpayer uses the simplified inventory method described in § 1.987–3(c)(2)(iv)(A), the historic rate for inventory accounted for under the last-in, first-out (LIFO) method of accounting is the yearly average exchange rate applicable to the year in which the inventory's LIFO layer arose. The historic rate for all other inventory of such a taxpayer is the yearly average exchange rate for the taxable year for which the determination of the historic rate for such inventory is relevant.

(C) *Inventory under the historic inventory method.* In the case of inventory with respect to which a taxpayer has elected under § 1.987–3(c)(2)(iv)(B) to use the historic inventory method, each inventoriable cost with respect to such inventory may have a different historic rate. The

historic rate for each inventoriable cost is the exchange rate at which such item would be translated under § 1.987–3 if it were not an inventoriable cost.

(D) *Liabilities generally.* In the case of a liability that is incurred or assumed by a section 987 QBU, the historic rate is the yearly average exchange rate applicable to the year the liability is incurred or assumed.

(E) [Reserved].

(ii) *Historic rate when an election to use spot rates in lieu of yearly average exchange rates is in effect.* A taxpayer that has elected under paragraph (c)(1)(iii) of this section to use spot rates in lieu of yearly average exchange rates must determine historic rates under paragraphs (c)(3)(i)(A) and (c)(3)(i)(D) of this section using the spot rate (as defined in paragraph (c)(1) of this section) for the date an asset is acquired by a section 987 QBU or a liability is assumed or incurred by a section 987 QBU in lieu of using the yearly average exchange rate.

(iii) *Date placed in service for depreciable or amortizable property.* In the case of depreciable or amortizable property, an owner may determine the historic rate (whether a yearly average exchange rate or a spot rate, as applicable) by reference to the date such property is placed in service by the section 987 QBU rather than the date the property was acquired, provided that this convention is consistently applied for all such property attributable to that section 987 QBU.

(iv) *Changed functional currency.* In the case of a section 987 QBU or an owner of a section 987 QBU that previously changed its functional currency, § 1.985–5(d)(1)(ii)(A) and § 1.985–5(e)(4)(i)(A), respectively, shall be taken into account in determining the historic rate for an item reflected on the balance sheet of the section 987 QBU immediately prior to the year of change.

(d) *Marked item.* A marked item is an asset (marked asset) or liability (marked liability) that is properly reflected on the books and records of a section 987 QBU under § 1.987–2(b) and that—

(1) Is denominated in, or determined by reference to, the functional currency of the section 987 QBU, is not a section 988 transaction of the section 987 QBU, and would be a section 988 transaction if such item were held or entered into directly by the owner of the section 987 QBU;

(2) Is a prepaid expense or a liability for an advance payment of unearned income, in either case having an original term of one year or less on the date the prepaid expense or liability for an advance payment of unearned income arises; or

(3) [Reserved].

(e) *Historic item.* A historic item is an asset (historic asset) or liability (historic liability) that is properly reflected on the books and records of a section 987 QBU under § 1.987–2(b) and that is not a marked item (as defined in paragraph (d) of this section).

(f) [Reserved].

(g) *Elections*—(1) *In general.* This paragraph (g) provides rules for making elections under section 987. Except as otherwise provided in paragraph (g)(2) of this section, such elections—

(i) May be made separately for each section 987 QBU;

(ii) Are made by the owner of the section 987 QBU (as defined in paragraph (b)(4) of this section); and

(iii) Must be made for the first taxable year in which the election is relevant in determining the section 987 taxable income or loss, or section 987 gain or loss, of the section 987 QBU and in which the regulations implementing the election are applicable with respect to the section 987 QBU.

(2) *Exceptions to the general rules*—(i) *Consistency and timeliness requirements for certain elections.* Notwithstanding paragraph (g)(1)(i) of this section, the following consistency and timeliness requirements apply:

(A) *Section 987 grouping election.* Elections made pursuant to paragraph (b)(2)(ii) of this section (regarding the grouping of section 987 QBUs) are binding on all section 987 QBUs that are eligible to be grouped under the particular election (for example, election to group all euro QBUs owned by the same aggregate partnership), regardless of whether the section 987 QBU is established or acquired after the election is made and regardless of whether the section 987 QBU is identified on the election as required in paragraph (g)(3)(i)(A) of this section.

(B) [Reserved].

(ii) *Persons making elections for QBUs owned by foreign corporations.* Notwithstanding paragraph (g)(1)(ii) of this section, if a section 987 QBU is owned by a foreign corporation, elections shall be made in accordance with § 1.964–1(c) by the foreign corporation's controlling domestic shareholders, as defined under § 1.964–1(c)(5)(i) (dealing with controlled foreign corporations) and § 1.964–1(c)(5)(ii) (dealing with noncontrolled section 902 corporations).

(3) *Manner of making elections*—(i) *Election made by attaching statement to a return.* Except as provided in paragraph (g)(3)(ii) of this section, elections shall be made under section 987 for each section 987 QBU by attaching a statement with the information required in this paragraph (g)(3)(i) to the timely filed tax return of the owner or, in the case of a foreign corporation, other applicable person for the first taxable year in which the election is required to be made under paragraph (g)(1)(iii) of this section.

(A) *Section 987 grouping election.* The election provided in paragraph (b)(2)(ii) of this section must be titled ''Section 987 Grouping Election Under § 1.987–1(b)(2)(ii)'' and provide the following information:

(*1*) The name, address, and functional currency of each section 987 QBU that the taxpayer is grouping together; and

(*2*) The owner's name and address.

(B) *Election to use a spot rate convention.* An election under paragraph (c)(1)(ii) of this section to use a spot rate convention must be titled ''Section 987 Election to Use a Spot Rate Convention Under § 1.987–1(c)(1)(ii)'' and provide the following information:

(*1*) A description of the convention; and

(*2*) The name and address of each section 987 QBU for which the election is being made.

(C) *Election to use spot rates in lieu of yearly average exchange rates.* An election under paragraph (c)(1)(iii) of this section to use spot rates in lieu of yearly average exchange rates must be titled ''Section 987 Election to Use Spot Rates in Lieu of Yearly Average Exchange Rates Under § 1.987–1(c)(1)(iii)'' and provide the following information:

(*1*) A description of the convention; and

(*2*) The name and address of each section 987 QBU for which the election is being made.

(D) *Election to use the historic inventory method.* An election under § 1.987–3(c)(2)(iv)(B) to use the historic inventory method shall be titled ''Section 987 Election to Use the Historic Inventory Method Under § 1.987–3(c)(2)(iv)(B)'' and must provide the name and address of each section 987 QBU for which the election is being made.

(ii) *Election made by filing a dedicated section 987 form.* If the Commissioner publishes a form that provides the manner in which elections are made under section 987, the form shall govern the manner in which elections are made under section 987.

(4) *No change in method of accounting.* An election under section 987 is not governed by the general rules concerning changes in methods of accounting. See also paragraph (g)(5) of this section.

(5) *Revocation of an election.* Elections under section 987 may not be

revoked without the consent of the Commissioner or his delegate. The Commissioner or his delegate will consider allowing a revocation of an election if the taxpayer can demonstrate significantly changed circumstances or such other circumstances that clearly demonstrate a substantial non-tax business reason for revoking the election.

§ 1.987–2 Attribution of items to eligible QBUs; definition of a transfer and related rules.

(a) *Scope and general principles.* Paragraph (b) of this section provides rules for attributing assets and liabilities, and items of income, gain, deduction, and loss, to an eligible QBU. Assets and liabilities are attributed to a section 987 QBU for purposes of section 987. Items of income, gain, deduction, and loss are attributed to a section 987 QBU for purposes of computing the section 987 taxable income of the section 987 QBU and of its owner. Paragraph (c) of this section defines a transfer to or from a section 987 QBU. Paragraph (d) of this section provides translation rules for transfers to a section 987 QBU.

(b) *Attribution of items to an eligible QBU*—(1) *General rules.* Except as provided in paragraphs (b)(2) and (3) of this section, items are attributable to an eligible QBU to the extent they are reflected on the separate set of books and records, as defined in § 1.989(a)–1(d), of the eligible QBU. In the case of a section 987 aggregate partnership, items reflected on the books and records of the partnership and deemed allocated to an eligible QBU of such partnership are considered to be reflected on the books and records of such eligible QBU. For purposes of this section, the term ''item'' refers to any asset or liability, and any item of income, gain, deduction, or loss. Items that are attributed to an eligible QBU pursuant to this section must be adjusted to conform to Federal income tax principles. Except as provided in § 1.989(a)–1(d)(3), these attribution rules apply solely for purposes of section 987. For example, the allocation and apportionment of interest expense under section 864(e) is independent of the rules under section 987.

(2) *Exceptions for non-portfolio stock, interests in partnerships, and certain acquisition indebtedness.* The following items shall not be considered to be on the books and records of an eligible QBU:

(i) Stock of a corporation (whether domestic or foreign), other than stock of a corporation reflected on the books and records (within the meaning of paragraph (b)(1) of this section) of an eligible QBU if the owner of the eligible QBU owns less than 10 percent of the total value of all classes of stock of such corporation. For this purpose, section 318(a) applies in determining ownership, except that in applying section 318(a)(2)(C), the phrase ''10 percent'' is used instead of the phrase ''50 percent.''

(ii) An interest in a partnership (whether domestic or foreign).

(iii) A liability that was incurred to acquire stock described in paragraph (b)(2)(i) of this section or that was incurred to acquire a partnership interest described in paragraph (b)(2)(ii) of this section.

(iv) Income, gain, deduction, or loss arising from the items described in paragraphs (b)(2)(i) through (iii) of this section. For example, a section 951 inclusion with respect to stock of a foreign corporation described in paragraph (b)(2)(i) of this section shall not be considered to be on the books and records of an eligible QBU.

(3) *Adjustments to items reflected on the books and records*—(i) *General rule.* If a principal purpose of recording (or failing to record) an item on the books and records of an eligible QBU is the avoidance of Federal income tax under, or through the use of, section 987, the item must be allocated between or among the eligible QBU, the owner of such eligible QBU, and any other persons, entities (including DEs), or other QBUs within the meaning of § 1.989(a)–1(b) (including eligible QBUs) in a manner that reflects the substance of the transaction. For purposes of this paragraph (b)(3)(i), relevant factors for determining whether such Federal income tax avoidance is a principal purpose of recording (or failing to record) an item on the books and records of an eligible QBU shall include, but are not limited to, the factors set forth in paragraphs (b)(3)(ii) and (iii) of this section. The presence or absence of any factor or factors is not determinative. Moreover, the weight given to any factor (whether or not set forth in paragraphs (b)(3)(ii) and (iii) of this section) depends on the particular case.

(ii) *Factors indicating no tax avoidance.* For purposes of paragraph (b)(3)(i) of this section, factors that may indicate that recording (or failing to record) an item on the books and records of an eligible QBU did not have as a principal purpose the avoidance of Federal income tax under, or through the use of, section 987 include the recording (or not recording) of an item:

(A) For a significant and bona fide business purpose;

(B) In a manner that is consistent with the economics of the underlying transaction;

(C) In accordance with generally accepted accounting principles (or similar comprehensive accounting standard);

(D) In a manner that is consistent with the treatment of similar items from year to year;

(E) In accordance with accepted conditions or practices in the particular trade or business of the eligible QBU;

(F) In a manner that is consistent with an explanation of existing internal accounting policies that is evidenced by documentation contemporaneous with the timely filing of a Federal income tax return for the taxable year; and

(G) As a result of a transaction between legal entities (for example, the transfer of an asset or the assumption of a liability), even if such transaction is not regarded for Federal income tax purposes (for example, a transaction between a DE and its owner).

(iii) *Factors indicating tax avoidance.* For purposes of paragraph (b)(3)(i) of this section, factors that may indicate that a principal purpose of recording (or failing to record) an item on the books and records of an eligible QBU is the avoidance of Federal income tax under, or through the use of, section 987 include:

(A) The presence or absence of an item on the books and records that is the result of one or more transactions that are transitory, for example, due to a circular flow of cash or other property;

(B) The presence or absence of an item on the books and records that is the result of one or more transactions that do not have substance;

(C) The presence or absence of an item on the books and records that results in the taxpayer (or a person related to the taxpayer within the meaning of section 267(b) or section 707(b)) having offsetting positions with respect to the functional currency of a section 987 QBU; and

(D) The absence of any or all of the factors listed in paragraph (b)(3)(ii) of this section.

(4) *Assets and liabilities of a section 987 aggregate partnership or DE that are not attributed to an eligible QBU.* Neither a section 987 aggregate partnership nor a DE is an eligible QBU and, thus, neither entity can be a section 987 QBU. See § 1.987–1(b)(2) and (3). As a result, a section 987 aggregate partnership or DE may own assets and liabilities that are not attributed to an eligible QBU as provided under this paragraph (b) and, therefore, are not subject to section 987. For the foreign

currency treatment of such assets or liabilities, see § 1.988–1(a)(4).

(c) *Transfers to and from section 987 QBUs*—(1) *In general.* The following rules apply for purposes of determining whether there is a transfer of an asset or a liability from an owner to a section 987 QBU, or from a section 987 QBU to an owner. These rules apply solely for purposes of section 987.

(2) *Disregarded transactions*—(i) *General rule.* An asset or liability shall be treated as transferred to a section 987 QBU from its owner (whether direct owner or indirect owner, as defined in § 1.987–1(b)(4)) if, as a result of a disregarded transaction (as defined in paragraph (c)(2)(ii) of this section), such asset or liability is reflected on the books and records of the section 987 QBU within the meaning of paragraph (b) of this section. Similarly, an asset or liability shall be treated as transferred from a section 987 QBU to its owner if, as a result of a disregarded transaction, such asset or liability is no longer reflected on the books and records of the section 987 QBU within the meaning of paragraph (b) of this section.

(ii) *Definition of a disregarded transaction.* For purposes of this section, a disregarded transaction means a transaction that is not regarded for Federal income tax purposes (for example, any transaction between separate section 987 QBUs of the same owner). For purposes of this paragraph (c), a disregarded transaction shall be treated as including the recording of an asset or liability on the books and records of an eligible QBU (as defined in § 1.987–1(b)(3)) of an owner, if the recording is the result of such asset or liability being removed from the books and records of a separate eligible QBU of the same owner, whether such separate eligible QBU is owned directly or is owned indirectly through the same entity (including through a DE or a section 987 aggregate partnership). Additionally, if an asset or liability that is attributable to a section 987 QBU within the meaning of paragraph (b) of this section is sold or exchanged (including in a nonrecognition transaction, such as an exchange under section 351) for an asset or liability that is not attributable to the section 987 QBU immediately after the sale or exchange, the sold or exchanged asset or liability that was attributable to the section 987 QBU immediately before the transaction shall be treated as transferred from the section 987 QBU to its direct or indirect owner in a disregarded transaction immediately before the sale or exchange for purposes of section 987 (including for purposes of recognizing section 987 gain or loss under § 1.987–5) and subsequently sold or exchanged by the owner. The preceding sentence shall not apply with respect to an acquisition or disposition of an interest in a section 987 aggregate partnership or in a DE, as described in paragraph (c)(5) of this section.

(iii) *Items derived from disregarded transactions ignored.* For purposes of section 987, disregarded transactions shall not give rise to items of income, gain, deduction, or loss that are taken into account in determining section 987 taxable income or loss under § 1.987–3.

(3) *Transfers of assets to and from section 987 QBUs owned through section 987 aggregate partnerships*—(i) *Contributions to section 987 aggregate partnerships.* Solely for purposes of section 987, an asset shall be treated as transferred by an indirect owner (as defined in § 1.987–1(b)(4)(ii)) to a section 987 QBU of a partner (as defined in § 1.987–1(b)(5)(ii)) to the extent the indirect owner contributes the asset to the section 987 aggregate partnership that carries on the activities of the section 987 QBU, provided that, immediately prior to the contribution, the asset is not reflected on the books and records of the section 987 QBU within the meaning of paragraph (b) of this section and the asset is reflected on the books and records of the section 987 QBU immediately following such contribution. For purposes of this paragraph (c)(3)(i), deemed contributions of money described under section 752 shall be disregarded. See paragraph (c)(4)(ii) of this section for rules governing the assumption by a partner of liabilities of a section 987 aggregate partnership.

(ii) *Distributions from section 987 aggregate partnerships.* Solely for purposes of section 987, an asset shall be treated as transferred from a section 987 QBU of a partner to its indirect owner to the extent the section 987 aggregate partnership that carries on the activities of the section 987 QBU distributes the asset to the indirect owner, provided that, immediately prior to such distribution, the asset is reflected on the books and records of the section 987 QBU within the meaning of paragraph (b) of this section, and the asset is not reflected on the books and records of the section 987 QBU immediately after such distribution. For purposes of this paragraph (c)(3)(ii), deemed distributions of money described under section 752 shall be disregarded. See paragraph (c)(4)(i) of this section for rules governing the assumption by a section 987 aggregate partnership of liabilities of a partner.

(4) *Transfers of liabilities to and from section 987 QBUs owned through section 987 aggregate partnerships*—(i) *Assumptions of partner liabilities.* Solely for purposes of section 987, a liability of the owner of a section 987 aggregate partnership shall be treated as transferred to a section 987 QBU of a partner if, and to the extent, the section 987 aggregate partnership assumes such liability, provided that, immediately prior to the transfer, the liability is not reflected on the books and records of the section 987 QBU within the meaning of paragraph (b) of this section, and the liability is reflected on the books and records of the section 987 QBU immediately following the transfer.

(ii) *Assumptions of section 987 aggregate partnership liabilities.* Solely for purposes of section 987, a liability of a section 987 aggregate partnership shall be treated as transferred from a section 987 QBU of a partner to its indirect owner if, and to the extent, the indirect owner assumes such liability of the section 987 aggregate partnership, provided that, immediately prior to such assumption, the liability is reflected on the books and records of the section 987 QBU within the meaning of paragraph (b) of this section, and the liability is not reflected on the books and records of the section 987 QBU immediately following the transfer.

(5) *Acquisitions and dispositions of interests in DEs and section 987 aggregate partnerships.* Solely for purposes of section 987, an asset or liability shall be treated as transferred to a section 987 QBU from its owner if, as a result of an acquisition (including by contribution) or disposition of an interest in a section 987 aggregate partnership or DE, such asset or liability is reflected on the books and records of the section 987 QBU. Similarly, an asset or liability shall be treated as transferred from a section 987 QBU to its owner if, as a result of an acquisition or disposition of an interest in a section 987 aggregate partnership or DE, the asset or liability is not reflected on the books and records of the section 987 QBU.

(6) *Changes in form of ownership.* For purposes of this paragraph (c), mere changes in the form of ownership of an eligible QBU shall not result in a transfer to or from a section 987 QBU. Instead, the determination of whether a transfer has occurred in such case shall be made under paragraph (c)(5) of this section. For example, a transaction that causes a direct owner of an eligible QBU to become an indirect owner of the eligible QBU shall not, except to the extent provided in paragraph (c)(5) of this section, result in a transfer to or from a section 987 QBU. See, for example, Rev. Rul. 99–5 (1999–1 CB

434), Rev. Rul. 99–6 (1999–1 CB 432), § 601.601(d)(2) of this chapter, and section 708 and the applicable regulations.

(7) *Application of general tax law principles.* General tax law principles, including the circular cash flow, step-transaction, economic substance, and substance-over-form doctrines, apply for purposes of determining whether there is a transfer of an asset or liability under this paragraph (c), including a transfer of an asset or liability pursuant to a disregarded transaction (as defined in paragraph (c)(2)(ii) of this section).

(8) *Interaction with § 1.988–1(a)(10).* See § 1.988–1(a)(10) for rules regarding the treatment of an intra-taxpayer transfer of a section 988 transaction.

(9) [Reserved].

(10) *Examples.* The following examples illustrate the principles of this paragraph (c). For purposes of the examples, X and Y are domestic corporations, have the U.S. dollar as their functional currency, and use the calendar year as their taxable years. Furthermore, except as otherwise provided, Business A and Business B are eligible QBUs that have the euro and the Japanese yen, respectively, as their functional currencies, and DE1 and DE2 are DEs. For purposes of determining whether any of the transfers in these examples result in remittances, see § 1.987–5.

Example 1. Transfer to a directly owned section 987 QBU. (i) *Facts.* X owns all of the interests in DE1. DE1 owns Business A, which is a section 987 QBU of X. X owns €100 that are not reflected on the books and records of Business A. Business A is in need of additional capital and, as a result, X lends the €100 to DE1 for use in Business A in exchange for a note.

(ii) *Analysis.* (A) The loan from X to DE1 is not regarded for Federal income tax purposes (because it is an interbranch transaction) and therefore is a disregarded transaction (as defined in paragraph (c)(2)(ii) of this section). As a result, the DE1 note held by X and the liability of DE1 under the note are not taken into account under this section.

(B) As a result of the disregarded transaction, the €100 is reflected on the books and records of Business A. Therefore, X is treated as transferring €100 to its Business A section 987 QBU for purposes of section 987. This transfer is taken into account in determining the amount of any remittance for the taxable year under § 1.987–5(c). See § 1.988–1(a)(10)(ii) for the application of section 988 to X as a result of the transfer of non-functional currency to its section 987 QBU.

Example 2. Transfer to a directly owned section 987 QBU. (i) *Facts.* X owns Business A and Business B, both of which are section 987 QBUs of X. X owns equipment that is used in Business A and is reflected on the books and records of Business A. Because Business A has excess manufacturing capacity and X intends to expand the manufacturing capacity of Business B, the equipment formerly used in Business A is transferred to Business B for use by Business B. As a result of the transfer, the equipment is removed from the books and records of Business A and is recorded on the books and records of Business B.

(ii) *Analysis.* The transfer of the equipment from the books and records of Business A to the books and records of Business B is not regarded for Federal income tax purposes (because it is an interbranch transaction), and therefore it is a disregarded transaction for purposes of this paragraph (c). Therefore, for purposes of section 987, the Business A section 987 QBU is treated as transferring the equipment to X, and X is subsequently treated as transferring the equipment to the Business B section 987 QBU. These transfers are taken into account in determining the amount of any remittance for the taxable year under § 1.987–5(c).

Example 3. Intracompany sale of property between two section 987 QBUs. (i) *Facts.* X owns all of the interests in DE1 and DE2. DE1 and DE2 own Business A and Business B, respectively, both of which are section 987 QBUs of X. DE1 owns equipment that is used in Business A and is reflected on the books and records of Business A. For business reasons, DE1 sells a portion of the equipment used in Business A to DE2 in exchange for a fair market value amount of Japanese yen. The yen used by DE2 to acquire the equipment was generated by Business B and was reflected on Business B's books and records. Following the sale, the yen and the equipment will be used in Business A and Business B, respectively. As a result of such sale, the equipment is removed from the books and records of Business A and is recorded on the books and records of Business B. Similarly, as a result of the sale, the yen is removed from the books and records of Business B and is recorded on the books and records of Business A.

(ii) *Analysis.* (A) The sale of equipment between DE1 and DE2 is a transaction that is not regarded for Federal income tax purposes (because it is an interbranch transaction). Therefore the transaction is a disregarded transaction for purposes of paragraph (c) of this section. As a result, the sale is not taken into account under this section and, pursuant to paragraph (c)(2)(iii) of this section, the sale does not give rise to an item of income, gain, deduction, or loss for purposes of determining section 987 taxable income or loss under § 1.987–3. However, the yen and equipment exchanged by DE1 and DE2 in connection with the sale must be taken into account as a disregarded transaction under this paragraph (c).

(B) As a result of the disregarded transaction, the equipment ceases to be reflected on the books and records of Business A and becomes reflected on the books and records of Business B. Therefore, the Business A section 987 QBU is treated as transferring the equipment to X, and X is subsequently treated as transferring such equipment to the Business B section 987 QBU.

(C) Additionally, as a result of the disregarded transaction, the yen currency ceases to be reflected on the books and records of Business B and becomes reflected on the books and records of Business A. Therefore, the Business B section 987 QBU is treated as transferring the yen to X, and X is subsequently treated as transferring such yen from X to the Business A section 987 QBU. The transfers among Business A, Business B and X are taken into account in determining the amount of any remittance for the taxable year under § 1.987–5(c).

Example 4. Sale of property by a section 987 QBU to a corporation that is a member of the consolidated group. (i) *Facts.* X owns all of the stock of Y and all of the interests in DE1. DE1 owns Business A. X and Y file a consolidated return. Business A sells property to Y for €100.

(ii) *Analysis.* The sale of property by Business A to Y is not considered a transfer of property to X (and a corresponding transfer from X to Y) under paragraph (c) of this section because the transaction is regarded for Federal income tax purposes. Rather, for purposes of section 987, the transaction is considered to occur between Business A and Y.

Example 5. Transactions of a section 987 QBU owned through an aggregate partnership. (i) *Facts.* (A) X owns all of the stock of Y and a 50 percent interest in the capital and profits of P, a partnership. Y owns the other 50 percent interest in P. P owns 100 percent of the interests in DE1 and DE2. DE1 owns Business A and DE2 owns Business B.

(B) In connection with Business A, DE1 licenses intangible property to both DE2 and X. X enters into the license agreement in a transaction other than in its capacity as a partner of P and, therefore, the license is considered as occurring between P and one who is not a partner within the meaning of section 707(a). X uses the intangible property in its own trade or business in the U.S. DE2 uses the intangible property in Business B. Pursuant to the license agreement, X and DE2 pay a €30 and a €50 royalty, respectively, to DE1.

(ii) *Analysis.* (A) Under § 1.987–1(b)(5)(i), P is a section 987 aggregate partnership because X and Y own all the interests in partnership capital and profits, X and Y are related within the meaning of section 267(b), and the requirements of § 1.987–1(b)(5)(i)(B) are satisfied. X and Y each have a 50 percent allocable share of the assets and liabilities of Business A and Business B, as determined under § 1.987–7. Under § 1.987–1(b)(5)(ii), the assets and liabilities of Business A allocated to X are a section 987 QBU of X, and the assets and liabilities of Business A allocated to Y are a section 987 QBU of Y. Likewise, the assets and liabilities of Business B allocated to X are a section 987 QBU of X, and the assets and liabilities of Business B allocated to Y are a section 987 QBU of Y.

(B) The license from DE1 to DE2 is not regarded for Federal income tax purposes (because it is an interbranch agreement) and, as a result, royalty payments under the license are disregarded transactions. Thus, pursuant to paragraph (c)(2)(iii) of this section, DE1's receipt of the royalty pursuant to the license agreement does not give rise to

an item of income, gain, deduction, or loss for purposes of determining section 987 taxable income or loss under § 1.987–3. However, the €50 that is paid from DE2 to DE1 pursuant to the license agreement must be taken into account under paragraph (c) of this section. Accordingly, €50 ceases to be reflected on the books and records of Business B and becomes reflected on the books and records of Business A. As a result, a 50 percent allocable share of the €50 royalty payment (€25) is treated as transferred from each of the Business B section 987 QBUs of X and Y, to X and Y, respectively. And subsequently, X and Y are treated as transferring their respective receipts of €25 to their respective Business A section 987 QBUs. These transfers are taken into account in determining the amount of any remittance to either of X or Y for the taxable year under § 1.987–5(c).

(C) The €30 royalty payment from X to DE1 is regarded for Federal income tax purposes (because it is a payment from a partnership to a separate entity). Accordingly, the royalty payment is not a disregarded transaction for purposes of this paragraph (c) and is therefore not treated as a transfer of an asset from an owner to a section 987 QBU. As a result, the payment is not taken into account in determining the amount of any remittance for the taxable year under § 1.987–5(c). Instead, the payment gives rise to an item of income and deduction that must be taken into account in computing section 987 taxable income or loss of Business A pursuant to § 1.987–3.

Example 6. Acquisition of an interest in a partnership. (i) *Facts.* (A) X owns all of the stock of Z, a domestic corporation with the dollar as its functional currency. X also owns all of the stock of Y and a 50 percent interest in the capital and profits of P, a partnership. Y owns the other 50 percent interest in P. P owns Business A, and P owns no other assets or liabilities other than those of Business A.

(B) Z contributes cash to P in exchange for a 20 percent interest in the capital and profits of P. The cash Z contributes to P is used in Business A and is reflected on Business A's books and records.

(ii) *Analysis.* (A) Under § 1.987–1(b)(5)(i), P is a section 987 aggregate partnership because X and Y own all the interests in partnership capital and profits, X and Y are related within the meaning of section 267(b), and the requirements of § 1.987–1(b)(5)(i)(B) are satisfied. Prior to the contribution to P by Z, X and Y each have a 50 percent allocable share of the assets and liabilities of Business A, as determined under § 1.987–7. Under § 1.987–1(b)(5)(ii), the assets and liabilities of Business A allocated to X are a section 987 QBU of X, and the assets and liabilities of Business A allocated to Y are a section 987 QBU of Y.

(B) Following Z's acquisition of a 20 percent interest in P, P remains a section 987 aggregate partnership because X, Y and Z own all the interests in partnership capital and profits; X, Y, and Z are related within the meaning of section 267(b); and the requirements of § 1.987–1(b)(5)(i)(B) are satisfied. Z acquires a 20 percent allocable share of the assets and liabilities of Business A, as determined under § 1.987–7. Under § 1.987–1(b)(5)(ii), the assets and liabilities of Business A allocated to Z are a section 987 QBU of Z (because Z becomes an indirect owner of Business A and Z and Business A have different functional currencies).

(C) As a result of Z's contribution of cash to Business A, through its contribution to P, each of X, Y, and Z are allocated a share of that Business A asset. Accordingly, under § 1.987–2(c)(5), Z is treated as contributing its allocable share of the cash to its Business A section 987 QBU. In addition, Z is treated as transferring X's and Y's respective allocable shares of the cash to X and Y, and X and Y are subsequently treated as transferring that cash to their respective Business A section 987 QBUs.

(D) In addition, as a result of Z's acquisition of its interest in P and Z's consequent acquisition of a Business A section 987 QBU, Z's allocable portion of the assets and liabilities of Business A (other than the cash) cease being reflected on the books and records of the respective Business A section 987 QBUs of each of X and Y. Those allocable portions of assets and liabilities from the Business A section 987 QBUs of X and Y are treated as if they are transferred from such section 987 QBUs to their respective owners, X and Y. These assets and liabilities are consequently recorded on the books and records of Z's Business A section 987 QBU. Accordingly, X and Y are treated as transferring those assets and liabilities to Z, and Z is treated as contributing those assets and liabilities to its new Business A section 987 QBU.

Example 7. Acquisition of an interest in a partnership. (i) *Facts.* The facts are the same as in *Example 6,* except that the cash that Z contributes to P in exchange for a 20 percent interest in P is not used in Business A and is not reflected on Business A's books and records. Instead, the cash is reflected on P's books and records.

(ii) *Analysis.* (A) Following Z's acquisition of a 20 percent interest in P, P remains a section 987 aggregate partnership because X, Y and Z own all the interests in partnership capital and profits; X, Y, and Z are related within the meaning of section 267(b); and the requirements of § 1.987–1(b)(5)(i)(B) are satisfied. Z acquires a 20 percent allocable share of the assets and liabilities of Business A, as determined under § 1.987–7. Under § 1.987–1(b)(5)(ii), the assets and liabilities of Business A allocated to Z are a section 987 QBU of Z (because Z becomes an indirect owner of Business A and Z and Business A have different functional currencies).

(B) As a result of Z's acquisition of its interest in P and Z's consequent acquisition of a Business A section 987 QBU, Z's allocable portion of the assets and liabilities of Business A cease being reflected on the books and records of the respective Business A section 987 QBUs of each of X and Y. Those allocable portions of assets and liabilities from the Business A section 987 QBUs of X and Y are treated as if they are transferred from such section 987 QBUs to their respective owners, X and Y. These assets and liabilities are consequently recorded on the books and records of Z's Business A section 987 QBU. Accordingly, X and Y are treated as transferring those assets and liabilities to Z, and Z is treated as contributing those assets and liabilities to its new Business A section 987 QBU.

Example 8. Conversion of a DE to a partnership through a sale of an interest. (i) *Facts.* X owns all of the stock of Y and all of the interests in DE1. DE1 owns Business A. Y acquires 50 percent of the DE1 interests from X for cash.

(ii) *Analysis.* (A) DE1 is converted to a partnership when Y purchases the 50 percent interest in DE1. For Federal income tax purposes, Y's purchase of 50 percent of X's interest in DE1 is treated as the direct purchase of 50 percent of the assets of Business A because DE1 is disregarded and Business A is treated as held directly by X. Immediately after the sale of 50 percent of Business A to Y, X and Y are treated as contributing their respective interests in the assets of Business A to a partnership. See Rev. Rul. 99–5 (1999–1 CB 434) (situation 1) and § 601.601(d)(2) of this chapter.

(B) For purposes of this paragraph (c), these deemed transactions are disregarded transactions. Under § 1.987–1(b)(5)(i), the newly formed partnership is a section 987 aggregate partnership because X and Y own all the interests in partnership capital and profits, X and Y are related within the meaning of section 267(b), and the requirements of § 1.987–1(b)(5)(i)(B) are satisfied. Because Y is a partner in a section 987 aggregate partnership that owns Business A and because Y and Business A have different functional currencies, Y's portion of the Business A assets and liabilities constitutes a section 987 QBU of Y.

(C) As a result of the conversion of DE1 to a partnership, Y acquires an allocable share of 50 percent of the assets and liabilities of Business A, as determined under § 1.987–7. Accordingly, 50 percent of the assets and liabilities of Business A cease being reflected on the books and records of X's section 987 QBU. Under § 1.987–2(b)(5), these amounts are treated as if they are transferred from X's section 987 QBU to X, and X is treated as transferring these assets and liabilities to Y. Accordingly, the assets and liabilities of Business A allocated to Y are treated as transferred by Y to Y's newly formed Business A section 987 QBU.

Example 9. Conversion of a DE to a partnership through a contribution. (i) *Facts.* X owns all of the stock of Y and all of the interests in DE1. DE1 owns Business A. Y contributes property (that is not then attributed to a section 987 QBU of Y) to DE1 in exchange for an interest in DE1. The property transferred by Y to DE1 is used in Business A and is reflected on the books and records of Business A.

(ii) *Analysis.* (A) DE1 is converted to a partnership when Y contributes property to DE1 in exchange for a 50 percent interest in DE1. For Federal income tax purposes, Y's contribution is treated as a contribution to a partnership in exchange for an ownership interest in the partnership. X is treated as contributing all of Business A to the partnership in exchange for a partnership interest. See Rev. Rul. 99–5 (situation 2), (1999–1 CB 434) and § 601.601(d)(2) of this chapter.

(B) For purposes of this paragraph (c), these deemed transactions are disregarded

transactions. Under § 1.987–1(b)(5)(i), the newly formed partnership is a section 987 aggregate partnership because X and Y own all the interests in partnership capital and profits, X and Y are related within the meaning of section 267(b), and the requirements of § 1.987–1(b)(5)(i)(B) are satisfied. Because Y is a partner in a section 987 aggregate partnership that owns Business A and because Y and Business A have different functional currencies, Y's portion of the Business A assets and liabilities constitutes a section 987 QBU of Y.

(C) As a result of the conversion of DE1 to a partnership, Y acquires an allocable share of 50 percent of the assets and liabilities of Business A, as determined under § 1.987–7. Accordingly, under § 1.987–2(c)(5), Y is treated as contributing its allocable share of its contributed property to its Business A section 987 QBU. In addition, Y is treated as transferring X's allocable share of the contributed property to X, and X is subsequently treated as transferring that property to its Business A section 987 QBUs. In addition, Y's allocable share of the original (pre-conversion) assets and liabilities of Business A cease being reflected on the books and records of X's section 987 QBU. Under § 1.987–2(b)(5), these amounts are treated as if they are transferred from X's section 987 QBU to X, and X is treated as transferring these assets and liabilities to Y. Y is subsequently treated as transferring these assets and liabilities to Y's Business A section 987 QBU.

Example 10. Contribution of assets to a corporation. (i) *Facts.* X owns Business A. X forms Z, a domestic corporation, contributing 50 percent of its Business A assets and liabilities to Z in exchange for all of the stock of Z. X and Z do not file a consolidated tax return.

(ii) *Analysis.* Pursuant to paragraph (b)(2) of this section, the Z stock received in exchange for 50 percent of Business A's assets and liabilities is not reflected on the books and records of, and therefore is not attributable to, Business A for purposes of section 987 immediately after the exchange. As a result, pursuant to paragraph (c)(2)(i) and (ii) of this section, 50 percent of the assets and liabilities of Business A are treated as transferred from Business A to X in a disregarded transaction immediately before the exchange. The result would be the same even if X and Z filed a consolidated return.

Example 11. Circular transfers. (i) *Facts.* X owns Business A. On December 30, 2021, Business A purports to transfer €100 to X. On January 2, 2022, X purports to transfer €50 to Business A. On January 4, 2022, X purports to transfer another €50 to Business A. As of the end of 2021, X has an unrecognized section 987 loss with respect to Business A, such that a remittance, if respected, would result in recognition of a foreign currency loss under section 987.

(ii) *Analysis.* Because the transfer by Business A to X is offset by the transfers from X to Business A that occurred in close temporal proximity, the Internal Revenue Service (IRS) may disregard the purported transfers to and from Business A for purposes of section 987 pursuant to general tax principles under paragraph (c)(7) of this section.

Example 12. Transfers without substance. (i) *Facts.* X owns Business A and Business B. On January 1, 2021, Business A purports to transfer €100 to X. On January 4, 2021, X purports to transfer €100 to Business B. The account in which Business B deposited the €100 is used to pay the operating expenses and other costs of Business A. As of the end of 2021, X has an unrecognized section 987 loss with respect to Business A, such that a remittance, if respected, would result in recognition of a foreign currency loss under section 987.

(ii) *Analysis.* Because Business A continues to have use of the transferred property, the IRS may disregard the €100 purported transfer from Business A to X for purposes of section 987 pursuant to general tax principles under paragraph (c)(7) of this section.

Example 13. Offsetting positions in section 987 QBUs. (i) *Facts.* X owns Business A and Business B. Each of Business A and Business B has the euro as its functional currency. X has not made a grouping election under § 1.987–1(b)(2)(ii). On January 1, 2021, X borrows €1,000 from a third party lender, records the liability with respect to the borrowing on the books and records of Business A, and records the borrowed €1,000 on the books and records of Business B. On December 31, 2022, when Business A has $100 of net unrecognized section 987 loss and Business B has $100 of net unrecognized section 987 gain resulting from the change in exchange rates with respect to the liability and the €1,000, X terminates the Business A section 987 QBU.

(ii) *Analysis.* Because Business A and Business B have offsetting positions in the euro, the IRS will scrutinize the transaction under paragraph (b)(3) of this section to determine if a principal purpose of recording the euro-denominated liability on the books and records of Business A and the borrowed euros on the books and records of Business B was the avoidance of tax under section 987. If such a principal purpose is present, the IRS may reallocate the items (that is, the euros and the euro-denominated liability) between Business A, Business B, and X, under paragraph (c)(7) of this section to reflect the substance of the transaction.

Example 14. Offsetting positions with respect to a section 987 QBU and a section 988 transaction. (i) *Facts.* X owns all of the interests in DE1, and DE1 owns Business A. On January 1, 2021, X borrows €1,000 from a third party lender and records the liability with respect to the borrowing on its books and records. X contributes the €1,000 loan proceeds to DE1 and the €1,000 are reflected on the books and records of Business A. On December 31, 2022, when Business A has $100 of net unrecognized section 987 loss resulting from the change in exchange rates with respect to the €1,000 received from the borrowing, and when the euro-denominated borrowing, if repaid, would result in $100 of gain under section 988, X terminates the Business A section 987 QBU.

(ii) *Analysis.* Because X and Business A have offsetting positions in the euro, the IRS will scrutinize the transaction under paragraph (b)(3) of this section to determine whether a principal purpose of recording the borrowed euros on the books and records of Business A, or not recording the corresponding euro-denominated liability on the books and records of Business A, was the avoidance of tax under section 987. If such a principal purpose is present, the Commissioner may reallocate the items (that is, the euros and the euro-denominated liability) between Business A and X under paragraph (c)(7) of this section to reflect the substance of the transaction.

Example 15. Offsetting positions with respect to a section 987 QBU and a section 988 transaction. (i) *Facts.* X owns all of the stock of Y and all of the interests in DE1. DE1 owns Business A. X and Y file a consolidated return. On January 1, 2021, DE1 lends €1,000 to Y. X records the receivable with respect to the loan on Business A's books and records. On December 31, 2022, when Business A has $100 of net unrecognized section 987 gain resulting from the loan, Y repays the €1,000 liability. The repayment of the euro-denominated borrowing results in $100 of loss to Y under section 988. X claims a $100 loss on its consolidated return under section 988. Business A does not make any remittances to X in 2022, so the offsetting gain with respect to the loan receivable has not been recognized by X.

(ii) *Analysis.* Y, a related party to X, and Business A have offsetting positions in the euro. The IRS will scrutinize the transaction under paragraph (b)(3) of this section to determine whether a principal purpose of recording the euro-denominated receivable on the books and records of Business A, rather than on the books and records of X, was to avoid tax through the use of section 987. If such a principal purpose is present, the IRS may reallocate the euro-denominated receivable between Business A and X under paragraph (c)(7) of this section to reflect the substance of the transaction. Other provisions may also apply to defer or disallow the loss.

Example 16. Loan by section 987 QBU followed by immediate distribution to owner. (i) *Facts.* X owns all of the interests in DE1. DE1 owns Business A. On January 1, 2021, Business A borrows €1,000 from a bank. On January 2, 2021, Business A distributes the €1,000 it received from the bank to X. There are no other transfers between X and Business A during the year. At the end of the year, X has net unrecognized section 987 loss with respect to Business A such that a remittance would result in the recognition of foreign currency loss under section 987.

(ii) *Analysis.* Because the proceeds from the loan to Business A are immediately transferred to X and the distribution from Business A to X could result in the recognition of section 987 loss, the IRS may scrutinize the recording of the loan on the books of Business A and move the loan onto the books of X, resulting in the transfer not being taken into account for purposes of section 987 under paragraph (b)(3) of this section.

Example 17. Payment of interest by section 987 QBU on obligation of owner. (i) *Facts.* X owns all of the interests in DE1. DE1 owns business A. On January 1, X borrows €1,000 from a bank. On July 1, Business A pays €20 in interest on X's €1,000 obligation to the bank.

(ii) *Analysis.* Under general tax law principles as provided in paragraph (c)(7) of this section, on July 1, 2021, Business A is treated for purposes of section 987 as making a transfer of €20 to X, and X is treated as making a €20 interest payment to the bank.

(d) *Translation of items transferred to a section 987 QBU*—(1) *Marked items.* The adjusted basis of a marked asset, or the amount of a marked liability, transferred to a section 987 QBU shall be translated into the section 987 QBU's functional currency at the spot rate (as defined in § 1.987–1(c)(1)) applicable to the date of transfer. If the asset or liability transferred is denominated in (or determined by reference to) the functional currency of the section 987 QBU (for example, cash or a note denominated in the functional currency of the section 987 QBU), no translation is required. See § 1.988–1(a)(10)(ii) for special rules regarding intra-taxpayer transfers.

(2) *Historic items.* The adjusted basis of a historic asset, or the amount of a historic liability, transferred to a section 987 QBU shall be translated into the section 987 QBU's functional currency at the rate provided in § 1.987–1(c)(3).

§ 1.987–3 Determination of section 987 taxable income or loss of an owner of a section 987 QBU.

(a) *In general.* This section provides rules for determining the taxable income or loss, or the earnings and profits, of an owner of a section 987 QBU (hereafter, section 987 taxable income or loss). Paragraph (b) of this section provides rules for determining items of income, gain, deduction, and loss, which generally must be determined in the section 987 QBU's functional currency. Paragraph (c) of this section provides rules for translating each item determined under paragraph (b) of this section into the functional currency of the owner of the section 987 QBU, if necessary. Paragraph (e) of this section provides examples illustrating the application of the rules of this section.

(b) *Determination of each item of income, gain, deduction, or loss in the section 987 QBU's functional currency*—(1) *In general.* Except as otherwise provided in this section, a section 987 QBU shall determine each item of income, gain, deduction, or loss of such section 987 QBU in its functional currency under Federal income tax principles.

(2) *Translation of items of income, gain, deduction, or loss that are denominated in a nonfunctional currency*—(i) *In general.* Except as otherwise provided in paragraphs (b)(2)(ii) and (b)(4) of this section, an item of income, gain, deduction, or loss that is denominated in (or determined by reference to) a nonfunctional currency (including the functional currency of the owner) shall be translated into the section 987 QBU's functional currency at the spot rate (as defined in § 1.987–1(c)(1)) on the date such item is properly taken into account, subject to the limitation under § 1.987–1(c)(1)(ii)(B) regarding the use of a spot rate convention. Examples 1, 2 and 6 of paragraph (e) of this section illustrate the application of this paragraph (b)(2)(i).

(ii) [Reserved].

(3) *Determination in the case of a section 987 QBU owned through a section 987 aggregate partnership*—(i) *In general.* Except as otherwise provided in this paragraph (b)(3), the taxable income or loss of a section 987 aggregate partnership, and the distributive share of any owner that is a partner in such partnership, shall be determined in accordance with the provisions of subchapter K of the Internal Revenue Code.

(ii) *Determination of each item of income, gain, deduction, or loss in the eligible QBU's functional currency.* A section 987 aggregate partnership generally shall determine each item of income, gain, deduction, or loss reflected on the books and records of each of its eligible QBUs under § 1.987–2(b) in the functional currency of each such QBU.

(iii) *Allocation of items of income, gain, deduction, or loss of an eligible QBU.* A section 987 aggregate partnership shall allocate the items of income, gain, deduction, or loss of each eligible QBU among its partners in accordance with each partner's distributive share of such income, gain, deduction, or loss as determined under subchapter K of the Internal Revenue Code.

(iv) *Translation of items into the owner's functional currency.* To the extent the items referred to in paragraph (b)(3)(iii) of this section are allocated to a partner, the partner shall adjust the items to conform to Federal income tax principles and translate the items into the partner's functional currency as provided in paragraph (c) of this section.

(4) [Reserved].

(c) *Translation of items of income, gain, deduction, or loss of a section 987 QBU into the owner's functional currency*—(1) *In general.* Except as otherwise provided in this section, the exchange rate to be used by an owner in translating an item of income, gain, deduction, or loss attributable to a section 987 QBU into the owner's functional currency, if necessary, shall be the yearly average exchange rate (as defined in § 1.987–1(c)(2)) for the taxable year. However, an owner of a section 987 QBU that has elected under § 1.987–1(c)(1)(iii) to use spot rates in lieu of yearly average exchange rates must use the spot rate (as defined in § 1.987–1(c)(1)) for the date each item is properly taken into account.

(2) *Exceptions*—(i) *Recovery of basis with respect to historic assets.* Except as otherwise provided in this section, the exchange rate to be used by the owner in translating any recovery of basis (whether through a sale or exchange; deemed sale or exchange; cost recovery deduction such as depreciation, depletion or amortization; or otherwise) with respect to a historic asset (as defined in § 1.987–1(e)) shall be the historic rate as determined under § 1.987–1(c)(3) for the property to which such recovery of basis is attributable.

(ii) [Reserved].

(iii) *Gain or loss on the sale, exchange or other disposition of an interest in a section 987 aggregate partnership.* [Reserved].

(iv) *Cost of goods sold computation*—(A) *General rule—simplified inventory method.* Cost of goods sold (COGS) for a taxable year shall be translated into the functional currency of the owner at the yearly average exchange rate (as defined in § 1.987–1(c)(2)) for the taxable year and adjusted as provided in paragraph (c)(3) of this section.

(B) *Election to use the historic inventory method.* In lieu of using the simplified inventory method described in paragraph (c)(2)(iv)(A) of this section, the owner of a section 987 QBU may elect under this paragraph (c)(2)(iv)(B) to translate inventoriable costs (including current-year inventoriable costs and costs that were capitalized into inventory in prior years) that are included in COGS at the historic rate as determined under § 1.987–1(c)(3) for each such cost. As described in § 1.987–1(c)(1)(iii), a taxpayer that elects to use spot rates in lieu of yearly average exchange rates as provided in that section will be deemed to have made the election described in this paragraph (c)(2)(iv)(B).

(3) *Adjustments to COGS required under the simplified inventory method*—(i) *In general.* An owner of a section 987 QBU that uses the simplified inventory method described in paragraph (c)(2)(iv)(A) of this section must make the adjustment described in paragraph (c)(3)(ii) of this section. In addition, the owner must make the adjustment described in paragraph (c)(3)(iii) of this section with respect to any inventory for which the section 987 QBU does not use the LIFO inventory

method (as described in section 472) and must make the adjustment described in paragraph (c)(3)(iv) of this section with respect to any inventory for which the section 987 QBU uses the LIFO inventory method. An owner of a section 987 QBU that uses the simplified inventory method must make all of the applicable adjustments described in paragraphs (c)(3)(ii) through (iv) with respect to the section 987 QBU even in taxable years in which the amount of COGS is zero.

(ii) *Adjustment for cost recovery deductions included in inventoriable costs.* The translated COGS amount computed under paragraph (c)(2)(iv)(A) of this section must be increased or decreased (as appropriate) to reflect the difference between the historic rates appropriate for translating cost recovery deductions attributable to other historic assets and the exchange rate used to translate COGS under paragraph (c)(2)(iv)(A) of this section, to the extent any such cost recovery deductions are included in inventoriable costs for the taxable year. The adjustment shall be included as an adjustment to translated COGS computed under paragraph (c)(2)(iv)(A) of this section in full in the year to which the adjustment relates and shall not be allocated between COGS and ending inventory. The adjustment for each cost recovery deduction shall be computed as the product of:

(A) The cost recovery deduction, expressed in the functional currency of the section 987 QBU; and

(B) The exchange rate specified in paragraph (c)(2)(i) of this section for translating the cost recovery deduction (that is, the historic rate for the property to which such deduction is attributable) less the exchange rate used to translate COGS under the simplified inventory method described in paragraph (c)(2)(iv)(A) of this section (that is, the yearly average exchange rate for the taxable year).

(iii) *Adjustment to beginning inventory for non-LIFO inventory.* In the case of inventory with respect to which a section 987 QBU does not use the LIFO inventory method (non-LIFO inventory), the translated COGS amount computed under paragraph (c)(2)(iv)(A) of this section must be increased or decreased (as appropriate) by the product of:

(A) The ending non-LIFO inventory included on the closing balance sheet for the preceding year, expressed in the functional currency of the section 987 QBU; and

(B) The exchange rate described in §§ 1.987–4(e)(2)(ii) and 1.987–1(c)(3)(i)(C) that is used for translating ending inventory on the closing balance sheet for the preceding year (that is, the yearly average exchange rate for the preceding year) less the exchange rate used to translate COGS under paragraph (c)(2)(iv)(A) of this section (that is, the yearly average exchange rate for the taxable year).

(iv) *Adjustment for year of LIFO liquidation.* In the case of inventory with respect to which a section 987 QBU uses the LIFO inventory method, for each LIFO layer liquidated in whole or in part during the taxable year, the translated COGS amount computed under paragraph (c)(2)(iv)(A) of this section must be increased or decreased (as appropriate) by the product of:

(A) The amount of the LIFO layer liquidated during the taxable year, expressed in the functional currency of the section 987 QBU; and

(B) The exchange rate described in §§ 1.987–4(e)(2)(ii) and 1.987–1(c)(3)(i)(C) that is used for translating such LIFO layer (that is, the yearly average exchange rate for the year such LIFO layer arose) less the exchange rate used to translate COGS under paragraph (c)(2)(iv)(A) of this section (that is, the yearly average exchange rate for the taxable year).

(d) [Reserved].

(e) *Examples.* The following examples illustrate the application of this section. For purposes of the examples, U.S. Corp is a domestic corporation that uses the calendar year as its taxable year and has the U.S. dollar as its functional currency. Except as otherwise indicated, U.S. Corp is the owner of Business A, a section 987 QBU with the euro as its functional currency, and elects under paragraph (c)(2)(iv)(B) of this section to use the historic inventory method with respect to Business A but does not make any other elections under section 987. However, where it is specified that U.S. Corp elects to use spot rates in lieu of yearly average exchange rates under § 1.987–1(c)(1)(iii), U.S. Corp also elects under § 1.987–1(c)(1)(ii) to use a spot rate convention. Under this convention, sales booked during a particular month are translated at the average of the spot rates on the first and last day of the preceding month (the ''convention rate''). Exchange rates used in these examples are selected for the purpose of illustrating the principles of this section. No inference (for example, whether a currency is hyperinflationary or not) is intended by their use. See § 1.987–4(g) for an illustration of the simplified inventory method described in paragraphs (c)(2)(iv)(A) and (c)(3) of this section.

Example 1. Business A properly accrues £100 of income from the provision of services. Under paragraph (b)(2)(i) of this section, the £100 is translated into €90 at the spot rate (as defined in § 1.987–1(c)(1)) on the date of accrual, without the use of a spot rate convention. In determining U.S. Corp's taxable income, the €90 of income is translated into dollars at the rate provided in paragraph (c)(1) of this section.

Example 2. Business A sells a historic asset consisting of non-inventory property for £100. Under paragraph (b)(2)(i) of this section, the £100 amount realized is translated into €85 at the spot rate (as defined in § 1.987–1(c)(1)) on the sale date without the use of a spot rate convention. In determining U.S. Corp's taxable income, the €85 is translated into dollars at the rate provided in paragraph (c)(1) of this section. The euro basis of the property is translated into dollars at the rate provided in paragraph (c)(2)(i) of this section (that is, the historic rate as determined under § 1.987–1(c)(3)).

Example 3. (i) Business A uses a first-in, first-out (FIFO) method of accounting for inventory. Business A sells 1,200 units of inventory in 2021 for €3 per unit. Business A's gross sales are translated under paragraph (c)(1) of this section at the yearly average exchange rate for the year of the sale. The yearly average exchange rate is €1 = $1.02 for 2020 and €1 = $1.05 for 2021. Thus, Business A's dollar gross sales will be computed as follows:

GROSS SALES

[2021]

Month	Number of units	Amount in €	€/$ yearly average rate	Amount in $
Jan	100	300	€1 = $1.05	315.00
Feb	200	600	€1 = $1.05	630.00
March	0	0	€1 = $1.05	0
April	200	600	€1 = $1.05	630.00
May	100	300	€1 = $1.05	315.00
June	0	0	€1 = $1.05	0

GROSS SALES—Continued

[2021]

Month	Number of units	Amount in €	€/$ yearly average rate	Amount in $
July	100	300	€1 = $1.05	315.00
Aug	100	300	€1 = $1.05	315.00
Sept	0	0	€1 = $1.05	0
Oct	0	0	€1 = $1.05	0
Nov	100	300	€1 = $1.05	315.00
Dec	300	900	€1 = $1.05	945.00
	1,200	.....	.....	3,780.00

(ii) The purchase price for each inventory unit was €1.50. Under § 1.987–1(c)(3)(i) and paragraph (c)(2)(iv)(B) of this section, the basis of each item of inventory is translated into dollars at the yearly average exchange rate for the year the inventory was acquired.

OPENING INVENTORY AND PURCHASES

[2021]

Month	Number of units	Amount in €	€/$ yearly average rate	Amount in $
Opening inventory (purchased in December 2020)	100	150	€1 = $1.02	153.00
Purchases in 2021:				
Jan	300	450	€1 = $1.05	472.50
Feb	0	0	€1 = $1.05	0
March	0	0	€1 = $1.05	0
April	300	450	€1 = $1.05	472.50
May	0	0	€1 = $1.05	0
June	0	0	€1 = $1.05	0
July	300	450	€1 = $1.05	472.50
Aug	0	0	€1 = $1.05	0
Sept	0	0	€1 = $1.05	0
Oct	0	0	€1 = $1.05	0
Nov	300	450	€1 = $1.05	472.50
Dec	0	0	€1 = $1.05	0
	1,200	.....	.....	1,890.00

(iii) Because Business A uses a FIFO method for inventory, Business A is considered to have sold in 2021 the 100 units of opening inventory purchased in 2020 ($153.00), the 300 units purchased in January 2021 ($472.50), the 300 units purchased in April 2021 ($472.50), the 300 units purchased in July 2021 ($472.50), and 200 of the 300 units purchased in November 2021 ($315.00). Accordingly, Business A's translated dollar COGS for 2021 is $1,885.50. Business A's opening inventory for 2022 is 100 units of inventory with a translated dollar basis of $157.50.

(iv) Accordingly, for purposes of section 987 Business A has gross income in dollars of $1,894.50 ($3,780.00—$1,885.50).

Example 4. (i) The facts are the same as in *Example 3* except that U.S. Corp properly elects under paragraph § 1.987–1(c)(1)(iii) to use spot rates in lieu of yearly average exchange rates. As a result, under paragraph (c)(3) of this section, U.S. Corp uses the convention rate to translate items of income, gain, deduction, or loss where such rate is appropriate. Thus, Business A's dollar gross sales will be computed as follows:

GROSS SALES

[2021]

Sales	Number of units	Amount in €	€/$ convention rate	Amount in $
Jan	100	300	€1 = $1.00	300
Feb	200	600	€1 = $1.05	630
March	0	0	€1 = $1.03	0
April	200	600	€1 = $1.02	612
May	100	300	€1 = $1.04	312
June	0	0	€1 = $1.05	0
July	100	300	€1 = $1.06	318
Aug	100	300	€1 = $1.05	315
Sept	0	0	€1 = $1.06	0
Oct	0	0	€1 = $1.07	0
Nov	100	300	€1 = $1.08	324
Dec	300	900	€1 = $1.08	972

GROSS SALES—Continued

[2021]

Sales	Number of units	Amount in €	€/$ convention rate	Amount in $
	1,200	.....	.....	3,783

(ii) As in *Example 3,* the purchase price for each inventory unit was €1.50. Under § 1.987–3(c)(2)(iv)(B), U.S. Corp uses the convention rate as the historic rate in determining COGS.

OPENING INVENTORY AND PURCHASES

[2021]

Month	Number of units	Amount in €	€/$ convention rate	Amount in $
Opening inventory (purchased in December 2020)	100	150	€1 = $1.02	153
Purchases in 2021:				
Jan	300	450	€1 = $1.00	450
Feb	0	0	€1 = $1.05	0
March	0	0	€1 = $1.03	0
April	300	450	€1 = $1.02	459
May	0	0	€1 = $1.04	0
June	0	0	€1 = $1.05	0
July	300	450	€1 = $1.06	477
Aug	0	0	€1 = $1.05	0
Sept	0	0	€1 = $1.06	0
Oct	0	0	€1 = $1.07	0
Nov	300	450	€1 = $1.08	486
Dec	0	0	€1 = $1.08	486
	1,200	.....	.....	1,872

(iii) As set forth in (i), Business A's gross sales are $3,783.

(iv) Because Business A uses a FIFO method for inventory, Business A is considered to have sold in 2021 the 100 units of opening inventory purchased in December 2020 ($150), the 300 units purchased in January 2021 ($450), the 300 units purchased in April 2021 ($459), the 300 units purchased in July 2021 ($477), and 200 of the 300 units purchased in November 2021 ($324). Thus, Business A's COGS is $1,860.

(v) Accordingly, Business A has gross income in dollars of $1,923 ($3,783 − $1,860).

Example 5. The facts are the same as in *Example 3* except that during 2021, Business A incurred €100 of depreciation expense with respect to a truck. No portion of the depreciation expense is an inventoriable cost. The truck was purchased on January 15, 2020. The yearly average exchange rate for 2020 was €1 = $1.02. Under paragraph (c)(2)(i) of this section, the €100 of depreciation is translated into dollars at the historic rate. Under § 1.987–1(c)(3)(i), the historic rate is the yearly average rate for 2020. Accordingly, U.S. Corp takes into account depreciation of $102 with respect to Business A in 2021.

Example 6. The facts are the same as in *Example 5* except that the €100 of depreciation expense incurred during 2021 with respect to the truck is an inventoriable cost. As a result, the depreciation expense is capitalized into the 1,200 units of inventory purchased by Business A in 2021. Of those 1,200 units, 1,100 units are sold during the year, and 100 units become ending inventory. The portion of depreciation expense capitalized into inventory that is sold during 2021 is reflected in Business A's euro COGS and is translated at the €1 = $1.02 yearly average exchange rate for 2020, the year in which the truck was purchased. The portion of the depreciation expense capitalized into the 100 units of ending inventory is not taken into account in 2021 but, rather, will be taken into account in the year the ending inventory is sold, translated at the €1 = $1.02 yearly average exchange rate for 2020.

Example 7. Business A purchased raw land on October 16, 2020, for €8,000 and sold the land on November 1, 2021, for €10,000. The yearly average exchange rate was €1 = $1.02 for 2020 and €1 = $1.05 for 2021. Under paragraph (c)(1) of this section, the amount realized is translated into dollars at the yearly average exchange rate for 2021 (€10,000 × $1.05 = $10,500). Under paragraph (c)(2)(i) of this section, the basis is determined at the historic rate for 2020, which is the yearly average rate under section § 1.987–1(c)(3)(i) for such year (€8,000 × $1.02 = $8,160). Accordingly, the amount of gain reported by U.S. Corp on the sale of the land is $2,340 ($10,500 − $8,160).

Example 8. The facts are the same as in *Example 7* except that Business A properly elects under paragraph § 1.987–1(c)(1)(iii) to use spot rates in lieu of yearly average rates. Accordingly, the amount realized will be translated at the convention rate for the date of sale, and the basis will be translated at the convention rate for the date of purchase. The convention rate is €1 = $1.01 for October 2020 and is €1 = $1.08 for November 2021. Under these facts, the amount realized, translated into dollars at the convention rate for November 2021, is $10,800 (€10,000 × $1.08), and the basis, translated at the convention rate for October 2020, is $8,080 (€8,000 × $1.01). The amount of gain reported by U.S. Corp on the sale of the land is $2,720 ($10,800 − $8,080).

§ 1.987–4 Determination of net unrecognized section 987 gain or loss of a section 987 QBU.

(a) *In general.* The net unrecognized section 987 gain or loss of a section 987 QBU shall be determined by the owner annually as provided in paragraph (b) of this section in the owner's functional currency. Only assets and liabilities reflected on the books and records of the section 987 QBU under § 1.987–2(b) shall be taken into account.

(b) *Calculation of net unrecognized section 987 gain or loss.* Net unrecognized section 987 gain or loss of a section 987 QBU for a taxable year shall equal the sum of:

(1) The section 987 QBU's net accumulated unrecognized section 987 gain or loss for all prior taxable years to

which these regulations apply as determined in paragraph (c) of this section, and

(2) The section 987 QBU's unrecognized section 987 gain or loss for the current taxable year as determined in paragraph (d) of this section.

(c) *Net accumulated unrecognized section 987 gain or loss for all prior taxable years*—(1) *In general.* A section 987 QBU's net accumulated unrecognized section 987 gain or loss for all prior taxable years is the aggregate of the amounts determined under § 1.987–4(d) for all prior taxable years to which these regulations apply, reduced by the amounts taken into account under § 1.987–5 upon remittances for all such prior taxable years.

(2) [Reserved].

(d) *Calculation of unrecognized section 987 gain or loss for a taxable year.* The unrecognized section 987 gain or loss of a section 987 QBU for a taxable year shall be determined under paragraphs (d)(1) through (8) of this section.

(1) *Step 1: Determine the change in the owner functional currency net value of the section 987 QBU for the taxable year*—(i) *In general.* The change in the owner functional currency net value of the section 987 QBU for the taxable year shall equal—

(A) The owner functional currency net value of the section 987 QBU, determined in the functional currency of the owner under paragraph (e) of this section, on the last day of the taxable year; less

(B) The owner functional currency net value of the section 987 QBU, determined in the functional currency of the owner under paragraph (e) of this section, on the last day of the preceding taxable year. This amount shall be zero in the case of the section 987 QBU's first taxable year.

(ii) *Year section 987 QBU is terminated.* If a section 987 QBU is terminated within the meaning of § 1.987–8 during an owner's taxable year, the owner functional currency net value of the section 987 QBU as provided in paragraph (d)(1)(i)(A) of this section shall be determined on the date the section 987 QBU is terminated.

(2) *Step 2: Increase the amount determined in step 1 by the amount of assets transferred from the section 987 QBU to the owner*—(i) *In general.* The amount determined in paragraph (d)(1) of this section shall be increased by the total amount of assets described in paragraph (d)(2)(ii) of this section transferred from the section 987 QBU to the owner during the taxable year translated into the owner's functional currency as provided in paragraph (d)(2)(ii) of this section.

(ii) *Assets transferred from the section 987 QBU to the owner during the taxable year.* The assets transferred from the section 987 QBU to the owner for the taxable year shall equal the sum of:

(A) The amount of the section 987 QBU's functional currency and the aggregate adjusted basis of all marked assets (as defined in § 1.987–1(d)), after taking into account § 1.988–1(a)(10), transferred to the owner during the taxable year determined in the functional currency of the section 987 QBU and translated into the owner's functional currency at the spot rate (as defined in § 1.987–1(c)(1)) applicable to the date of transfer; and

(B) The aggregate adjusted basis of all historic assets (as defined in § 1.987–1(e)), after taking into account § 1.988–1(a)(10), transferred to the owner during the taxable year determined in the functional currency of the section 987 QBU and translated into the owner's functional currency at the historic rate for each such asset (as defined in § 1.987–1(c)(3)).

(3) *Step 3: Decrease the amount determined in steps 1 and 2 by the amount of assets transferred from the owner to the section 987 QBU*—(i) *In general.* The aggregate amount determined in paragraphs (d)(1) and (d)(2) of this section shall be decreased by the total amount of assets transferred from the owner to the section 987 QBU during the taxable year determined in the functional currency of the owner as provided in paragraph (d)(3)(ii) of this section.

(ii) *Total of all amounts transferred from the owner to the section 987 QBU during the taxable year.* The total amount of assets transferred from the owner to the section 987 QBU for the taxable year shall equal the aggregate of:

(A) The total amount of functional currency of the owner transferred to the section 987 QBU during the taxable year; and

(B) The adjusted basis, determined in the functional currency of the owner, of any asset transferred to the section 987 QBU during the taxable year (after taking into account § 1.988–1(a)(10)).

(4) *Step 4: Decrease the amount determined in steps 1 through 3 by the amount of liabilities transferred from the section 987 QBU to the owner.* The aggregate amount determined in paragraphs (d)(1) through (3) of this section shall be decreased by the aggregate amount of liabilities transferred from the section 987 QBU to the owner during the taxable year. The amount of such liabilities shall be translated into the functional currency of the owner at the spot rate (as defined in § 1.987–1(c)(1)) applicable on the date of transfer.

(5) *Step 5: Increase the amount determined in steps 1 through 4 by the amount of liabilities transferred from the owner to the section 987 QBU.* The aggregate amount determined in paragraphs (d)(1) through (4) of this section shall be increased by the aggregate amount of liabilities transferred by the owner to the section 987 QBU during the taxable year. The amount of such liabilities shall be translated into the functional currency of the owner at the spot rate (as defined in § 1.987–1(c)(1)) applicable on the date of transfer.

(6) *Step 6: Decrease or increase the amount determined in steps 1 through 5 by the section 987 taxable income or loss, respectively, of the section 987 QBU for the taxable year.* The aggregate amount determined in paragraphs (d)(1) through (5) of this section shall be decreased or increased by the section 987 taxable income or loss, respectively, computed under § 1.987–3 for the taxable year.

(7) *Step 7: Increase the amount determined in steps 1 through 6 by any expenses that are not deductible in computing the section 987 taxable income or loss of the section 987 QBU for the taxable year.* The aggregate amount determined under paragraphs (d)(1) through (6) shall be increased by the amount of any expense or loss attributable to a section 987 QBU for the taxable year that is not deductible in computing the section 987 QBU's taxable income or loss for the year, including any foreign income taxes incurred by the section 987 QBU with respect to which the owner claims a credit (translated at the same rate at which such taxes were translated under section 986(a)).

(8) *Step 8: Decrease the amount determined in steps 1 through 7 by the amount of any tax-exempt income.* The aggregate amount determined under paragraphs (d)(1) through (7) shall be decreased by the amount of any income or gain attributable to a section 987 QBU for the taxable year that is not included in computing the section 987 QBU's taxable income or loss for the year.

(e) *Determination of the owner functional currency net value of a section 987 QBU*—(1) *In general.* The owner functional currency net value of a section 987 QBU on the last day of a taxable year shall equal the aggregate amount of functional currency and the adjusted basis of each asset on the section 987 QBU's balance sheet on that day, less the aggregate amount of each

liability on the section 987 QBU's balance sheet on that day, in each case translated into the owner's functional currency as provided in paragraph (e)(2) of this section. Such amount shall be determined by:

(i) Preparing a balance sheet for the relevant date from the section 987 QBU's books and records (within the meaning of § 1.989(a)–1(d)), as recorded in the section 987 QBU's functional currency and showing all assets and liabilities reflected on such books and records as provided in § 1.987–2(b);

(ii) Making adjustments necessary to conform the items reflected on the balance sheet described in paragraph (e)(1)(i) of this section to United States tax accounting principles; and

(iii) Translating the asset and liability amounts on the adjusted balance sheet described in paragraph (e)(1)(ii) of this section into the functional currency of the owner in accordance with paragraph (e)(2) of this section.

(2) *Translation of balance sheet items into the owner's functional currency.* The amount of the section 987 QBU's functional currency, the basis of an asset, or the amount of a liability shall be translated as follows:

(i) *Marked item.* A marked item (as defined in § 1.987–1(d)) shall be translated into the owner's functional currency at the spot rate (as defined in § 1.987–1(c)(1)) applicable to the last day of the relevant taxable year.

(ii) *Historic item.* A historic item (as defined in § 1.987–1(e)) shall be translated into the owner's functional currency at the historic rate (as defined in § 1.987–1(c)(3)).

(f) [Reserved].

(g) *Examples.* The following examples illustrate the provisions of this section. For purposes of the examples, U.S. Corp is a domestic corporation that uses the calendar year as its taxable year and has the dollar as its functional currency. Except as otherwise indicated, U.S. Corp elects under § 1.987–3(c)(2)(iv)(B) to use the historic inventory method with respect to all of its section 987 QBUs but does not make other elections under section 987. Exchange rate and tax accounting (for example, depreciation rate) assumptions used in these examples are selected for the purpose of illustrating the principles of this section, and no inference is intended by their use. Additionally, the examples are not intended to demonstrate when activities constitute a trade or business within the meaning of § 1.989(a)–1(b)(2)(ii)(A) and § 1.989(a)–1(c) and therefore whether a section 987 QBU is onsidered to exist.

Example 1. (i) On July 1, 2021, U.S. Corp establishes Japan Branch, a section 987 QBU of U.S. Corp that has the yen as its functional currency, and transfers to Japan Branch $1,000 and raw land with a basis of $500. Japan Branch immediately exchanges the $1,000 for ¥100,000. On the same day, Japan Branch borrows ¥10,000. For the taxable year 2021, Japan Branch earns ¥2,000 per month (total of ¥12,000 for the six-month period from July 1, 2021, through December 31, 2021) for providing services and incurs ¥333.33 per month (total of ¥2,000 when rounded for the six-month period from July 1, 2021, through December 31, 2021) of related expenses. Assume that the spot rate on July 1, 2021, is $1 = ¥100; the spot rate on December 31, 2021, is $1 = ¥120; and the average rate for the period of July 1, 2021, to December 31, 2021, is $1 = ¥110. Thus, the ¥12,000 of services revenue when properly translated under § 1.987–3(c)(1) at the yearly average exchange rate equals $109.09 (¥12,000 × ($1/¥110)) = $109.09). The ¥2,000 of expenses translated at the same yearly average exchange rate equals $18.18 (¥2,000 × ($1/¥110) = $18.18). Thus, Japan Branch's net income translated into dollars equals $90.91 ($109.09 − $18.18 = $90.91).

(ii) Under paragraph (a) of this section, U.S. Corp must compute the net unrecognized section 987 gain or loss of Japan Branch for 2021. Because this is Japan Branch's first taxable year, the net unrecognized section 987 gain or loss (as defined under paragraph (b) of this section) is the branch's unrecognized section 987 gain or loss for 2021 as determined in paragraph (d) of this section. The calculation under paragraph (d) of this section is made as follows:

(iii) *Step 1.* Under paragraph (d)(1) of this section, U.S. Corp must determine the change in the owner functional currency net value (OFCNV) of Japan Branch for 2021 in dollars. The change in the OFCNV of Japan Branch for 2021 is equal to the OFCNV of Japan Branch determined in dollars on the last day of 2021, less the OFCNV of Japan Branch determined in dollars on the last day of the preceding taxable year.

(A) The OFCNV of Japan Branch determined in dollars on the last day of the current taxable year is determined under paragraph (e) of this section as the sum of the basis of each asset on Japan Branch's balance sheet on December 31, 2021, less the sum of each liability on Japan Branch's balance sheet on that date, translated into dollars as provided in paragraph (e)(2) of this section.

(B) For this purpose, Japan Branch will show the following assets and liabilities on its balance sheet for December 31, 2021:

(1) ¥120,000;

(2) Raw land with a basis of ¥55,000 ($500 translated under § 1.987–2(d)(2) at the historic rate of $1 = ¥110); and

(3) Liabilities of ¥10,000.

(C) Under paragraph (e)(2) of this section, U.S. Corp will translate these items as follows. The ¥120,000 is a marked asset and the ¥10,000 liability is a marked liability (as each is defined in § 1.987–1(d)). These items are translated into dollars on December 31, 2021, using the spot rate on December 31, 2021, of $1 = ¥120. The raw land is a historic asset (as defined in § 1.987–1(e)) and is translated into dollars under paragraph (e)(2)(ii) of this section at the historic rate, which under § 1.987–1(c)(3)(1)(A) is the yearly average exchange rate of $1 = ¥110 applicable to the year the land was transferred to the QBU. Thus, the OFCNV of Japan Branch on December 31, 2021, in dollars is $1,416.67 determined as follows:

Assets	Amount in ¥	Translation rate	Amount in $
Yen	120,000	$1 = ¥120 (spot rate—12/31/21)	$1,000.00
Land	55,000	1 = ¥110 (yearly average rate—2021)	500.00
Total assets			1,500.00
Liabilities:			
Bank Loan	10,000	1 = ¥120 (spot rate—12/31/21)	83.33
Total liabilities			83.33
2021 ending OFCNV			1,416.67

(D) Under paragraph (d)(1) of this section, the change in OFCNV of Japan Branch for 2021 is equal to the OFCNV of the branch determined in dollars on December 31, 2021, ($1,416.67) less the OFCNV of the branch determined in dollars on the last day of the preceding taxable year. Because this is the first taxable year of Japan Branch, the OFCNV of Japan Branch determined in dollars on the last day of the preceding taxable year is zero under paragraph (d)(1)(i)(B) of this section. Accordingly, the change in OFCNV of Japan Branch for 2021 is $1,416.67.

(iv) *Step 2.* Under paragraph (d)(2) of this section, the aggregate amount determined in paragraph (d)(1) of this section (step 1) is increased by the total amount of assets described in paragraph (d)(2)(ii) of this section transferred from the section 987 QBU to the owner during the taxable year translated into the owner's functional currency as provided in paragraph (d)(2)(ii) of this section. Because no such amounts

were transferred, there is no change in the $1,416.67 determined in step 1.

(v) *Step 3.* Under paragraph (d)(3) of this section, the aggregate amount determined in paragraphs (d)(1) and (d)(2) of this section (steps 1 and 2) is decreased by the total amount of assets transferred from the owner to the section 987 QBU during the taxable year as determined in paragraph (d)(3)(ii) of this section in dollars. On July 1, 2021, U.S. Corp transferred to Japan Branch $1,000.00 (which Japan Branch immediately converted into ¥100,000) and raw land with a basis of $500.00 (equal to ¥55,000, translated under § 1.987–2(d)(2) at the historic rate of $1 = ¥110). Thus, the $1,416.67 determined under steps 1 and 2 is reduced by $1,500.00, resulting in ($83.33).

(vi) *Steps 4 and 5.* Because no liabilities were transferred by U.S. Corp to Japan Branch or by Japan Branch to U.S. Corp during the taxable year, the aggregate amount determined in paragraph (d)(3) of this section (Step 3) is not increased or decreased.

(vii) *Step 6.* Under paragraph (d)(6) of this section, the aggregate amount determined after applying paragraphs (d)(1) through (5) of this section (steps 1 through 5) is decreased by the section 987 taxable income of Japan Branch of $90.91 from ($83.33) to ($174.24).

(viii) *Steps 7 and 8.* Paragraphs (d)(7) and (d)(8) do not apply because Japan Branch does not have any tax-exempt or nondeductible items. Accordingly, the unrecognized section 987 loss of Japan Branch for 2021 is ($174.24), the amount determined after applying step 6.

Example 2. (i) U.S. Corp operates in the United Kingdom through U.K. Branch, a section 987 QBU of U.S. Corp that has the pound as its functional currency. U.S. Corp properly elects under § 1.987–1(c)(1)(ii) for U.K. Branch to use a spot rate convention (when permitted). Under the chosen convention, the spot rate (the ''convention rate'') for any transaction occurring during a month is the average of the pound spot rate and the 30-day forward rate for pounds on the next-to-last Thursday of the preceding month. The yearly average exchange rate was £1 = $0.90 for 2020, £1 = $1.00 for 2021, and £1 = $1.10 for 2022. The closing balance sheet of U.K. Branch in 2021 reflected the following assets:

(A) £100;

(B) A sales office purchased in 2020 with an adjusted basis of £1,000;

(C) A delivery truck purchased in 2020 with an adjusted basis of £200;

(D) Inventory of 100 units purchased in 2021 with a basis of £100; and

(E) Stock in ABC Corporation purchased in 2021 with a basis of £150, representing less than 10 percent of the total voting power and value of all classes of stock of ABC Corporation.

The closing balance sheet of U.K. Branch for 2021 reflected one liability, £50 of long-term debt entered into in 2020 with F Bank, an unrelated bank.

The office, truck, stock, and inventory are historic assets (as defined in § 1.987–1(e)). The £100 and long-term debt are marked items (as defined in § 1.987–1(d)). Assume that U.S. Corp translated U.K. Branch's 2021 closing balance sheet as follows:

Assets	Amount in £	Translation rate	Amount in $
Pounds	100.00	£1 = $1.05 (convention rate—Dec. 2021)	105.00
Office	1,000.00	£1 = $0.90 (historic rate—2020)	900.00
Truck	200.00	£1 = $0.90 (historic rate—2020)	180.00
Stock	50.00	£1 = $1.00 (historic rate—2021)	150.00
Inventory	100.00	£1 = $1.00 (historic rate—2021)	100.00
Total assets			1,435.00
Liabilities:			
Bank Loan	50.00	£1 = $1.05 (convention rate—Dec. 2021)	52.50
Total liabilities			52.50
2021 ending OFCNV			1,382.50

(ii) U.K. Branch uses the first-in, first-out (FIFO) method of accounting for inventory. In 2022, U.K. Branch sold 100 units of inventory for a total of £300 and purchased another 100 units of inventory for £100. There is depreciation of £33 with respect to the office and £40 with respect to the truck, and U.K. Branch incurred £30 of business expenses during 2022. Neither the depreciation nor the business expenses are inventoriable costs. All items of income earned and expenses incurred during 2022 are received and paid, respectively, in pounds. Under § 1.987–3, U.K. Branch's section 987 taxable income or loss is determined as follows:

Item	Amount in £	Translation rate	Amount in $
Gross receipts	300.00	£1 = $1.10 (yearly average rate—2022)	330.00
Less:			
COGS	(100.00)	£1 = $1.00 (historic rate—2021)	(100.00)
Gross income			230.00
Dep:			
Office	(33.00)	£1 = $0.90 (historic rate—2020)	(29.70)
Truck	(40.00)	£1 = $0.90 (historic rate—2020)	(36.00)
Other expenses	(30.00)	£1 = $1.10 (yearly average rate—2022)	(33.00)
Total expenses			(98.70)
Section 987 taxable income			131.30

Accordingly, U.K. Branch has $131.30 of section 987 taxable income in 2022.

(iii) In December 2022, U.K. Branch transferred £30 to U.S. Corp, and U.S. Corp transferred a computer with a basis of $10 to U.K. Branch. U.S. Corp's net accumulated unrecognized section 987 gain or loss for all prior taxable years as determined in paragraph (c) of this section is $30.

(iv) The unrecognized section 987 gain or loss of U.K. Branch for 2022 is determined as follows:

(A) *Step 1.* Under paragraph (d)(1) of this section, the change in OFCNV for the taxable year must be determined. This amount is equal to the OFCNV of U.K. Branch determined under paragraph (e) of this section on the last day of 2022, less the OFCNV of U.K. Branch determined on the last day of 2021. The OFCNV of U.K. Branch on December 31, 2022, and the change in OFCNV for 2022, are determined as follows:

Assets	Amount in £	Translation rate	Amount in $
Pounds	240.00	£1 = $1.15 (convention rate—Dec. 2022)	276.00
Office	967.00	1 = $0.90 (historic rate—2020)	870.30
Truck	160.00	£1 = $0.90 (historic rate—2020)	144.00
Inventory	100.00	£1 = $1.10 (historic rate—2022)	110.00
Computer	9.09	£1 = $1.10 (historic rate—2022)	10.00
Stock	150.00	£1 = $1.00 (historic rate—2021)	150.00
Total assets			1,560.30
Liabilities:			
Bank Loan	50.00	£1 = $1.15 (convention rate—Dec. 2022)	57.50
Total liabilities			57.50
2022 ending OFCNV			1,502.80
Less:			
2021 ending OFCNV			(1,382.50)
Change in OFCNV			120.30

(B) *Step 2.* Under paragraph (d)(2) of this section, the aggregate amount determined in step 1 must be increased by the total amount of assets described in paragraph (d)(2)(ii) of this section transferred from U.K. Branch to U.S. Corp during the taxable year, translated into U.S. Corp's functional currency as provided in paragraph (d)(2)(ii) of this section. The amount of assets transferred from U.K. Branch to U.S. Corp during 2022 is determined as follows:

Asset	Amount in £	Translation rate	Amount in $
£30	30.00	£1 = $1.15 (convention rate—Dec. 2022)	34.50

(C) *Step 3: Decrease the aggregate amount described in steps 1 and 2 by the owner's transfers to the section 987 QBU.* Under paragraph (d)(3) of this section, the aggregate amount determined in steps 1 and 2 must be decreased by the total amount of all assets transferred from U.S. Corp to U.K. Branch during the taxable year as determined in paragraph (d)(3)(ii) of this section. The amount of assets transferred from U.S. Corp to U.K. Branch during 2022 is determined as follows:

Asset			Amount in $
Computer			10.00

(D) *Step 4.* Under paragraph (d)(4) of this section, the aggregate amount determined in steps 1 through 3 must be decreased by the aggregate amount of liabilities transferred by U.K. Branch to U.S. Corp. Under these facts, such amount is $0.

(E) *Step 5.* Under paragraph (d)(5) of this section, the aggregate amount determined in steps 1 through 4 must be increased by the aggregate amount of liabilities transferred by U.S. Corp to U.K. Branch. Under these facts, such amount is $0.

(F) *Step 6.* Under paragraph (d)(6) of this section, the aggregate amount determined in steps 1 through 5 is decreased or increased, respectively, by any section 987 taxable income or loss of U.K. Branch computed under § 1.987–3 for the taxable year. The amount of U.K. Branch's taxable income, as determined above, is $131.30.

(H) *Steps 7 and 8:* Paragraphs (d)(7) and (d)(8) do not apply because U.K. Branch does not have any tax-exempt income or nondeductible expense.

(v) *Summary.* Taking steps 1 through 8 into account, the amount of U.S. Corp's unrecognized section 987 gain or loss with respect to U.K. Branch in 2022 is computed as follows:

Step	Amount in $	Balance
1	+ 120.30	$120.30
2	+ 34.50	154.80
3	− 10.00	144.80
4	− 0	144.80
5	+ 0	144.80
6	− 131.30	13.50
7	+ 0	13.50
8	− 0	13.50

Thus, U.S. Corp's unrecognized section 987 gain for 2022 with respect to U.K. Branch is $13.50. As of the end of 2022, before taking into account the recognition of any section 987 gain or loss under § 1.987–5, U.S. Corp's net unrecognized section 987 gain is $43.50 (that is, $30.00 accumulated from prior years, plus $13.50 in 2022).

Example 3. (i) *Background.* U.S. Corp is the owner of Business A, a section 987 QBU that has the euro as its functional currency. Business A uses the FIFO method to account for inventory and uses the simplified inventory method described in § 1.987–3(c)(2)(iv)(A). On the last day of 2020, U.S. Corp begins Business A by contributing to Business A a building with a basis of $780, a machine with a basis of $300, and $100. On January 1, 2021, Business A converts the $100 into €100. The tax basis of the building and machine is translated into euros using the historic rate, which is the yearly average exchange rate for 2020, the year of the transfer. Accordingly, the building and the machine have a tax basis of €780 and €300, respectively, on December 31, 2020. The

building and machine have annual depreciation of €20 and €30, respectively. Business A determines that 50 percent of the building depreciation should be allocated to the cost of goods manufactured (that is, treated as an inventoriable cost) and 50 percent should be allocated to selling, general and administrative (SG&A) expenses. The machine is used exclusively to manufacture inventory. Relevant exchange rates for purposes of this example are as follows:

Year	Yearly average exchange rate	December 31 spot rate
2020	€1 = $1.00	€1 = $1.00
2021	€1 = $1.50	€1 = $2.00
2022	€1 = $2.50	€1 = $3.00

(ii) *Operations in 2021.* During 2021, Business A recognizes €140 of revenue from sales of finished goods. The related COGS is €70. Business A pays €10 in salaries allocable to SG&A. Inventoriable costs in 2021 include €10 of depreciation on the building and €30 of depreciation on the machine. Business A's balance sheet on December 31, 2021, shows no liabilities and the following assets: currency of €160, the building with an adjusted basis of €760, the machine with an adjusted basis of €270, and ending inventory with a FIFO cost basis of €40, comprising raw materials and finished goods.

(A) *Determination of income.* Under the simplified inventory method, Business A's income for 2021 is computed as follows:

Item	Amount in €	Translation rate	Amount in $
Sales revenue	140	€1 = $1.50 (yearly avg. rate—2021)	210
COGS before adjustments	70	€1 = $1.50 (yearly avg. rate—2021)	105
Adjustment for cost recovery deductions (see calculation below).			(20)
Adjustment for beginning inventory (none)			0
Adjusted COGS			85
SG&A:			
Depreciation on building (50%)	10	€1 = $1.00 (historic rate—2020)	10
Salaries	10	€1 = $1.50 (yearly avg. rate—2021)	15
Total SG&A			25
Section 987 net income (revenue less COGS and SG&A).			100

COGS Adjustments. Adjustment for cost recovery deductions included in inventoriable costs.

Depreciation amount	Historic rate	2021 yearly avg. rate	Difference in translation rates	Adjustment (depreciation × change in rates)
€10 (building)	1.00	1.50	(0.50)	($5)
€30 (machine)	1.00	1.50	(0.50)	(15)
Total adjustment for cost recovery deductions				(20)

(B) *Determination of OFCNV for 2020 and 2021.* Under the simplified inventory method, the OFCNV of Business A for 2020 and 2021 is determined under paragraph (e) of this section as follows:

OFCNV—END OF 2021

Assets	Amount in €	Translation rate	Amount in $
Euros	160	€1 = $2.00 (year-end spot rate—2021)	320
Building	760	€1 = $1.00 (historic rate—2020)	760
Machine	270	€1 = $1.00 (historic rate—2020)	270
Inventory	40	€1 = $1.50 (yearly average rate—2021)	60
Total assets			1,410
Liabilities:			
Total liabilities			0
2021 ending OFCNV			1,410

OFCNV—END OF 2020

Assets	Amount in €	Translation rate	Amount in $
Euros	100	€1 = $1.00 (year-end spot rate—2020)	100
Building	780	€1 = $1.00 (historic rate—2020)	780
Machine	300	€1 = $1.00 (historic rate—2020)	300
Total assets			1,180
Liabilities:			
Total liabilities			0
2020 ending OFCNV			1,180

(C) *Determination of net unrecognized section 987 gain or loss.* The net unrecognized section 987 gain or loss of Business A is determined under paragraph (d) of this section as follows (relevant steps only):

(*1*) *Step 1.* Under paragraph (d)(1) of this section, the change in OFCNV for the taxable year must be determined. This amount is equal to the OFCNV of Business A determined under paragraph (e) of this section on the last day of 2021, less the OFCNV of Business A determined on the last day of 2020.

2021 ending OFCNV	$1,410
Less: 2020 ending OFCNV	(1,180)
Change in OFCNV	230

(*2*) *Step 6.* Under paragraph (d)(6) of this section, the aggregate amount determined in steps 1 through 5 must be decreased by the section 987 taxable income of Business A. The amount of Business A's taxable income for 2021, as determined above, is $100.

Change in OFCNV	$230
Less: section 987 taxable income	(100)
Unrecognized section 987 gain	130
Plus: Net accumulated unrecognized section 987 gain or loss from prior years	0
Net unrecognized section 987 gain	130

(iii) *Operations in 2022.* During 2022, Business A recognizes €180 of revenue from sales of finished goods. The related COGS is €96. Business A pays €10 in salaries allocable to SG&A. Inventoriable costs in 2022 include €30 of depreciation on the machine and €10 of depreciation on the building. Business A's balance sheet on December 31, 2022, shows no liabilities and the following assets: currency of €260, the building with an adjusted basis of €740, the machine with an adjusted basis of €240, and ending inventory with a FIFO cost basis of €54, comprising raw materials and finished goods.

(A) *Determination of income.* Under the simplified inventory method, Business A's income for 2022 is computed as follows:

Item	Amount in €	Translation rate	Amount in $
Sales revenue	180	€1 = $2.50 (yearly avg. rate—2022)	450
COGS before adjustments	96	€1 = $2.50 (yearly avg. rate—2022)	240
Adjustment for cost recovery deductions (see calculation below).			(60)
Adjustment for beginning inventory (see calculation below).			(40)
Adjusted COGS			140
SG&A:			
Depreciation on building (50%)	10	€1 = $1.00 (historic rate—2020)	10
Salaries	10	€1 = $2.50 (yearly avg. rate—2022)	25
Total SG&A			35
Section 987 net income (revenue less COGS and SG&A).			275

COGS Adjustments. Adjustment for cost recovery deductions.

Depreciation amount	Historic rate	2022 yearly avg. rate	Difference in translation rates	Adjustment (depreciation × change in rates)
€10 (building)	1.00	2.50	(1.50)	($15)
€30 (machine)	1.00	2.50	(1.50)	(45)
Total adjustment for cost recovery deductions				(60)

Adjustment for beginning inventory.

Prior year ending inventory	2021 yearly avg. rate	2022 yearly avg. rate	Difference in translation rates	Adjustment (inventory × change in rates)
€40	1.50	2.50	(1.00)	($40)
Total adjustment for beginning inventory				(40)

(B) *Determination of OFCNV.* Under the simplified inventory method, the OFCNV of Business A for 2022 is determined under paragraph (e) of this section as follows:

OFCNV—END OF 2022

Assets	Amount in €	Translation rate	Amount in $
Euros	260	€1 = $3.00 (year-end spot rate—2022)	780
Building	740	€1 = $1.00 (historic rate—2020)	740
Machine	240	€1 = $1.00 (historic rate—2020)	240
Inventory	54	€1 = $2.50 (yearly average rate—2022)	135
Total assets			1,895
Liabilities:			
Total liabilities			0
2022 ending OFCNV			1,895

(C) *Determination of net unrecognized section 987 gain or loss.* The net unrecognized section 987 gain of Business A is determined under paragraph (d) of this section as follows (relevant steps only):

(*1*) *Step 1.* Under paragraph (d)(1) of this section, the change in OFCNV for the taxable year must be determined. This amount is equal to the OFCNV of Business A determined under paragraph (e) of this section on the last day of 2022, less the OFCNV of Business A determined on the last day of 2021.

2022 ending OFCNV	$1,895
Less: 2021 ending OFCNV	(1,410)
Change in OFCNV	485

(*2*) *Step 6.* Under paragraph (d)(6) of this section, the aggregate amount determined in steps 1 through 5 must be decreased by the section 987 taxable income of Business A. The amount of Business A's taxable income for 2022, as determined above, is $275.

Change in OFCNV	$485
Less: Section 987 taxable income	(275)
Unrecognized section 987 gain 2022	210
Plus: Net accumulated unrecognized section 987 gain from prior year	130
Net unrecognized section 987 gain	340

Example 4. (i) *Background.* The background facts about Business A are the same as in *Example 3,* except that Business A uses the dollar-value LIFO method to account for inventory.

(ii) *Operations in 2021.* The facts about Business A's operations in 2021 are the same as in *Example 3.*

(A) *Determination of income.* Under the simplified inventory method, Business A's income for 2021 is computed as follows:

Item	Amount in €	Translation rate	Amount in $
Sales revenue	140	€1 = $1.50 (yearly avg. rate—2021)	210
COGS before adjustments	70	€1 = $1.50 (yearly avg. rate—2021)	105
Adjustment for cost recovery deductions (same as *Example 1*).			(20)
Adjustment for LIFO liquidation (none)			0
Adjusted COGS			85
SG&A:			
Depreciation on building (50%)	10	€1 = $1.00 (historic rate—2020)	10
Salaries	10	€1 = $1.50 (yearly avg. rate—2021)	15
Total SG&A			25
Section 987 net income (revenue less COGS and SG&A).			100

(B) *Determination of OFCNV for 2020 and 2021.* Under the simplified inventory method, the OFCNV of Business A for 2020 and 2021 is determined under paragraph (e) of this section as follows:

OFCNV—END OF 2021

Assets	Amount in €	Translation rate	Amount in $
Euros	160	€1 = $2.00 (year-end spot rate—2021)	320
Building	760	€1 = $1.00 (historic rate—2020)	760

OFCNV—END OF 2021—Continued

Assets	Amount in €	Translation rate	Amount in $
Machine	270	€1 = $1.00 (historic rate—2020)	270
Inventory	40	€1 = $1.50 (historic rate—2021)	60
Total assets			1,410
Liabilities:			
Total liabilities			0
2021 ending OFCNV			1,410

OFCNV—END OF 2020

Assets	Amount in €	Translation rate	Amount in $
Euros	100	€1 = $1.00 (year-end spot rate—2020)	100
Building	780	€1 = $1.00 (historic rate—2020)	780
Machine	300	€1 = $1.00 (historic rate—2020)	300
Total assets			1,180
Liabilities:			
Total liabilities			0
2020 ending OFCNV			1,180

(C) *Determination of net unrecognized section 987 gain or loss.* The net unrecognized section 987 gain or loss of Business A for 2021 is determined under paragraph (d) of this section as follows (relevant steps only):

(*1*) *Step 1.* Under paragraph (d)(1) of this section, the change in OFCNV for the taxable year must be determined. This amount is equal to the OFCNV of Business A determined under paragraph (e) of this section on the last day of 2021, less the OFCNV of Business A determined on the last day of 2020.

2021 ending OFCNV	$1,410
Less: 2020 ending OFCNV	(1,180)
Change in OFCNV	(230)

(*2*) *Step 6.* Under paragraph (d)(6) of this section, the aggregate amount determined in steps 1 through 5 must be decreased by the section 987 taxable income of Business A. The amount of Business A's taxable income for 2021, as determined above, is $100.

Change in OFCNV	$230
Less: section 987 taxable income	(100)
Unrecognized section 987 gain	130
Plus: Net accumulated unrecognized section 987 gain or loss from prior years	0
Net unrecognized section 987 gain	130

(iii) *Operations in 2022.* The facts about Business A's operations in 2022 are the same as in *Example 3,* except that due to Business A's dollar-value LIFO method of inventory accounting, Business A's balance sheet on December 31, 2022, reflects a 2021 layer of inventory with a LIFO cost basis of €40 and a 2022 layer of inventory with a LIFO cost basis of €10.80, and Business A's COGS is €99.20.

(A) *Determination of income.* Business A's income for 2022 is computed as follows:

Item	Amount in €	Translation rate	Amount in $
Sales revenue	180	€1 = $2.50 (yearly avg. rate—2022)	450
COGS before adjustments	99.20	€1 = $2.50 (yearly avg. rate—2022)	248
Adjustment for cost recovery deductions (same as *Example 3*).			(60)
Adjustment for LIFO liquidation (none)			0
Adjusted COGS			188
SG&A:			
Depreciation on building (50%)	10	€1 = $1.00 (historic rate—2020)	10
Salaries	10	€1 = $2.50 (yearly avg. rate—2022)	25
Total SG&A			35
Section 987 net income (revenue less COGS and SG&A).			227

OFCNV—END OF 2022

Assets	Amount in €	Translation rate	Amount in $
Euros	260.00	€1 = $3.00 (year-end spot rate—2022)	780
Building	740.00	€1 = $1.00 (historic rate—2020)	740
Machine	240.00	€1 = $1.00 (historic rate—2020)	240
Inventory	10.80	€1 = $2.50 (historic rate—2022)	27
	40.00	€1 = $1.50 (historic rate—2021)	60
Total assets			1,847

OFCNV—END OF 2022—Continued

Assets	Amount in €	Translation rate	Amount in $
Liabilities:			
Total liabilities			0
2022 ending OFCNV			1,847

(B) *Determination of net unrecognized section 987 gain or loss.* The net unrecognized section 987 gain of Business A for 2022 is determined under paragraph (d) of this section as follows (relevant steps only):

(*1*) *Step 1.* Under paragraph (d)(1) of this section, the change in OFCNV for the taxable year must be determined. This amount is equal to the OFCNV of Business A determined under paragraph (e) of this section on the last day of 2022, less the OFCNV of Business A determined on the last day of 2021.

2022 ending OFCNV	$1,847
Less: 2021 ending OFCNV	(1,410)
Change in OFCNV	437

(*2*) *Step 6—Decrease the aggregate amount determined in steps 1 through 5 by the section 987 taxable income of the section 987 QBU for the taxable year.* Under paragraph (d)(6) of this section, the aggregate amount determined in steps 1 through 5 must be decreased by the section 987 taxable income of Business A. The amount of Business A's taxable income for 2022, as determined above, is $227.

Change in OFCNV	$437
Less: section 987 taxable income	(227)
Unrecognized section 987 gain 2022	210
Plus: net accumulated unrecognized section 987 gain from prior years	130
Net unrecognized section 987 gain	340

(iv) *Operations in 2023.* During 2023, Business A recognizes revenue of €252 from sales of finished goods. The related COGS is €140.80, reflecting a full liquidation of the 2022 inventory layer with a LIFO cost basis of $10.80 and a partial liquidation of inventory from the 2021 layer with a LIFO cost basis of $10.00. Business A pays €10 in salaries allocable to SG&A. Inventoriable costs in 2023 include €10 of depreciation on the building and €30 of depreciation on the machine. Business A's balance sheet on December 31, 2023, shows no liabilities and the following assets: currency of €422, the building with an adjusted basis of €720, the machine with an adjusted basis of €210, and a 2021 layer of ending inventory with a LIFO cost basis of €30, comprising raw materials and finished goods. The yearly average exchange rate for 2023 is €1 = $3.50, and the spot rate on December 31, 2023 is €1 = $4.00.

(A) *Determination of income.* Business A's income for 2023 is computed as follows:

Item	Amount in €	Translation rate	Amount in $
Sales revenue	252	€1 = $3.50 (yearly avg. rate—2023)	882
COGS before adjustments	140.80	€1 = $3.50 (yearly avg. rate—2023)	492.80
Adjustment for cost recovery deductions (see calculation below).			(100.00)
Adjustment for LIFO liquidation (see calculation below).			(30.80)
Adjusted COGS			362.00
SG&A:			
Depreciation on building (50%)	10	€1 = $1.00 (historic rate—2020)	10
Salaries	10	€1 = $3.50 (yearly avg. rate—2023)	35
Total SG&A			45
Section 987 net income			475

COGS Adjustments.

Adjustment for cost recovery deductions.

Depreciation amount	Historic rate	2023 yearly avg. rate	Difference in translation rates	Adjustment (depreciation × change in rates)
€10 (building)	1.00	3.50	(2.50)	($25)
€30 (machine)	1.00	3.50	(2.50)	(75)
Total adjustment for cost recovery deductions				(100)

Adjustment for LIFO liquidation.

LIFO liquidation layer	Historic rate	2023 yearly avg. rate	Difference in translation rates	Adjustment (liquidated layer × change in rates)
€10.80 (2022)	2.50	3.50	(1.00)	($10.80)
€10 (2021)	1.50	3.50	(2.00)	(20.00)

LIFO liquidation layer	Historic rate	2023 yearly avg. rate	Difference in translation rates	Adjustment (liquidated layer × change in rates)
Total adjustment for liquidation of LIFO layers				(30.80)

(B) *Determination of OFCNV.* The OFCNV of Business A for 2023 is determined under paragraph (e) of this section as follows:

OFCNV—END OF 2023

Assets	Amount in €	Translation rate	Amount in $
Euros	422	€1 = $4.00 (year-end spot rate—2023)	1,688
Building	720	€1 = $1.00 (historic rate—2020)	720
Machine	210	€1 = $1.00 (historic rate—2020)	210
Inventory	30	€1 = $1.50 (historic rate—2021)	45
Total assets			2,663
Liabilities:			
Total liabilities			0
2023 ending OFCNV			2,663

(C) *Determination of net unrecognized section 987 gain or loss.* The net unrecognized section 987 gain of Business A is determined under paragraph (d) of this section as follows (relevant steps only):

(*1*) *Step 1.* Under paragraph (d)(1) of this section, the change in OFCNV for the taxable year must be determined. This amount is equal to the OFCNV of Business A determined under paragraph (e) of this section on the last day of 2023, less the OFCNV of Business A determined on the last day of 2022.

2023 ending OFCNV	$2,663
Less: 2022 ending OFCNV	(1,847)
Change in OFCNV	816

(*2*) *Step 6—Decrease the aggregate amount determined in steps 1 through 5 by the section 987 taxable income of the section 987 QBU for the taxable year.* Under paragraph (d)(6) of this section, the aggregate amount determined in steps 1 through 5 must be decreased by the section 987 taxable income of Business A. The amount of Business A's taxable income for 2023, as determined above, is $475.

Change in OFCNV	$816
Less: section 987 taxable income	(475)
Unrecognized section 987 gain 2023	341
Plus: net accumulated unrecognized section 987 gain from prior years	340
Net unrecognized section 987 gain	681

§ 1.987–5 Recognition of section 987 gain or loss.

(a) *Recognition of section 987 gain or loss by the owner of a section 987 QBU.* The taxable income of an owner of a section 987 QBU shall include the owner's section 987 gain or loss recognized with respect to the section 987 QBU for the taxable year. Except as otherwise provided, for any taxable year the owner's section 987 gain or loss recognized with respect to a section 987 QBU shall equal:

(1) The owner's net unrecognized section 987 gain or loss with respect to the section 987 QBU determined under § 1.987–4 on the last day of such taxable year (or, if earlier, on the day the section 987 QBU is terminated under § 1.987–8); multiplied by

(2) The owner's remittance proportion for the taxable year, as determined under paragraph (b) of this section.

(b) *Remittance proportion.* The owner's remittance proportion with respect to a section 987 QBU for a taxable year shall equal:

(1) The remittance, as determined under paragraph (c) of this section, to the owner from the section 987 QBU for such taxable year; divided by

(2) The sum of

(A) The aggregate adjusted basis of the gross assets of the section 987 QBU as of the end of the taxable year that are reflected on its year-end balance sheet translated into the owner's functional currency as provided in § 1.987–4(e)(2) and

(B) The amount of the remittance as determined under paragraph (c) of this section.

(c) *Remittance*—(1) *Definition.* A remittance shall be determined in the owner's functional currency and shall equal the excess, if any, of:

(i) The aggregate of all amounts transferred from the section 987 QBU to the owner during the taxable year, as determined in paragraph (d) of this section; over

(ii) The aggregate of all amounts transferred from the owner to the section 987 QBU during the taxable year, as determined in paragraph (e) of this section.

(2) *Day when a remittance is determined.* An owner's remittance from a section 987 QBU shall be determined on the last day of the owner's taxable year (or, if earlier, on the day the section 987 QBU is terminated under § 1.987–8).

(3) *Termination.* A termination of a section 987 QBU as determined under § 1.987–8 is treated as a remittance of all the gross assets of the section 987 QBU to the owner on the date of such termination. See § 1.987–8(e). Accordingly, the remittance proportion in the case of a termination is 1.

(d) *Aggregate of all amounts transferred from the section 987 QBU to the owner for the taxable year.* For purposes of paragraph (c)(1)(i) of this section, the aggregate amount transferred from the section 987 QBU to the owner for the taxable year shall be the aggregate amount of functional currency and the aggregate adjusted basis of the assets transferred, as determined in the owner's functional currency under § 1.987–4(d)(2). Solely for this purpose, the amount of liabilities transferred from the owner to the section 987 QBU, as determined in the owner's functional currency under § 1.987–4(d)(5), shall be treated as a transfer of assets from the section 987 QBU to the owner in an amount equal to the amount of such liabilities.

(e) *Aggregate of all amounts transferred from the owner to the section 987 QBU for the taxable year.* For purposes of paragraph (c)(1)(ii) of this section, the aggregate of all amounts transferred from the owner to the section 987 QBU for the taxable year shall be the aggregate amount of functional currency and the aggregate adjusted basis of the assets transferred, as determined in the owner's functional currency under § 1.987–4(d)(3). Solely for this purpose, the amount of liabilities transferred from the section 987 QBU to the owner determined under § 1.987–4(d)(4) shall be treated as a transfer of assets from the owner to the section 987 QBU in an amount equal to the amount of such liabilities.

(f) *Determination of owner's adjusted basis in transferred assets*—(1) *In general.* The owner's adjusted basis in an asset received in a transfer from a section 987 QBU (whether or not such transfer is made in connection with a remittance, as defined in paragraph (c) of this section) shall be determined in the owner's functional currency under the rules prescribed in paragraphs (f)(2) and (f)(3) of this section.

(2) *Marked asset.* The basis of a marked asset shall be the amount determined by translating the section 987 QBU's functional currency basis of the asset, after taking into account § 1.988–1(a)(10), into the owner's functional currency at the spot rate (as defined in § 1.987–1(c)(1)) applicable to the date of transfer.

(3) *Historic asset.* The basis of a historic asset shall be the amount determined by translating the section 987 QBU's functional currency basis of the asset, after taking into account § 1.988–1(a)(10), into the owner's functional currency at the historic rate for the asset (as defined in § 1.987–1(c)(3)).

(g) *Example.* The following example illustrates the calculation of section 987 gain or loss under this section:

Example. (i) U.S. Corp, a domestic corporation with the dollar as its functional currency, operates in the United Kingdom through Business A, a section 987 QBU with the pound as its functional currency. During 2021, the following transfers took place between U.S. Corp and Business A. On January 5, 2021, U.S. Corp transferred to Business A $300, which Business A used during the year to purchase services. On March 5, 2021, Business A transferred a machine to U.S. Corp. The pound adjusted basis of the machine when properly translated into dollars as described under § 1.987–4(d)(2)(ii)(B) and paragraph (d) of this section is $500. On November 1, 2021, Business A transferred pounds to U.S. Corp. The dollar amount of the pounds when properly translated as described under § 1.987–4(d)(2)(ii)(A) and paragraph (d) of this section is $2,300. On December 7, 2021, U.S. Corp transferred a truck to Business A with an adjusted basis of $2,000.

(ii) At the end of 2021, Business A holds assets, properly translated into the owner's functional currency pursuant to § 1.987–4(e)(2), consisting of a computer with a pound adjusted basis equivalent to $500, a truck with a pound adjusted basis equivalent to $2,000, and pounds equivalent to $2,850. In addition, Business A has a pound liability entered into in 2020 with Bank A. All such assets and liabilities are reflected on the books and records of Business A. Assume that the net unrecognized section 987 gain for Business A as determined under § 1.987–4 as of the last day of 2021 is $80.

(iii) U.S. Corp's section 987 gain with respect to Business A is determined as follows:

(A) *Computation of amount of remittance.* Under paragraphs (c)(1) and (c)(2) of this section, U.S. Corp must determine the amount of the remittance for 2021 in the owner's functional currency (dollars) on the last day of 2021. The amount of the remittance for 2021 is $500, determined as follows:

Transfers from Business A to U.S. Corp in dollars:

Machine	$500
Pounds	2,300
Aggregate transfers from Business A to U.S. Corp	2,800

Transfers from U.S. Corp to Business A in dollars:

U.S. dollars	$300
Truck	2,000
Aggregate transfers from U.S. Corp to Business A	2,300

Computation of amount of remittance:

Aggregate transfers from Business A to U.S. Corp	$2,800
Less: aggregate transfers from U.S. Corp to Business A	(2,300)
Total remittance	500

(B) *Computation of section 987 QBU gross assets plus remittance.* Under paragraph (b)(2) of this section, Business A must determine the aggregate basis of its gross assets that are reflected on its year-end balance sheet translated into the owner's functional currency and must increase this amount by the amount of the remittance.

Computer	$500
Pounds	2,850
Truck	2,000
Aggregate gross assets	5,350
Remittance	500
Aggregate basis of Business A's gross assets at end of 2021, increased by amount of remittance	5,850

(C) *Computation of remittance proportion.* Under paragraph (b) of this section, Business A must compute the remittance proportion by dividing the $500 remittance amount by the $5,850 sum of the aggregate basis of Business A's gross assets and the amount of the remittance. The resulting remittance proportion is 0.085.

(D) *Computation of section 987 gain or loss.* The amount of U.S. Corp's section 987 gain or loss that must be recognized with respect to Business A is determined under paragraph (a) of this section by multiplying the 0.085 remittance proportion by the $80 of net unrecognized section 987 gain. U.S. Corp's resulting recognized section 987 gain for 2021 is $6.80.

■ **Par. 5.** Sections 1.987–6 through 1.987–11 are added to read as follows:

* * * * *

Sec.

* * * * *

§ 1.987–6 Character and source of section 987 gain or loss.

(a) *Ordinary income or loss.* Section 987 gain or loss is ordinary income or loss for Federal income tax purposes.

(b) *Character and source of section 987 gain or loss*—(1) *In general.* With respect to each section 987 QBU, the owner must determine the character and source of section 987 gain or loss in the year of a remittance under the rules of this paragraph (b) for all purposes of the Internal Revenue Code, including sections 904(d), 907, and 954.

(2) *Method required to characterize and source section 987 gain or loss.* The owner must use the asset method set forth in § 1.861–9T(g) to characterize and source section 987 gain or loss. In applying the asset method, the owner must take into account only the assets of the section 987 QBU and must consistently determine the value of the assets on the basis of either the tax book value or the fair market value of the assets. The modified gross income method described in § 1.861–9T(j) cannot be used.

(3) *Coordination with section 954.* Solely for purposes of determining the excess of foreign currency gains over foreign currency losses characterized as foreign personal holding company income under section 954(c)(1)(D), section 987 gain or loss that is characterized pursuant to paragraph (b)(2) of this section by reference to assets that give rise to subpart F income shall be treated as foreign currency gain or foreign currency loss attributable to section 988 transactions not directly related to the business needs of the controlled foreign corporation.

(c) *Examples.* The following examples illustrate the application of this section.

Example 1. CFC is a controlled foreign corporation as defined in section 957 with the Swiss franc (Sf) as its functional currency. CFC is the owner of Business A, a section 987 QBU that has the euro as its functional currency. For the year 2021, CFC recognizes section 987 gain of Sf10,000 under § 1.987–5. Applying the rules of this section, Business A has average total assets of Sf1,000,000, which generate income as follows: Sf750,000 of assets that generate foreign source general limitation income under section 904(d)(1)(A), none of which is subpart F income under section 952; and Sf250,000 of assets that generate foreign source passive income under section 904(d)(1)(B), all of which is subpart F income. Under paragraph (b) of this section, Sf7,500 (Sf750,000/Sf1,000,000 × Sf10,000) of the section 987 gain will be characterized as foreign source general limitation income that is not subpart F income under section 952, and Sf2,500 (Sf250,000/Sf1,000,000 × Sf10,000) will be characterized as foreign source passive income that is characterized as foreign personal holding company income under section 954(c)(1)(D). All of the section 987 gain is treated as ordinary income.

Example 2. The facts are the same as in *Example 1* except that: (a) CFC recognizes section 987 loss of Sf40,000, Sf10,000 of which is characterized under paragraph (b) of this section by reference to assets that give rise to subpart F income; and (b) CFC otherwise has Sf12,000 of net foreign currency gain determined under § 1.954–2(g) that is taken into account in determining the excess of foreign currency gain over foreign currency losses characterized as foreign personal holding company income under section 954(c)(1)(D). Under paragraph (b)(3) of this section, the Sf10,000 section 987 loss characterized by reference to assets that give rise to subpart F income is treated as foreign currency loss attributable to section 988 transactions not directly related to the business needs of the controlled foreign corporation for purposes of determining the excess of foreign currency gains over foreign currency losses characterized as foreign personal holding company income under section 954(c)(1)(D). Accordingly, CFC will aggregate the Sf10,000 section 987 loss with the Sf12,000 net foreign currency gain and will have Sf2,000 of net foreign currency gain characterized as foreign personal holding company income under section 954(c)(1)(D).

§ 1.987–7 Section 987 aggregate partnerships.

(a) *In general.* This section provides rules for determining an owner's share of the assets and liabilities of an eligible QBU that is owned indirectly, as described in § 1.987–1(b)(4)(ii), through a section 987 aggregate partnership.

(b) [Reserved].

(c) *Coordination with subchapter K.* [Reserved].

§ 1.987–8 Termination of a section 987 QBU.

(a) *Scope.* This section provides rules regarding the termination of a section 987 QBU. Paragraph (b) of this section provides general rules for determining when a termination occurs. Paragraph (c) of this section provides exceptions to the general termination rules for certain transactions described in section 381(a). Paragraph (e) of this section describes certain effects of terminations. Paragraph (f) of this section contains examples that illustrate the principles of this section.

(b) *In general.* Except as provided in paragraph (c) of this section, a section 987 QBU terminates if the conditions described in one of paragraphs (b)(1) through (4) is satisfied.

(1) *Trade or business ceases.* A section 987 QBU ceases its trade or business. When a section 987 QBU ceases its trade or business is determined based on all the facts and circumstances, provided that an owner may continue to treat a section 987 QBU as a section 987 QBU for a reasonable period during the winding up of such trade or business, which period may in no event exceed two years from the date on which such QBU ceases its activities carried on for profit.

(2) *Substantially all assets transferred.* The section 987 QBU transfers substantially all (within the meaning of section 368(a)(1)(C)) of its assets to its owner. For purposes of this paragraph (b)(2), the amount of assets transferred from the section 987 QBU to its owner as a result of a transaction shall be reduced by the amount of assets transferred from the owner to the section 987 QBU pursuant to the same transaction. See Examples 2, 5, and 6 in paragraph (f) of this section.

(3) *Owner no longer a CFC.* A foreign corporation that is a controlled foreign corporation (as defined in section 957) that is the owner of a section 987 QBU ceases to be a controlled foreign corporation as a result of a transaction or series of transactions after which persons that were related to the corporation within the meaning of section 267(b) immediately before the transaction or series of transactions collectively own sufficient interests in the corporation such that the corporation would continue to be considered a controlled foreign corporation if such persons were United States shareholders within the meaning of section 951(b).

(4) *Owner ceases to exist.* The owner of the section 987 QBU ceases to exist (including in connection with a transaction described in section 381(a)).

(c) *Transactions described in section 381(a)*—(1) *Liquidations.* Notwithstanding paragraph (b) of this section, a termination does not occur when the owner of a section 987 QBU ceases to exist in a liquidation described in section 332, except in the following cases:

(i) The distributor is a domestic corporation and the distributee is a foreign corporation.

(ii) The distributor is a foreign corporation and the distributee is a domestic corporation.

(iii) The distributor and the distributee are both foreign corporations and the functional currency of the distributee is the same as the functional currency of the distributor's section 987 QBU.

(2) *Reorganizations.* Notwithstanding paragraph (b) of this section, a termination does not occur when the owner of the section 987 QBU ceases to exist in a reorganization described in section 381(a)(2), except in the following cases:

(i) The transferor is a domestic corporation and the acquiring corporation is a foreign corporation.

(ii) The transferor is a foreign corporation and the acquiring corporation is a domestic corporation.

(iii) The transferor is a controlled foreign corporation immediately before the transfer, the acquiring corporation is a foreign corporation that is not a controlled foreign corporation immediately after the transfer, and the acquiring corporation was related to the transferor within the meaning of section 267(b) immediately before the transfer.

(iv) The transferor and the acquiring corporation are foreign corporations and the functional currency of the acquiring corporation is the same as the functional currency of the transferor's section 987 QBU.

(d) [Reserved].

(e) *Effect of terminations.* A termination of a section 987 QBU as determined in this section is treated as a remittance of all the gross assets of the section 987 QBU to its owner immediately before the section 987 QBU terminates. Thus, except as otherwise provided in these regulations under section 987, a termination results in the recognition of any net unrecognized section 987 gain or loss of the section 987 QBU. See § 1.987–5(c)(3).

(f) *Examples.* The following examples illustrate the principles of this section. Except as otherwise provided, U.S. Corp is a domestic corporation that has the U.S. dollar as its functional currency, and Business A is a section 987 QBU.

Example 1. Cessation of operations. (i) *Facts.* U.S. Corp is the owner of Business A,

a sales office of U.S. Corp in Country X. Business A ceases sales activities on December 31, 2021. During 2022, Business A sells all of the assets used in its sales activities and winds up its business, settling outstanding accounts.

(ii) *Analysis.* Business A's trade or business ceases on December 31, 2021. The cessation of Business A's trade or business causes a termination of the Business A section 987 QBU under paragraph (b)(1) of this section on December 31, 2021, unless U.S. Corp chooses to continue to treat Business A as a section 987 QBU until completion of the wind-up activities in 2022. If U.S. Corp chooses to continue to treat Business A as a section 987 QBU during the wind-up of Business A, Business A section 987 QBU would terminate under paragraph (b)(1) of this section upon completion of the wind-up in 2022.

Example 2. Transfer of a section 987 QBU to a member of a consolidated group. (i) *Facts.* U.S. Corp, the owner of Business A, transfers all the assets and liabilities of Business A to DS, a domestic corporation all of the stock of which is owned by U.S. Corp, in a transaction qualifying under section 351. U.S. Corp and DS are members of the same consolidated group.

(ii) *Analysis.* Pursuant to § 1.987–2(c)(2)(i) and (ii), as a result of the deemed exchange of the assets and liabilities of Business A for DS stock in a section 351 transaction, Business A is treated as transferring its assets and liabilities to U.S. Corp immediately before the transfer by U.S. Corp of the assets and liabilities to DS. Because a section 351 transaction is not a transaction described in section 381(a), the transfer of all of the assets of Business A to U.S. Corp causes a termination of the Business A section 987 QBU under paragraph (b)(2) of this section.

Example 3. Cessation of controlled foreign corporation status. (i) *Facts.* Foreign parent (FP) is a foreign corporation that owns all the stock of U.S. Corp, a domestic corporation. U.S. Corp owns all of the stock of FC, a controlled foreign corporation as defined in section 957. FC is the owner of Business A. FP contributes cash to FC in exchange for FC stock representing 60 percent of the voting power and value of all FC stock. FC no longer constitutes a controlled foreign corporation after the capital contribution.

(ii) *Analysis.* Because FC ceases to qualify as a controlled foreign corporation as a result of a transaction after which persons that were related to FC within the meaning of section 267(b) immediately before the transaction collectively own sufficient interests in FC such that the FC would continue to be considered a controlled foreign corporation if such persons were United States shareholders within the meaning of section 951(b), the Business A section 987 QBU terminates pursuant to paragraph (b)(3) of this section.

Example 4. Section 332 liquidation. (i) *Facts.* U.S. Corp owns all of the stock of FC, a foreign corporation. FC is the owner of Business A. Pursuant to a liquidation described in section 332, FC transfers all of its assets and liabilities to U.S. Corp.

(ii) *Analysis.* FC's liquidation causes a termination of the Business A section 987 QBU as provided in paragraph (b)(4) of this section because FC ceases to exist as a result of the liquidation. The exception for certain section 332 liquidations provided under paragraph (c)(1) of this section does not apply because U.S. Corp is a domestic corporation and FC is a foreign corporation. See paragraph (c)(1)(ii) of this section.

Example 5. Transfers to and from a section 987 QBU pursuant to the same transaction. (i) *Facts.* U.S. Corp owns 100 percent of DC1 and DC2, each a domestic corporation. DC1 owns Entity A, a DE that conducts a business (Business A) in Country X that constitutes a section 987 QBU of DC1. DC2 subsequently contributes property to Entity A in exchange for a 95 percent interest in Entity A. The property DC2 contributes to Entity A is used in the business conducted by Business A and is reflected on its books and records as provided under § 1.987–2(b).

(ii) *Analysis.* (A) For general Federal income tax purposes, Entity A is converted to a partnership when DC2 contributes property to Entity A in exchange for a 95 percent interest in Entity A. DC2's contribution is treated as a contribution to a partnership in exchange for an ownership interest in the partnership. DC1 is treated as contributing all of Business A to the partnership in exchange for a partnership interest. See Rev. Rul. 99–5 (situation 2), (1999–1 CB 434) and § 601.601(d)(2) of this chapter. For purposes of this section, these deemed transactions are not taken into account. See § 1.987–2(c) and § 1.987–2(c)(10), Example 9.

(B) Under § 1.987–1(b)(5)(i), Entity A is converted to a section 987 aggregate partnership when DC2 contributes property to Entity A in exchange for a 95 percent interest in Entity A because DC1 and DC2 own all the interests in partnership capital and profits, DC1 and DC2 are related within the meaning of section 267(b), and the requirements of § 1.987–1(b)(5)(i)(B) are satisfied. Because DC2 is a partner in a section 987 aggregate partnership that owns Business A and because DC2 and Business A have different functional currencies, DC2's portion of the Business A assets constitutes a section 987 QBU of DC2.

(C) As a result of the conversion of Entity A to a partnership, DC2 acquires an allocable share of 95 percent of the assets of Business A, as determined under § 1.987–7. Accordingly, under § 1.987–2(c)(5), DC2 is treated as contributing 95 percent of its contributed property to its Business A section 987 QBU. In addition, DC2 is treated as transferring 5 percent of the contributed property to DC1, and DC1 is subsequently treated as transferring that property to DC1's Business A section 987 QBU. In addition, 95 percent of the original (pre-conversion) assets of Business A cease being reflected on the books and records of DC1's section 987 QBU. Under § 1.987–2(b)(5), these amounts are treated as if they are transferred from DC1's section 987 QBU to DC1, and DC1 is treated as transferring these assets to DC2. DC2 is subsequently treated as transferring these assets to DC2's Business A section 987 QBU. The other 5 percent of the original (pre-conversion) assets are treated as remaining on the books and records of DC1's section 987 QBU and are not deemed to be transferred.

(D) For purposes of determining whether substantially all the assets of Business A were transferred from DC1's section 987 QBU as provided under paragraph (b)(2) of this section, the amount of assets transferred from Business A to DC1 under § 1.987–2(c) (95 percent of the assets held by Business A before the contribution by DC2) must be reduced by the 5 percent of the assets contributed by DC2, which were treated as transferred from DC2 to DC1 and subsequently transferred from DC1 to its Business A section 987 QBU, as a result of the formation of the section 987 aggregate partnership. Accordingly, the amount of assets transferred from DC1's section 987 QBU for purposes of paragraph (b)(2) of this section is equal to 95 percent of the original (pre-conversion) assets minus 5 percent of DC2's contributed assets.

Example 6. Deemed transfers to a CFC upon a check-the-box election. (i) *Facts.* In 2021, U.S. Corp forms an entity in a foreign country, Entity A. Entity A owns Business A, which has the pound as its functional currency. Entity A forms Entity B in another foreign country. Entity B owns Business B, a section 987 QBU that has the euro as its functional currency. At the time of formation, Entity A and Entity B elect to be DEs. In 2026, Entity A files an election on Form 8832 to be classified as a corporation under § 301.7701–3(g)(1)(iv) and becomes a CFC (FC) owned directly by U.S. Corp. FC has the pound as its functional currency.

(ii) *Analysis.* (A) Under § 1.987–1(b)(4)(i), U.S. Corp is the owner of Business A and Business B. In 2026, when Entity A elects to be classified as a corporation, U.S. Corp is deemed to contribute the assets and liabilities of Business A and Business B to FC under section 351 in exchange for FC stock. Pursuant to § 1.987–2(c)(2)(i) and (ii), as a result of the deemed exchange of the assets and liabilities of Business A and Business B for FC stock in a section 351 transaction, Business A and Business B are each treated as transferring their assets and liabilities to U.S. Corp immediately before U.S. Corp's transfer of such assets and liabilities to FC. The transfer of assets from Business A and Business B to U.S. Corp causes terminations of those section 987 QBUs under paragraph (b)(2) of this section. The assets and liabilities of Business A and Business B are now owned by FC, but because FC and Business A have the same functional currency, only Business B qualifies as a section 987 QBU to which section 987 applies.

(B) Terminations also would have occurred in 2026 if U.S. Corp had contributed Entity A and Entity B to an existing foreign corporation owned by U.S. Corp or to a newly created foreign corporation owned by U.S. Corp pursuant to a section 351 exchange because the transfer of all of the assets of Business A and Business B would cause terminations of those section 987 QBUs under paragraph (b)(2) of this section.

Example 7. Sale of a section 987 QBU to a member of a consolidated group. (i) *Facts.* U.S. Corp, the owner of Business A, sells all of the assets and liabilities of Business A to DS, a domestic corporation, in exchange for cash. U.S. Corp and DS are members of the

same consolidated group. The cash received on the sale is recorded on the books of U.S. Corp.

(ii) *Analysis.* Pursuant to § 1.987–2(c)(2)(i) and (ii), Business A is treated as transferring all of its assets and liabilities to U.S. Corp immediately before the sale by U.S. Corp to DS. As a result of this deemed transfer from Business A to U.S. Corp, the Business A section 987 QBU terminates under paragraph (b)(2) of this section.

§ 1.987–9 Recordkeeping requirements.

(a) *In general.* A taxpayer that is an owner of a section 987 QBU shall keep a copy of each election made by the taxpayer in accordance with the rules of § 1.987–1(g)(3) (if not required to be made on a form published by the Commissioner regarding section 987) and such reasonable records as are sufficient to establish the section 987 QBU's taxable income or loss and section 987 gain or loss.

(b) *Supplemental information.* An owner's obligation to maintain records under section 6001 and paragraph (a) of this section is not satisfied unless the following information is maintained in such records with respect to each section 987 QBU:

(1) The amount of the items of income, gain, deduction, or loss attributed to the section 987 QBU in the functional currency of the section 987 QBU.

(2) The amount of assets and liabilities attributed to the section 987 QBU in the functional currency of the section 987 QBU.

(3) The exchange rates used to translate items of income, gain, deduction, or loss of the section 987 QBU into the owner's functional currency and, if a spot rate convention is used, the manner in which such convention is determined.

(4) The exchange rates used to translate the assets and liabilities of the section 987 QBU into the owner's functional currency and, if a spot rate convention is used, the manner in which such convention is determined.

(5) The amount of the items of income, gain, deduction, or loss attributed to the section 987 QBU translated into the functional currency of the owner.

(6) The amount of assets and liabilities attributed to the section 987 QBU translated into the functional currency of the owner.

(7) The amount of assets and liabilities transferred by the owner to the section 987 QBU determined in the functional currency of the owner.

(8) The amount of assets and liabilities transferred by the section 987 QBU to the owner determined in the functional currency of the owner.

(9) The amount of the unrecognized section 987 gain or loss for the taxable year.

(10) The amount of the net accumulated unrecognized section 987 gain or loss at the close of the taxable year.

(11) If a remittance is made, the computations determined under § 1.861–9T(g) for purposes of sourcing and characterizing the remittance under § 1.987–5.

(12) The transition information required to be determined under § 1.987–10(e).

(c) *Retention of records.* The records required by this section, or records that support the information required on a form published by the Commissioner regarding section 987, must be maintained and kept at all times available for inspection by the Internal Revenue Service for so long as the contents thereof may become relevant in the administration of the Internal Revenue Code.

(d) *Information on a dedicated section 987 form.* The requirements of paragraph (b) of this section shall be satisfied if the taxpayer provides the specific information required on a form published by the Commissioner for this purpose.

§ 1.987–10 Transition rules.

(a) *Scope.* These transition rules shall apply to any taxpayer that is an owner of a section 987 QBU pursuant to § 1.987–1(b)(4) on the transition date (as defined in § 1.987–11(c)). Except as provided in paragraph (c) of this section, a taxpayer to which this section applies must transition from the method previously used to comply with section 987 (the ''prior section 987 method'') to the method prescribed by these regulations pursuant to the fresh start transition method set forth in paragraph (b) of this section.

(b) *Fresh start transition method*—(1) *In general.* Pursuant to the fresh start transition method, and solely for purposes of this section, all section 987 QBUs of a taxpayer, other than section 987 QBUs subject to paragraph (c) of this section, are deemed to terminate on the day before the transition date. No section 987 gain or loss is determined or recognized as a result of the deemed termination. The owner of a section 987 QBU that is deemed to terminate under this section is treated as having transferred all of the assets and liabilities attributable to such QBU to a new section 987 QBU on the transition date. This deemed transfer of assets and liabilities is taken into account only for purposes of transitioning to these regulations under section 987 and shall not be taken into account in determining the amounts transferred from the owner to the section 987 QBU during the taxable year for purposes of § 1.987–5(c)(1)(ii).

(2) *Application of § 1.987–4.* For purposes of applying § 1.987–4 with respect to a section 987 QBU described in paragraph (b)(1) of this section for the taxable year beginning on the transition date, the amount of assets and liabilities deemed transferred from the owner to the section 987 QBU on the transition date pursuant to paragraph (b)(1) of this section shall be determined by translating such assets and liabilities (without regard to whether the asset or liability is a marked item or a historic item) at the historic rate as determined under paragraph (b)(3) of this section.

(3) *Determination of historic rate.* For purposes of applying these regulations with respect to a section 987 QBU described in paragraph (b)(1) of this section for taxable years beginning on or after the transition date, the historic rate (as defined in § 1.987–1(c)(3)) for an asset or liability deemed transferred under paragraph (b)(1) of this section from an owner to the section 987 QBU on the transition date shall be the historic rate under § 1.987–1(c)(3) determined by reference to the date the assets were acquired or liabilities entered into or assumed by the section 987 QBU deemed terminated (that is, without regard to the deemed termination or transfer described in paragraph (b)(1) of this section). However, if the owner is not able to determine reliably the historic rate for a particular asset or liability, then the historic rate must be determined based on reasonable assumptions (for example, assumptions about turnover and aging of accounts receivable), consistently applied.

(4) *Example.* The provisions of this paragraph (b) are illustrated by the following example. Exchange rate assumptions used in the example are selected for the purpose of illustrating the principles of this section, and no inference is intended by their use. Additionally, the effect of depreciation is not taken into account for purposes of this example.

Example. (i) U.S. Corp is a domestic corporation with the dollar as its functional currency. U.S. Corp owns Business A, a U.K. branch with the pound as its functional currency. Business A was formed on January 1, year 1. U.S. Corp uses the method prescribed in the 1991 proposed section 987 regulations to determine the section 987 gain or loss of Business A. U.S. Corp contributed £6,000 to Business A on January 1, year 1. On the same day, Business A bought a truck for £4,000 and a computer for £1,000.

Business A had profits determined under § 1.987–1(b)(1)(i) through (iii) of the 1991 proposed section 987 regulations of £250 in each of year 1, year 2, and year 3, and the yearly average exchange rate was used in each of those years to translate Business A's profits under the 1991 proposed section 987 regulations. The yearly average exchange rate was £1 = $1.10 in year 1, £1 = $1.20 in year 2, and £1 = $1.30 in year 3. Business A incurred a £50 loss in each of year 4 and year 5. Business A made no remittances to U.S. Corp in any year.

(ii) On January 1, year 5, Business A transitions to the method provided in these regulations pursuant to the fresh start transition method described in paragraph (b) of this section. Pursuant to paragraph (b)(1) of this section, Business A is deemed to terminate on December 31, year 4. However, no section 987 gain or loss is determined or recognized as a result of the deemed termination. Pursuant to paragraph (b)(2) of this section, for purposes of applying § 1.987–4 with respect to Business A for year 5, the amount of assets and liabilities transferred from U.S. Corp to Business A on the transition date shall be determined by translating all of Business A's assets at the historic rates for those assets as determined under § 1.987–1(c)(3) and paragraph (b)(3) of this section. Because U.S. Corp is not able to determine reliably the historic rate for the pound currency it is deemed to transfer to Business A, U.S. Corp determines the historic rate for these pounds based on a last-in, first-out cash flow assumption. Thus, it is assumed that the £50 loss in each of year 4 and year 5 first reduces the £250 earned in year 3. Accordingly, for purposes of determining the amount of assets and liabilities deemed transferred from U.S. Corp to Business A on January 1, year 5, U.S. Corp translates Business A's assets and liabilities as follows:

Assets	Amount in £	Translation rate	Amount in $
Pounds	1,000	£1 = $1.10 (yearly average rate—year 1)	1,100
Pounds	250	£1 = $1.10 (yearly average rate—year 1)	275
Pounds	250	£1 = $1.20 (yearly average rate—year 2)	300
Pounds	150	£1 = $1.30 (yearly average rate—year 3)	195
Truck	4,000	£1 = $1.10 (yearly average rate—year 1)	4,400
Computer	1,000	£1 = $1.10 (yearly average rate—year 1)	1,100
Total assets			7,370
Liabilities:			
Total liabilities			0

(c) *Transition of section 987 QBUs that applied the method set forth in the 2006 proposed section 987 regulations.*—(1) *In general.* If, with respect to a particular section 987 QBU, a taxpayer's prior section 987 method was based on a reasonable application of the method described in the 2006 proposed section 987 regulations (REG–208270–86, 71 FR 52876), then the taxpayer shall apply these regulations under section 987 with respect to such section 987 QBU without regard to paragraph (b) of this section.

(2) *Application of § 1.987–4.* For purposes of applying § 1.987–4 with respect to a section 987 QBU described in paragraph (c)(1) for the taxable year beginning on the transition date, the owner functional currency net value of the section 987 QBU on the last day of the preceding taxable year under § 1.987–4(d)(1)(B) shall be the amount that was determined under § 1.987–4(d)(1)(A) of the 2006 proposed section 987 regulations for the preceding taxable year. Additionally, for purposes of applying § 1.987–4 with respect to a section 987 QBU described in paragraph (c)(1) for all taxable years that end after the transition date, the section 987 QBU's net unrecognized section 987 gain or loss for all prior taxable years under § 1.987–4(c) shall take into account the aggregate of the amounts determined under § 1.987–4(d) of the 2006 proposed section 987 regulations for taxable years for which the taxpayer applied the 2006 proposed section 987 regulations, reduced by the amounts taken into account under § 1.987–5 of the 2006 proposed section 987 regulations upon a remittance for all such prior taxable years.

(3) *Use of prior historic rate.* For purposes of applying these regulations under section 987 with respect to historic items (as defined in § 1.987–1(e)), other than inventory, that are reflected on the balance sheet of the section 987 QBU on the transition date, a taxpayer may use the same historic exchange rates as were used under the taxpayer's application of the 2006 proposed section 987 regulations in place of the historic rates that otherwise would be determined under § 1.987–1(c)(3), provided that, for all taxable years that end after the transition date, the taxpayer does so with respect to all historic items (other than inventory) that are reflected on the balance sheet of the section 987 QBU on the transition date.

(4) *Example.* The provisions of this paragraph (c) are illustrated by the following example. Exchange rate assumptions used in the example are selected for the purpose of illustrating the principles of this section, and no inference is intended by their use. Additionally, the effect of depreciation is not taken into account for purposes of this example.

Example. (i) U.S. Corp is a domestic corporation with the dollar as its functional currency. U.S. Corp owns Business A, a U.K. branch with the pound as its functional currency. Business A was formed on January 1, year 1. U.S. Corp uses a reasonable application of the method described in the 2006 proposed section 987 regulations to determine the section 987 gain or loss of Business A. On January 1, year 5, Business A transitions to the method provided in these regulations pursuant to the method described in this paragraph (c). Business A's opening balance sheet on January 1, year 5, includes pounds, a truck acquired in year 2, inventory accounted for under the FIFO method, and no liabilities. These assets remain on the balance sheet on December 31, year 5.

(ii) Pursuant to paragraph (c)(3) of this section, U.S. Corp chooses to use the same historic exchange rates as were used under its application of the 2006 proposed regulations in place of the historic rates prescribed under § 1.987–1(c)(3) for purposes of applying these regulations with respect to historic items (other than inventory) held on the transition date.

(iii) The pounds are marked items under § 1.987–1(d). Because the pounds are marked items, for purposes of determining the owner functional currency net value of Business A on the last day of year 5 pursuant to § 1.987–4(e), the pounds are translated into dollars using the spot rate (as defined in § 1.987–1(c)(1)) applicable to the last day of year 5.

(iv) The truck held on Business A's balance sheet on January 1, year 5, is a historic item under § 1.987–1(e). For purposes of determining the owner functional currency net value of Business A on the last day of year 5 pursuant to § 1.987–4(e), the basis of the truck is translated into dollars using the spot rate on the day the truck was acquired in year 2, as determined under § 1.987–1(c)(3) of the 2006 proposed section 987 regulations. If U.S. Corp had not chosen pursuant to paragraph (c)(3) of this section to use the same historic exchange rates as were used under its application of the 2006 proposed regulations, the basis of the truck would have been translated into dollars using the historic rate described in § 1.987–1(c)(3), which is the yearly average exchange rate for year 5.

(v) The inventory held on Business A's balance sheet on January 1, year 5, is a historic item under § 1.987–1(e). For purposes of determining the owner functional currency net value of Business A on the last day of year 5 pursuant to § 1.987–4(e), the FIFO cost basis of the inventory is translated into dollars using the historic rate, which pursuant to § 1.987–1(c)(3)(i)(B) is the yearly average exchange rate for year 5.

(vi) Pursuant to paragraph (c)(3) of this section, for purposes of applying § 1.987–4 with respect to Business A for year 5, the owner functional currency net value of Business A on the last day of year 4 under § 1.987–4(d)(1)(B) is the amount that was determined under § 1.987–4(d)(1)(A) of the 2006 proposed section 987 regulations for year 4. Additionally, Business A's net unrecognized section 987 gain or loss for all prior years under § 1.987–4(c) shall take into account the aggregate of the amounts determined under § 1.987–4(d) of the 2006 proposed section 987 regulations for year 1 through year 4, reduced by the amounts taken into account under § 1.987–5 of the 2006 proposed section 987 regulations upon a remittance for all such prior taxable years.

(d) *Adjustments to avoid double counting.* If a difference between the treatment of any item under these regulations and the treatment of the item under the taxpayer's prior section 987 method would result in income, gain, deduction or loss being taken into account more than once, then the net unrecognized section 987 gain or loss of the section 987 QBU, as determined under § 1.987–4(b) for the first taxable year for which these regulations apply, shall be adjusted to account for the difference.

(e) *Reporting*—(1) *In general.* Except as otherwise provided in this paragraph (e), the taxpayer must attach a statement titled ''Section 987 Transition Information'' to its timely filed return for the first taxable year to which these regulations under section 987 apply providing the following information:

(i) A description of each section 987 QBU to which these rules apply, the section 987 QBU's owner, the section 987 QBU's principal place of business, and a description of the prior section 987 method used by the taxpayer to determine section 987 gain or loss with respect to the section 987 QBU.

(ii) Any assumptions used by the taxpayer for determining the exchange rates used to translate the amount of assets and liabilities transferred to the section 987 QBU on the transition date, as provided in paragraph (b)(3) of this section.

(iii) With respect to each section 987 QBU subject to paragraph (c) of this section, a statement regarding whether historic items (as defined in § 1.987–1(c)(3)) are translated pursuant to paragraph (c)(2) of this section at the same historic rates as were used under the taxpayer's application of the 2006 proposed regulations or at the historic rates determined under § 1.987–1(c)(3).

(iv) With respect to each section 987 QBU with respect to which an adjustment is made pursuant to paragraph (d) of this section, a description of the adjustment and the basis for the computation of such adjustments.

(2) *Attachments not required where information is reported on a form.* Paragraph (e) of this section shall not apply to the extent the information described in such paragraph is required to be reported on a form published by the Commissioner.

§ 1.987–11 Effective/applicability date.

(a) *In general.* Except as otherwise provided in this section, §§ 1.987–1 through 1.987–10 shall apply to taxable years beginning on or after one year after the first day of the first taxable year following December 7, 2016.

(b) *Application of these regulations to taxable years beginning after* December 7, 2016. A taxpayer may apply these regulations under section 987 to taxable years beginning after December 7, 2016, provided the taxpayer consistently applies these regulations to such taxable years with respect to all section 987 QBUs directly or indirectly owned by the taxpayer on the transition date (as defined in paragraph (b)(2) of this section) as well as all section 987 QBUs directly or indirectly owned on the transition date by members that file a consolidated return with the taxpayer or by any controlled foreign corporation, as defined in section 957, in which a member owns more than 50 percent of the voting power or stock value, as determined under section 958(a).

(c) *Transition date.* The transition date is the first day of the first taxable year to which these regulations under section 987 are applicable with respect to a taxpayer under this section.

■ **Par. 6.** Section 1.988–0 is amended by adding an entry for § 1.988–1(a)(4).

§ 1.988–0 Taxation of gain or loss from a section 988 transaction; Table of Contents.

* * * * *

§ 1.988–1 Certain definitions and special rules.

(a) * * *

(4) Treatment of assets and liabilities of a section 987 aggregate partnership or DE that are not attributed to an eligible QBU.

* * * * *

■ **Par. 7.** Section 1.988–1 is amended by:

■ 1. Adding paragraph (a)(4).

■ 2. Revising paragraph (a)(10)(ii).

■ 3. Adding two sentences to the end of paragraph (i).

The additions and revision read as follows:

§ 1.988–1 Certain definitions and special rules.

(a) * * *

(4) *Treatment of assets and liabilities of a section 987 aggregate partnership or DE that are not attributed to an eligible QBU*—(i) *Scope.* This paragraph (a)(4) applies to assets and liabilities of a section 987 aggregate partnership as defined in § 1.987–1(b)(5), or of an entity disregarded as an entity separate from its owner for Federal income tax purposes (DE), that are not attributable to an eligible QBU as defined in § 1.987–1(b)(3).

(ii) *Section 987 Aggregate Partnerships.* For purposes of applying section 988 and the applicable regulations to transactions involving assets and liabilities described in paragraph (a)(4)(i) of this section that are held by a section 987 aggregate partnership, the owners of the section 987 aggregate partnership (within the meaning of § 1.987–1(b)(4)) shall be treated as owning their share of such assets and liabilities. Section 1.987–7(b) shall apply for purposes of determining an owner's share of such assets or liabilities.

(iii) *Disregarded entities.* For purposes of applying section 988 and the applicable regulations to transactions involving assets and liabilities described in paragraph (a)(4)(i) of this section that are held by a DE, the owner of the DE (within the meaning of § 1.987–1(b)(4)) shall be treated as owning all such assets and liabilities.

(iv) *Example.* The following example illustrates the application of paragraph (a)(4) of this section:

Example. Liability held through a section 987 aggregate partnership. (i) *Facts.* P, a foreign partnership, has two equal partners, X and Y. X is a domestic corporation with the dollar as its functional currency. Y is a foreign corporation wholly owned by X that has the yen as its functional currency. P is a section 987 aggregate partnership. On January 1, 2021, P borrowed yen and issued a note to the lender that obligated P to pay interest and repay principal to the lender in yen. Also on January 1, 2021, P used the yen it borrowed from the lender to acquire all of the stock of F, a foreign corporation, from an unrelated person. P also holds an eligible QBU (within the meaning of § 1.987–1(b)(3)) that has the yen as its functional currency. P maintains one set of books and records. The assets and liabilities of the eligible QBU are reflected on the books and records of P as provided under § 1.987–2(b). The F stock held by P, and the yen liability incurred to acquire the F stock, are also recorded on the

books and records of P but, pursuant to § 1.987–2(b)(2)(i), are not considered to be reflected on the books and records of the eligible QBU for purposes of section 987.

(ii) *Analysis.* X's portion of the assets and liabilities of the eligible QBU owned by P is a section 987 QBU. Y's portion of the assets and liabilities of the eligible QBU owned by P is not a section 987 QBU because Y and the eligible QBU have the same functional currency. Because the F stock and yen-denominated liability incurred to acquire such stock are not considered reflected on the books and records of the eligible QBU, they are not subject to section 987. In addition, because the F stock and the yen-denominated liability incurred to acquire such stock are held by P (but not attributable to P's eligible QBU), X and Y are treated as owning their respective shares of such stock and liability pursuant to § 1.988–1(a)(4)(ii) for purposes of applying section 988. As a result, P's becoming the obligor on the portion of the yen-denominated note that is treated as an obligation of X is a section 988 transaction pursuant to paragraphs (a)(1)(ii), (a)(2)(ii) and (a)(3) of this section. Similarly, the dispositions of yen to make payments of interest and principal on the liability, to the extent such yen are treated as owned by X under paragraph (a)(4)(ii) of this section, are section 988 transactions under paragraphs (a)(1)(i) and (a)(3) of this section. To the extent the yen are treated as owned by the eligible QBU, see § 1.987–2(c) for the treatment of the payment of yen as a transfer from the eligible QBU to X. P's becoming the obligor on Y's portion of the yen-denominated note, and Y's portion of the yen disposed of in connection with payments on such note, are not section 988 transactions because Y has the yen as its functional currency.

* * * * *

(10) * * *

(ii) *Certain intra-taxpayer transfers of section 988 transactions that result in the recognition of section 988 gain or loss*—(A) *In general.* Exchange gain or loss with respect to nonfunctional currency or any item described in paragraph (a)(2) of this section entered into with another taxpayer shall be realized upon a transfer (as defined under § 1.987–2(c)) of such currency or item from an owner to a section 987 QBU or from a section 987 QBU to an owner if as a result of such transfer—

(*1*) The currency or item loses its character as nonfunctional currency or as an item described in paragraph (a)(2) of this section; or

(*2*) The source of the exchange gain or loss could be altered absent the application of paragraph (a)(10)(ii)(B) of this section.

(B) *Computation of exchange gain or loss.* Exchange gain or loss described in section (a)(10)(ii)(A) of this section shall be computed in accordance with § 1.988–2 (without regard to § 1.988–2(b)(8)) as if the nonfunctional currency or item described in paragraph (a)(2) of this section had been sold or otherwise transferred at fair market value between unrelated taxpayers. For purposes of the preceding sentence, a taxpayer must use a translation rate that is consistent with the translation conventions of the section 987 QBU to or from which, as the case may be, the item is being transferred. In the case of a gain or loss incurred in a transaction described in this paragraph (a)(10)(ii) that does not have a significant business purpose, the Commissioner may defer such gain or loss.

* * * * *

(i) * * * Generally, the revisions to paragraphs (a)(3), (a)(4), and (a)(10)(ii) of this section shall apply to taxable years beginning one year after the first day of the first taxable year following December 7, 2016. If pursuant to § 1.987–11(b) a taxpayer applies §§ 1.987–1 through 1.987–11 beginning in a taxable year prior to the earliest taxable year described in § 1.987–11(a), then the revisions to paragraphs (a)(3), (a)(4), and (a)(10)(ii) of this section shall apply to taxable years of the taxpayer beginning on or after the first day of such prior taxable year.

■ **Par. 8.** Section 1.988–4 is amended by revising paragraph (b)(2) to read as follows:

§ 1.988–4 Source of gain or loss realized on a section 988 transfer.

* * * * *

(b) * * *

(2) *Proper reflection on the books of the taxpayer or qualified business unit*—(i) *In general.* For purposes of paragraph (b)(1) of this section, the principles of § 1.987–2(b) shall apply in determining whether an asset, liability, or item of income or expense is reflected on the books and records of a qualified business unit.

(ii) *Effective/applicability date.* Generally, paragraph (b)(2)(i) of this section shall apply to taxable years beginning on or after one year after the first day of the first taxable year following December 7, 2016. If pursuant to § 1.987–11(b) a taxpayer applies §§ 1.987–1 through 1.987–11 beginning in a taxable year prior to the earliest taxable year described in § 1.987–11(a), then paragraph (b)(2)(i) of this section shall apply to taxable years of the taxpayer beginning on or after the first day of such prior taxable year.

* * * * *

■ **Par. 9.** Section 1.989(a)–1 is amended by revising paragraph (b)(2)(i) and adding paragraphs (b)(4) and (d)(3) and (4) to read as follows:

§ 1.989(a)–1 Definition of a qualified business unit.

(b) * * *

(2) * * *

(i) *Persons*—(A) *Corporations.* A corporation is a QBU.

(B) *Individuals.* An individual is not a QBU.

(C) *Partnerships.* A partnership, other than a section 987 aggregate partnership as defined in § 1.987–1(b)(5), is a QBU.

(D) *Trusts and estates.* A trust or estate is a QBU of a beneficiary.

* * * * *

(4) *Effective/applicability date.* Generally, the revisions to paragraph (b)(2)(i) of this section shall apply to taxable years beginning on or after one year after the first day of the first taxable year following December 7, 2016. If pursuant to § 1.987–11(b) a taxpayer applies §§ 1.987–1 through 1.987–11 beginning in a taxable year prior to the earliest taxable year described in § 1.987–11(a), then the effective date of the revisions to paragraph (b)(2)(i) of this section with respect to the taxpayer shall apply to taxable years of the taxpayer beginning on or after the first day of such prior taxable year.

* * * * *

(d) * * *

(3) *Proper reflection on the books of the taxpayer or qualified business unit.* The principles of § 1.987–2(b) shall apply in determining whether an asset, liability, or item of income or expense is reflected on the books of a qualified business unit (and therefore is attributable to such unit).

(4) *Effective/applicability date.* Generally, the revisions to paragraph (d)(3) of this section shall apply to taxable years beginning on or after one year after the first day of the first taxable year following December 7, 2016. If pursuant to § 1.987–11(b) a taxpayer applies §§ 1.987–1 through 1.987–11 beginning in a taxable year prior to the earliest taxable year described in § 1.987–11(a), then the revisions to paragraph (b)(2)(i) of this section shall apply with respect to taxable years of the taxpayer beginning on or after the first day of such prior taxable year.

* * * * *

§ 1.989(c)–1 [Removed]

■ **Par. 10.** Section 1.989(c)–1 is removed.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 11.** The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 12.** In § 602.101, paragraph (b) is amended by adding an entry in numerical order to the table to read as follows:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB Control No.
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1.987–1	1545–2265
1.987–3	1545–2265
1.987–9	1545–2265
1.987–10	1545–2265
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John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: November 14, 2016.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

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26 CFR Part 1
Recognition and Deferral of Section 987 Gain or Loss; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9795]

RIN 1545–BL12

Recognition and Deferral of Section 987 Gain or Loss

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains temporary regulations under section 987 of the Internal Revenue Code (Code) relating to the recognition and deferral of foreign currency gain or loss under section 987 with respect to a qualified business unit (QBU) in connection with certain QBU terminations and certain other transactions involving partnerships. This document also contains temporary regulations under section 987 providing: an annual deemed termination election for a section 987 QBU; an elective method, available to taxpayers that make the annual deemed termination election, for translating all items of income or loss with respect to a section 987 QBU at the yearly average exchange rate; rules regarding the treatment of section 988 transactions of a section 987 QBU; rules regarding QBUs with the U.S. dollar as their functional currency; rules regarding combinations and separations of section 987 QBUs; rules regarding the translation of income used to pay creditable foreign income taxes; and rules regarding the allocation of assets and liabilities of certain partnerships for purposes of section 987. Finally, this document contains temporary regulations under section 988 requiring the deferral of certain section 988 loss that arises with respect to related-party loans. The text of these temporary regulations also serves as the text of the proposed regulations set forth in the Proposed Rules section in this issue of the **Federal Register**. In addition, in the Rules and Regulations section of this issue of the **Federal Register**, final regulations are being issued under section 987 to provide general guidance under section 987 regarding the determination of the taxable income or loss of a taxpayer with respect to a QBU.

DATES: *Effective date.* These regulations are effective on December 7, 2016.

Applicability date. For dates of applicability, see §§ 1.987–1T(h), 1.987–2T(e), 1.987–3T(f), 1.987–4T(h), 1.987–6T(d), 1.987–7T(d), 1.987–8T(g), 1.987–12T(j), 1.988–1T(j), and 1.988–2T(j).

FOR FURTHER INFORMATION CONTACT: Steven D. Jensen at (202) 317–6938 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

These temporary regulations are being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collection of information contained in these regulations has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget under control number 1545–2265. Responses to this collection of information are mandatory.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

For further information concerning this collection of information, the accuracy of the estimated burden and suggestions for reducing this burden, and where to submit comments on the collection of information, please refer to the preamble to the cross-referencing notice of proposed rulemaking published in the Proposed Rules section of this issue of the **Federal Register**.

Books and records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains temporary regulations under section 987 of the Code relating to the recognition and deferral of foreign currency gain or loss under section 987 with respect to a QBU in connection with certain QBU terminations and certain other transactions involving partnerships. This document also contains temporary regulations under section 987 providing (i) an annual deemed termination election for a section 987 QBU; (ii) an elective method, available to taxpayers that make the annual deemed termination election, for translating all items of income or loss with respect to a section 987 QBU at the yearly average exchange rate; (iii) rules regarding the treatment of section 988 transactions of a section 987 QBU; (iv) rules regarding QBUs with the U.S. dollar as their functional currency; (v) rules regarding combinations and separations of section 987 QBUs; (vi) rules regarding the translation of income used to pay creditable foreign income taxes; and (vii) rules regarding the allocation of assets and liabilities of certain partnerships for purposes of section 987. Finally, this document contains temporary regulations under section 988 requiring the deferral of certain section 988 loss that arises with respect to related-party loans.

Section 987 generally provides that, when a taxpayer owns one or more QBUs with a functional currency other than the U.S. dollar and such functional currency is different than that of the taxpayer, the taxable income or loss of the taxpayer with respect to each such QBU is determined by computing the taxable income or loss of each QBU separately in its functional currency and translating such income or loss at the appropriate exchange rate. Section 987 further requires the taxpayer to make ''proper adjustments'' (as prescribed by the Secretary of the Treasury (the Secretary)) for transfers of property between QBUs having different functional currencies, including by treating post-1986 remittances from each such QBU as made on a pro rata basis out of post-1986 accumulated earnings, by treating section 987 gain or loss as ordinary income or loss, and by sourcing such gain or loss by reference to the source of the income giving rise to post-1986 accumulated earnings.

Section 989(c) directs the Secretary to ''prescribe such regulations as may be necessary or appropriate to carry out the purposes of [subpart J], including regulations . . . limiting the recognition of foreign currency loss on certain remittances from qualified business units . . . [and] providing for the appropriate treatment of related party transactions (including transactions between qualified business units of the same taxpayer). . . .''

On September 6, 2006, the Treasury Department and the IRS issued proposed regulations under section 987 (REG–208270–86, 71 FR 52876) (the 2006 proposed regulations). The Treasury Department and the IRS received many written comments in response to the 2006 proposed regulations and, after consideration of those comments, are issuing final regulations (TD 9794) under section 987 (the final regulations) that are being published contemporaneously with these temporary regulations. These temporary regulations also reflect the consideration of comments received on the 2006 proposed regulations, as well as other considerations described in this preamble.

Explanation of Provisions

1. Deferral of Section 987 Gain or Loss on Certain Terminations and Other Transactions Involving Partnerships

A. Background

Under the final regulations, the owner of a section 987 QBU that terminates includes in income all of the net unrecognized section 987 gain or loss with respect to the section 987 QBU in the year it terminates. See §§ 1.987–5(c)(3) and 1.987–8(e). Section 1.987–8(b) and (c) describe the circumstances in which a section 987 QBU terminates, which include the transfer (or deemed transfer) of substantially all of the assets of the section 987 QBU and when the section 987 QBU's owner ceases to exist (except in connection with certain liquidations or reorganizations described in section 381(a)). Under these rules, a termination can result solely from a transfer of a section 987 QBU between related parties or, when a QBU is owned by an entity that is disregarded as an entity separate from its owner for Federal tax purposes (DE), from the deemed transfer that occurs when an election is made to treat the DE as a corporation for Federal tax purposes, notwithstanding that the QBU's assets continue to be used in the same trade or business.

The preamble to the 2006 proposed regulations requested comments regarding whether inbound liquidations under section 332 and inbound asset reorganizations under section 368(a) should result in terminations of section 987 QBUs. The preamble also requested comments on the interaction of the rules of § 1.1502–13 regarding intercompany transactions with the 2006 proposed regulations, including whether section 987 gain or loss resulting from the transfer of assets and liabilities of a section 987 QBU between members of the same consolidated group in a section 351 transaction should be deferred under § 1.1502–13. Many comments recommended that such a section 351 exchange should not trigger the recognition of section 987 gain or loss.

Because a termination can result in the deemed remittance of all the assets of a section 987 QBU in circumstances in which the assets continue to be used by a related person in the conduct of the same trade or business that formerly was conducted by the section 987 QBU, terminations can facilitate the selective recognition of section 987 losses. Section 989(c)(2) provides the Treasury Department and the IRS with authority to ''limit[] the recognition of foreign currency loss on certain remittances from qualified business units.'' The Treasury Department and the IRS have determined that terminations of section 987 QBUs generally should not be permitted to achieve the selective recognition of losses when the assets and liabilities of the section 987 QBU are transferred to a related person and remain subject to section 987 in the hands of the transferee, as in the case, for example, of a section 351 transfer of a section 987 QBU within a consolidated group. Similar policy considerations arise when the transfer of a partnership interest to a related person results in deemed transfers that cause the recognition of section 987 loss with respect to a section 987 QBU owned through the partnership, notwithstanding that the trade or business of the section 987 QBU continues without interruption and remains subject to section 987. In order to address these policy concerns, as described in greater detail in Part 1.C of this Explanation of Provisions, the temporary regulations defer section 987 losses resulting from certain termination events and partnership transactions in which the assets and liabilities of the section 987 QBU remain within a single controlled group (defined as all persons with the relationships to each other described in sections 267(b) or 707(b)) and remain subject to section 987.

The Treasury Department and the IRS also acknowledge, however, that part of the rationale for deferring section 987 losses—that is, the continuity of ownership of the section 987 QBU within a single controlled group—applies equally to section 987 gains that otherwise would be triggered when taxpayers transfer a section 987 QBU within a single controlled group. Thus, consistent with the recommendations of comments on the 2006 proposed regulations, the temporary regulations generally apply to defer the recognition of section 987 gains as well as losses when the transferee is subject to section 987 with respect to the assets of the section 987 QBU. The Treasury Department and the IRS have determined, however, that gain should not be deferred to the extent the assets of a section 987 QBU are transferred by a U.S. person to a related foreign person. Since recognition of the deferred gain generally would occur only as a result of remittances to the foreign owner, the IRS could face administrative difficulty in attempting to ensure that such deferred gain is appropriately recognized and not indefinitely deferred. Treating gains differently than losses in the context of transfers to related foreign persons generally is consistent with the policies underlying sections 267 and 367. In particular, this rule is consistent with the policy of recognizing foreign currency gains and not losses with respect to property transferred outbound in a nonrecognition transaction. See section 367(a)(3)(B)(iii).

In addition, the Treasury Department and the IRS have determined that selective recognition of losses should not be permitted in the context of certain outbound transfers even when the assets do not remain subject to section 987 in the hands of the transferee (because, for example, the transferee has the same functional currency as the QBU). Accordingly, consistent with the principles of sections 267 and 367(a), the temporary regulations also provide special rules to prevent the selective recognition of section 987 losses in certain other transactions involving outbound transfers.

B. Scope of Application of § 1.987–12T

Section 1.987–12T provides for the deferral of certain net unrecognized section 987 gain or loss that otherwise would be recognized in connection with specified events under § 1.987–5, which governs the recognition of section 987 gain or loss by the owner of a section 987 QBU to which the final regulations apply. In addition, because the policy concerns that motivate § 1.987–12T exist regardless of whether section 987 gain or loss is computed pursuant to the final regulations or some other reasonable method, § 1.987–12T applies to any foreign currency gain or loss realized under section 987(3), including foreign currency gain or loss realized under section 987 with respect to a QBU to which the final regulations generally are not applicable. In order to achieve this, the temporary regulations specify that references in § 1.987–12T to section 987 gain or loss refer to any foreign currency gain or loss realized under section 987(3) and that references to a section 987 QBU refer to any eligible QBU (as defined in § 1.987–1(b)(3)(i), but without regard to § 1.987–1(b)(3)(ii)) that is subject to section 987. Additionally, the temporary regulations specify that references in § 1.987–12T to the recognition of section 987 gain or loss under § 1.987–5 encompass any determination and recognition of gain or loss under section 987(3) that would occur but for § 1.987–12T. Accordingly, the temporary regulations require an owner of a QBU that is not subject to § 1.987–5 to adapt the rules set forth in § 1.987–12T to recognize section 987 gains or losses consistent with the principles of § 1.987–12T.

The policy concerns regarding selective realization of section 987 losses do not apply, however, with respect to a section 987 QBU that has made the annual deemed termination election described in Part 2 of this Explanation of Provisions, because all section 987 gain and loss is recognized annually under that election. Accordingly, § 1.987–12T is not applicable to section 987 gain or loss of a section 987 QBU with respect to which the annual deemed termination election is in effect.

Finally, in order to avoid any compliance burden associated with applying § 1.987–12T in circumstances involving relatively small amounts of section 987 gain or loss, § 1.987–12T includes a de minimis rule. That rule provides that § 1.987–12T does not apply to a section 987 QBU if the net unrecognized section 987 gain or loss of the section 987 QBU that, as a result of § 1.987–12T, would not be recognized under § 1.987–5 does not exceed $5 million.

Section 1.987–12T defers the recognition of section 987 gains and losses in connection with two types of specified events, which are referred to as ''deferral events'' and ''outbound loss events.'' Parts 1.C and 1.D of this Explanation of Provisions describe the rules governing deferral events and outbound loss events, respectively.

C. Deferral Events

As described in greater detail below, the temporary regulations provide that, notwithstanding § 1.987–5, the owner of a section 987 QBU with respect to which a deferral event occurs (a deferral QBU) must defer section 987 gain or loss that otherwise would be taken into account under § 1.987–5 in connection with the deferral event to the extent determined under § 1.987–12T(b)(3) and (c). Such deferred gain or loss is taken into account based on subsequent events in accordance with § 1.987–12T(c).

i. Deferral Events

The temporary regulations provide that a deferral event with respect to a section 987 QBU means any transaction or series of transactions that satisfy two conditions. Under the first condition, the transaction or series of transactions must be described in one of two categories. The first category, which is set forth in § 1.987–12T(b)(2)(ii)(A), is any termination of a section 987 QBU other than (i) a termination described in § 1.987–8(b)(3) (that is, a termination that results from the owner of the section 987 QBU ceasing to be a controlled foreign corporation (as defined in section 957(a)) (CFC) after certain related-party transactions); (ii) a termination described in § 1.987–8(c) (that is, a termination that results from a liquidation or asset reorganization described in section 381(a) involving an inbound or outbound transfer, a transfer by a CFC to a related non-CFC foreign corporation, or a transfer to a transferee that has the same functional currency as the section 987 QBU);[1] or (iii) a termination described solely in § 1.987–8(b)(1) (that is, a termination that results solely from the cessation of the trade or business of the section 987 QBU). Thus, the first category generally involves terminations that occur as a result of a transfer of substantially all the assets of a section 987 QBU other than a transfer as part of a transaction described in section 381(a) in which the owner ceases to exist. (A termination that results from an outbound section 381(a) transaction, however, may be an outbound loss event.)

The second category, which is described in § 1.987–12T(b)(ii)(B), encompasses certain partnership transactions that result in a net deemed transfer from a section 987 QBU to its owner as a result of which section 987 gain or loss otherwise would be recognized under § 1.987–5. The second category refers to two types of transactions involving partnerships.

First, the second category includes a disposition of part of an interest in a DE or partnership. Under § 1.987–2(c)(5), a transfer of part of an interest in a DE or section 987 aggregate partnership results in deemed transfers to the owner of a section 987 QBU held through that DE or partnership that may result in a remittance, but that generally do not cause a termination. For an illustration of the application of § 1.987–12T to a deferral event resulting from the conversion of a disregarded entity into a section 987 aggregate partnership, see § 1.987–12T(h), *Example 4.*

The second type of transaction included in the second category is a contribution of assets by a related person to a partnership or DE through which a section 987 QBU is held, provided that the contributed assets are not included on the books and records of an eligible QBU and the contribution causes a net transfer from a section 987 QBU owned through the partnership or DE. The rules of § 1.987–2 must be applied to determine whether the contribution would cause a net transfer from any section 987 QBUs held through a partnership. For example, if two partners (Partner A and Partner B) each own a 50% interest in an existing section 987 aggregate partnership with a single section 987 QBU, and Partner A contributes cash that is included on the books of the section 987 QBU after the contribution and Partner B contributes an equal amount of non-portfolio stock, the contributions would not cause either Partner A nor Partner B to have a net transfer from the section 987 QBU under § 1.987–2 and there would be no section 987 gain or loss to defer. As a result of the broad scope of application for § 1.987–12T specified in § 1.987–12T(a)(2), the second category includes transactions involving partnerships that are not section 987 aggregate partnerships even though QBUs that are held through such partnerships generally are not subject to the final regulations. Accordingly, § 1.987–12T applies to a disposition of a partnership interest or a contribution to a partnership if it otherwise would result in recognition of gain or loss under a taxpayer's reasonable method of applying section 987.

The second condition described in § 1.987–12T(b)(2) is that, immediately after the transaction or series of transactions, assets of the section 987 QBU are reflected on the books and records of a successor QBU. For this purpose, a successor QBU with respect to a section 987 QBU (original QBU) generally means a section 987 QBU on whose books and records assets of the original QBU are reflected immediately after the deferral event, provided that, immediately after the deferral event, the section 987 QBU is owned by a member of the controlled group that includes the person that owned the original QBU immediately before the deferral event. This relatedness requirement would not be met, for example, if the person that owned the original QBU ceased to exist in connection with the deferral event.

However, if the owner of the original QBU is a U.S. person, then a successor QBU does not include a section 987 QBU owned by a foreign person, except in the case of a deferral event that is solely described in the second category of transactions involving partnership and DE interests. This limitation on the definition of a successor QBU in the context of outbound transfers serves two purposes. First, consistent with the general policy of recognizing foreign currency gains upon an outbound transfer, the limitation ensures that section 987 gain is recognized to the extent section 987 QBU assets are transferred outbound in connection with a termination. Second, the

[1] The transfer of a section 987 QBU as part of a liquidation or asset reorganization described in section 381(a) in which the transferor and transferee have the same tax status is not a termination under § 1.987–8(b) and (c) and, therefore, cannot constitute a deferral event under the first category.

limitation coordinates the deferral event rules with the outbound loss event rules described in Part 1.D of this Explanation of Provisions, which contain different rules for the recognition of section 987 loss attributable to assets of a section 987 QBU that are transferred outbound in connection with a termination of the section 987 QBU.

ii. Recognition of Section 987 Gain or Loss Under § 1.987–5 in the Taxable Year of a Deferral Event

The temporary regulations provide that, in the taxable year of a deferral event, the owner of the deferral QBU generally recognizes section 987 gain or loss as determined under § 1.987–5, except that, solely for purposes of applying § 1.987–5, all assets and liabilities of the deferral QBU that, immediately after the deferral event, are properly reflected on the balance sheet of a successor QBU are treated as not having been transferred and therefore as remaining on the balance sheet of the deferral QBU, notwithstanding the deferral event. The effect of these rules is that, in the taxable year of a deferral event, only assets and liabilities of the deferral QBU that are not reflected on the books and records of a successor QBU immediately after the deferral event are taken into account in determining the amount of a remittance from the deferral QBU. Section 987 gain or loss that, as a result of these rules, is not recognized under § 1.987–5 in the taxable year of the deferral event is referred to as deferred section 987 gain or loss. As discussed in Part 1.D of this Explanation of Provisions, if the deferral event also constitutes an outbound loss event, the amount of loss recognized by the owner may be further limited under the rules applicable to outbound loss events.

iii. Recognition of Deferred Section 987 Gain or Loss in the Taxable Year of a Deferral Event and in Subsequent Taxable Years

The temporary regulations provide rules for determining when a deferral QBU owner recognizes deferred section 987 gain or loss. For this purpose, a deferral QBU owner means, with respect to a deferral QBU, the owner of the deferral QBU immediately before the deferral event with respect to the deferral QBU or the owner's qualified successor. The temporary regulations define a qualified successor with respect to a corporation (transferor corporation) as another corporation (acquiring corporation) that acquires the assets of the transferor corporation in a transaction described in section 381(a), but only if (A) the acquiring corporation is a domestic corporation and the transferor corporation was a domestic corporation, or (B) the acquiring corporation is a CFC and the transferor corporation was a CFC. A qualified successor of a corporation includes a qualified successor of a qualified successor of the corporation.

As described in the remainder of this Part 1.C.iii, the temporary regulations provide that deferred section 987 gain or loss is recognized upon subsequent remittances from a successor QBU, or upon a deemed remittance that occurs when a successor QBU ceases to be owned by a member of the deferral QBU owner's controlled group, subject to an exception that applies when a successor QBU terminates in an outbound transfer. In general, these rules depend on the continued existence of a deferral QBU owner (which includes a qualified successor) and a successor QBU and preserve the location of the deferred section 987 gain or loss as gain or loss of the deferral QBU owner.

a. Subsequent Remittances

A deferral QBU owner generally recognizes deferred section 987 gain or loss in the taxable year of a remittance from a successor QBU to the owner of the successor QBU (successor QBU owner). The amount of deferred section 987 gain or loss that a deferral QBU owner recognizes upon a remittance is the outstanding deferred section 987 gain or loss (that is, the deferred section 987 gain or loss not previously recognized) multiplied by the remittance proportion of the successor QBU owner with respect to the successor QBU for the taxable year as determined under § 1.987–5(b) and, to the extent relevant, § 1.987–12T. For an illustration of this rule, see § 1.987–12T(h), *Example 5*.

In certain cases, there may be multiple successor QBUs with respect to a single deferral QBU. For instance, there may be multiple successor QBUs if the owner of a section 987 aggregate partnership interest transfers part of its interest or if a successor QBU separates into two or more separated QBUs under § 1.987–2T(c)(9)(ii). To ensure that a deferral QBU owner recognizes the appropriate amount of deferred section 987 gain or loss in connection with a remittance in such cases, the temporary regulations provide that multiple successor QBUs of the same deferral QBU are treated as a single successor QBU for purposes of determining the amount of deferred section 987 gain or loss that is recognized.

For example, if the owner (Corp A) of a section 987 aggregate partnership interest transfers part of its interest to another member of Corp A's consolidated group (Corp B), the transfer would give rise to a deferral event with respect to the section 987 QBU (QBU A) that Corp A indirectly owns through the partnership. QBU A would be considered a deferral QBU, and Corp A would be considered a deferral QBU owner. In addition, QBU A would be considered a successor QBU with respect to itself, and the section 987 QBU (QBU B) that Corp B owns indirectly through the partnership interest it acquired also would be considered a successor QBU with respect to QBU A. In determining the amount of deferred section 987 gain or loss recognized upon subsequent remittances from successor QBUs, the two successor QBUs are treated as a single successor QBU, such that their remittance proportion is determined under § 1.987–5 on a combined basis, taking into account the assets and remittances of both successor QBUs.

b. Deemed Remittance When a Successor QBU Ceases To Be Owned by a Member of the Deferral QBU Owner's Controlled Group

Solely for purposes of determining a deferral QBU owner's recognition of any outstanding deferred section 987 gain or loss, a successor QBU owner is treated as having a remittance proportion of 1 in a taxable year in which its successor QBU ceases to be owned by a member of a controlled group that includes the deferral QBU owner, including as a result of the deferral QBU owner ceasing to exist without having a qualified successor. Accordingly, a deferral QBU owner would recognize all outstanding deferred section 987 gain or loss upon a successor QBU ceasing to be owned by a member of the deferral QBU owner's controlled group if there is only one successor QBU, but would recognize only a proportional amount if there are multiple successor QBUs, one or more of which remain in the deferral QBU owner's controlled group.

c. Recognition of Deferred Section 987 Loss in Certain Outbound Successor QBU Terminations

Notwithstanding that deferred section 987 gain or loss generally is recognized upon remittances from a successor QBU, § 1.987–12T(c)(3) provides that, if assets of a successor QBU are transferred (or deemed transferred) in an exchange that would constitute an outbound loss event if the successor QBU had a net accumulated section 987 loss at the time of the exchange, the deferral QBU owner recognizes any outstanding deferred section 987 loss on a similar basis as it would if it originally had transferred the

deferral QBU in an outbound loss event. Any outstanding deferred section 987 loss with respect to the deferral QBU that, as a result of this rule, is not recognized is recognized by the deferral QBU owner in the first taxable year in which the deferral QBU owner (including any qualified successor) and the acquirer of the assets of the successor QBU (or any qualified successor) cease to be members of the same controlled group. Section 1.987–12T(c)(4) ensures that the policy concerns that motivate the treatment of outbound loss events under the temporary regulations apply in comparable circumstances involving successor QBUs. See Part 1.D of this Explanation of Provisions for an explanation of outbound loss events.

d. Special Rules Regarding Successor QBUs

The temporary regulations include three special rules regarding successor QBUs that are relevant to the recognition of deferred section 987 gain or loss. First, if a section 987 QBU is a successor QBU with respect to a deferral QBU that is a successor QBU with respect to another deferral QBU, the first-mentioned section 987 QBU is considered a successor QBU with respect to the second-mentioned deferral QBU. For example, if QBU A is a successor QBU with respect to QBU B, and QBU B is a successor QBU with respect to QBU C, then QBU A is a successor QBU with respect to QBU C.

Second, if a successor QBU with respect to a deferral QBU separates into two or more separated QBUs (as defined in § 1.987–2T(c)(9)(iii)), each separated QBU is considered a successor QBU with respect to the deferral QBU.

Third, if a successor QBU with respect to a deferral QBU combines with another section 987 QBU of the same owner, resulting in a combined QBU (as defined in § 1.987–2T(c)(9)(i)), the combined QBU is considered a successor QBU with respect to the deferral QBU.

iv. Source and Character of Deferred Section 987 Gain and Loss

The temporary regulations provide that the source and character of deferred section 987 gain or loss is determined under § 1.987–6 as if such gain or loss had been recognized with respect to the deferral QBU under § 1.987–5 on the date of the deferral event that gave rise to the deferred section 987 gain or loss. Thus, the source and character of deferred section 987 gain or loss is determined under § 1.987–6 without regard to the timing rules of § 1.987–12T.

D. Outbound Loss Events

Section 1.987–12T(d) of the temporary regulations contains rules that defer section 987 loss to the extent assets of a section 987 QBU are transferred outbound to a related foreign person in connection with an ''outbound loss event.'' Specifically, the temporary regulations provide that, notwithstanding § 1.987–5, the owner of a section 987 QBU with respect to which an outbound loss event occurs (outbound loss QBU) includes in taxable income in the year of the outbound loss event section 987 loss with respect to that section 987 QBU only to the extent provided in § 1.987–12T(d)(3). Sections 1.987–12T(d)(4) and (5) provide rules for the subsequent recognition of losses that are deferred under § 1.987–12T(d) that differ from the remittance-based rules that generally apply following deferral events.

Like the definition of deferral event, an outbound loss event includes two categories of transactions with respect to a section 987 QBU with net unrecognized section 987 loss. First, an outbound loss event includes any termination of the section 987 QBU in connection with a transfer of assets of the section 987 QBU by a U.S. person to a foreign person that was a member of the same controlled group as the U.S. transferor immediately before the transaction or, if the transferee did not exist immediately before the transaction, immediately after the transaction (related foreign person). The second category of outbound loss events includes any transfer by a U.S. person of part of an interest in a section 987 aggregate partnership or DE through which the U.S. person owns the section 987 QBU to a related foreign person that has the same functional currency as the section 987 QBU. The second category also includes a contribution of assets by such a related foreign person to the partnership or DE if the contribution has the effect of reducing the U.S. person's interest in the section 987 QBU (and therefore causes a deemed transfer of assets and liabilities to the U.S. person from the section 987 QBU) and the contributed assets are not included on the books and records of an eligible QBU of the partnership or DE. The second category would be implicated, for example, if a U.S. person transferred part of the interest in a DE through which it owned a section 987 QBU to a foreign corporation that had the same functional currency as the section 987 QBU in an outbound section 351 transaction.

Under these rules, the owner of the outbound loss QBU recognizes section 987 loss in the taxable year of the outbound loss event as determined under § 1.987–5 and the deferral event rules of § 1.987–12T(b) and (c), except that, solely for purposes of applying § 1.987–5, certain assets and liabilities of the outbound loss QBU are treated as not having been transferred and therefore as remaining on the balance sheet of the section 987 QBU, notwithstanding the outbound loss event. In the first category of outbound loss event (involving outbound asset transfers resulting in terminations), assets and liabilities that, immediately after the outbound loss event, are properly reflected on the books and records of the related foreign person or a section 987 QBU of the related foreign person are treated as not having been transferred. In the second category of outbound loss event (involving certain partnership and DE transactions), assets and liabilities that, immediately after the outbound loss event, are reflected on the books and records of the eligible QBU from which the assets and liabilities of the outbound loss QBU are allocated, and not on the books and records of a section 987 QBU, are treated as not having been transferred. The difference between the amount that otherwise would have been recognized and the amount actually recognized under this rule is referred to as outbound section 987 loss.

Although an outbound loss event in the second category also would constitute a deferral event, the rules governing deferral events only defer section 987 loss of a deferral QBU to the extent assets and liabilities are reflected on the books and records of a successor QBU immediately after the deferral event. Assets and liabilities of a deferral QBU that are reflected on the books and records of an eligible QBU of a partnership and allocated to a partner that has the same functional currency as the eligible QBU, as would occur in an outbound loss event, are not reflected on the books and records of a successor QBU and so would not cause section 987 loss to be deferred under the deferral event rules. Thus, there is no overlap in terms of the effect of the outbound loss event rules and the deferral event rules.

If an outbound loss event results from the transfer of assets of the outbound loss QBU in a nonrecognition transaction, the basis of the stock that is received in the transaction is increased by an amount equal to the outbound section 987 loss. In effect, this rule converts a section 987 loss into an unrealized stock loss, which may be recognized upon a recognition event with respect to the stock. This treatment

is similar to the treatment under section 367(a) of foreign currency losses with respect to foreign-currency denominated property that is transferred outbound in a nonrecognition event to a foreign corporation that has as its functional currency the currency in which the property is denominated. Outbound section 987 loss attributable to an outbound loss event that does not occur in connection with a nonrecognition transaction is recognized by the owner of the outbound loss QBU in the first taxable year in which the owner (or any qualified successor) and the related foreign person that participated in the outbound loss event (or any qualified successor) cease to be members of the same controlled group. In many circumstances this treatment will provide similar results as converting section 987 loss into stock basis as in the case of outbound loss events that result from a nonrecognition transaction.

The temporary regulations provide that, if loss is recognized on the sale or exchange of stock within two years of an outbound loss event that gave rise to an adjustment to the basis of the stock, then, to the extent of the outbound section 987 loss, the source and character of the loss recognized on the sale or exchange will be determined under § 1.987–6 as if such loss were section 987 loss recognized pursuant to § 1.987–5 without regard to § 1.987–12T on the date of the outbound loss event.

E. Anti-Abuse Rule

The temporary regulations provide an anti-abuse rule to address transactions structured to avoid the deferral rules in § 1.987–12T. This rule provides that no section 987 loss is recognized under § 1.987–5 in connection with a transaction or series of transactions that are undertaken with a principal purpose of avoiding the purposes of § 1.987–12T. This rule would apply, for example, if, with a principal purpose of recognizing a deferred section 987 loss, a taxpayer engaged in a transaction that caused a deferral QBU owner to cease to exist without a qualified successor or caused a successor QBU to cease to exist, such that deferred section 987 loss otherwise would be recognized under § 1.987–12T(c).

F. Coordination With Fresh Start Transition Method

The temporary regulations require adjustments to coordinate the application of § 1.987–12T with the fresh start transition method described in § 1.987–10(b) for transitioning to the final regulations. If a deferral QBU owner is required under § 1.987–10(a) to apply the fresh start transition method with respect to the deferral QBU on the transition date, or if a deferral QBU owner would have been so required if it had owned the deferral QBU on the transition date, the outstanding deferred section 987 gain or loss of the deferral QBU owner with respect to the deferral QBU must be adjusted on the transition date to equal the amount of outstanding deferred section 987 gain or loss that the deferral QBU owner would have had with respect to the deferral QBU on the transition date if, immediately before the deferral event, the deferral QBU had transitioned to the final regulations pursuant to the fresh start transition method. Additionally, if the owner of an outbound loss QBU is required under § 1.987–10(a) to apply the fresh start transition method with respect to the outbound loss QBU on the transition date, or if the owner would have been so required if it had owned the outbound loss QBU on the transition date, the basis of any stock that was subject to a basis adjustment under § 1.987–12T as a result of the outbound loss event must be adjusted to equal the basis that such stock would have had on the transition date if, immediately prior to the outbound loss event, the outbound loss QBU had transitioned to the final regulations pursuant to the fresh start transition method. Outbound section 987 loss that is not reflected in stock basis but that will be recognized when the owner and the related foreign person that participated in the outbound loss event cease to be members of the same controlled group must be adjusted in a similar manner. These adjustments to coordinate the application of § 1.987–12T with the fresh start transition method must be made even if the deferral QBU owner or the owner of the outbound loss QBU continues to own the deferral QBU or the outbound loss QBU on the transition date, as in the case of a deferral event or outbound loss event resulting from a transfer of part of an interest in a section 987 aggregate partnership that does not result in the termination of the deferral QBU or outbound loss QBU.

G. Effective Date

The temporary regulations under § 1.987–12T generally apply to any deferral event or outbound loss event that occurs on or after *January 6, 2017.* However, if the deferral event or outbound loss event is undertaken with a principal purpose of recognizing section 987 loss, the 30 day delayed effective date does not apply and § 1.987–12T is effective immediately on December 7, 2016.

2. Annual Deemed Termination Election

A comment on the 2006 proposed regulations recommended that taxpayers be permitted to make a one-time election under § 1.987–5 to deem a section 987 QBU as having terminated at the end of each year, thereby requiring the owner to recognize all section 987 gains or losses with respect to the QBU on an annual basis. The comment suggested that such an election would allow taxpayers to reduce the complexity and administrative cost of complying with section 987 because taxpayers would not be required to track transactions between an owner and its section 987 QBU or unrecognized section 987 gains and losses carried over from previous years.

The Treasury Department and the IRS have determined that an annual deemed termination election would not obviate the need to track transactions between an owner and its section 987 QBU, since the net transfer would remain relevant to the annual calculation of section 987 gain or loss. Nonetheless, the Treasury Department and the IRS agree that an annual deemed termination election could enhance administrability of the final regulations by reducing the recordkeeping requirements necessary to apply the final regulations. Additionally, when an annual deemed termination election is in effect, taxpayers could not strategically time remittances in order to selectively recognize section 987 losses but not section 987 gains. Eliminating this planning opportunity would obviate the need for the deferral provisions of § 1.987–12T. Furthermore, as discussed in Part 3 of this Explanation of Provisions, an annual deemed termination election would address a policy concern with permitting the hybrid approach to section 987 suggested by comments on the 2006 proposed regulations.

Based on the foregoing considerations, § 1.987–8T(d) provides an election for a taxpayer to deem its section 987 QBUs to terminate on the last day of each taxable year for which the election is in effect. Because the considerations supporting an annual deemed termination election generally are relevant regardless of whether a taxpayer is subject to the final regulations, the election under § 1.987–8T(d) is available to any taxpayer without regard to the applicability of the final regulations to that taxpayer or any of its section 987 QBUs. A section 987 QBU to which this election applies is treated as having made a remittance of all of its gross assets to its owner

immediately before the section 987 QBU terminates on the last day of each taxable year, resulting in the recognition of any net unrecognized section 987 gain or loss of the section 987 QBU. See §§ 1.987–5(c)(3) and 1.987–8(e). The owner is then treated as having transferred all of the assets and liabilities of the terminated section 987 QBU to a new section 987 QBU on the first day of the following taxable year.

As noted in Part 1 of this Explanation of Provisions, the temporary regulations provide that the deferral provisions of § 1.987–12T do not apply with respect to section 987 QBUs for which the annual deemed termination election is in effect. Consequently, a taxpayer that finds the annual deemed termination election preferable to § 1.987–12T based on ease of compliance or other reasons may make the annual deemed termination election. Moreover, as discussed in Part 3 of this Explanation of Provisions, a taxpayer that makes the annual deemed termination election with respect to a section 987 QBU may reduce the compliance burden associated with computing taxable income or loss under the final regulations by electing to translate taxable income or loss of the section 987 QBU into the owner's functional currency at the yearly average exchange rate without any adjustments.

The Treasury Department and the IRS have determined that special consistency and effective date rules are needed for the annual deemed termination election to prevent taxpayers from using the election to selectively recognize section 987 losses without recognizing section 987 gains. Unless the annual deemed termination election is required to be made with respect to all section QBUs owned by related persons at the time of the election, taxpayers could choose to make the election only with respect to section 987 QBUs that have net unrecognized section 987 losses at the time of the election. Accordingly, § 1.987–1T(g)(2)(i)(B)(*1*) provides that the annual deemed termination election generally applies to all section 987 QBUs owned by an electing taxpayer, as well as to all section 987 QBUs owned by any person that has a relationship to the taxpayer described in section 267(b) or section 707(b) (substituting ''and the profits interest'' for ''or the profits interest'' in section 707(b)(1)(A) and substituting ''and profits interests'' for ''or profits interests'' in section 707(b)(1)(B)) on the last day of the first taxable year for which the election applies to the taxpayer (a related person).

A taxpayer that is subject to the final regulations and that must transition to the final regulations under the fresh start transition method of § 1.987–10(b) (fresh start taxpayer) may make the annual deemed termination election only if the first taxable year for which the election would apply is either (i) the first taxable year beginning on or after the transition date (as defined in § 1.987–11(c)) with respect to the taxpayer or (ii) a subsequent taxable year in which the ''taxpayer's controlled group aggregate section 987 loss'' (if any) does not exceed $5 million. For this purpose, a ''taxpayer's controlled group aggregate section 987 loss'' means the aggregate net amount of section 987 gain or loss that would be recognized pursuant to the election under § 1.987–8T(d) by the taxpayer and all related persons in the first taxable year of each person for which the election would apply.

Taxpayers that used a method based on a reasonable application of the 2006 proposed regulations prior to the transition date, and which therefore are not subject to the fresh start transition method pursuant to § 1.987–10(c), and taxpayers for which the final regulations are not applicable, must follow the election rules for fresh start taxpayers if any related party is a fresh start taxpayer. If no related party is a fresh start taxpayer, the annual deemed termination election may be made only if the first taxable year for which the election would apply is either (i) the first taxable year beginning on or after December 7, 2016, in which the election is relevant in determining section 987 taxable income or loss or section 987 gain or loss or (ii) a subsequent taxable year in which the ''taxpayer's controlled group aggregate section 987 loss'' (if any) does not exceed $5 million.

If a taxpayer makes the annual deemed termination election, the election will apply to the first taxable year of a related person that ends with or within a taxable year of the taxpayer to which the taxpayer's election applies. Once made, the annual deemed termination election may not be revoked.

As provided in § 1.987–1T(g)(2)(i)(B)(*2*), the special consistency and effective date rules in § 1.987–1T(g)(2)(i)(B)(*1*) do not apply and a taxpayer may make a separate election under § 1.987–8T(d) with respect to any section 987 QBU owned by the taxpayer if the first taxable year for which the election would apply to the taxpayer with respect to the section 987 QBU is a taxable year in which the deemed termination results in the recognition of section 987 gain with respect to the section 987 QBU or the deemed termination results in the recognition of $1 million or less of section 987 loss with respect to the section 987 QBU.

3. Election To Translate All Items at the Yearly Average Exchange Rate

As discussed in the preamble to the final regulations, comments on the 2006 proposed regulations recommended a hybrid approach that would combine the methodology of the regulations proposed under section 987 in 1991 (INTL–965–86, 56 FR 48457) for computing a section 987 QBU's net income with the methodology of the 2006 proposed regulations for computing section 987 gain or loss. Under the proposed hybrid approach, section 987 gain or loss generally would be determined under the method of the 2006 proposed regulations, but taxable income or loss would be translated into the owner's functional currency at the yearly average exchange rate without any adjustments.

Although a hybrid approach would simplify the calculation of section 987 taxable income or loss, the preamble to the final regulations observes that the hybrid approach gives rise to offsetting effects in section 987 taxable income or loss and in the foreign exchange exposure pool (FEEP) that raise concerns similar to those addressed by Congress in enacting section 1092. In particular, under the hybrid approach, exchange rate effects with respect to historic assets would be reflected in section 987 taxable income or loss to the extent of any cost recovery deductions with respect to those assets, but equal and offsetting amounts would be reflected in the FEEP and would be recognized only upon remittances. Thus, offsetting effects arising from a single asset would be taken into account at different times. The Treasury Department and the IRS have determined that it would be inappropriate for regulations under section 987 to permit distortions to section 987 taxable income or loss that have the effect of causing potentially large offsetting amounts of loss or gain to be reflected in the FEEP with respect to the same asset, since the loss or gain in the FEEP would be recognized only upon voluntary remittances from the QBU.

Nonetheless, the Treasury Department and the IRS acknowledge the concerns expressed in comments regarding the complexity of the 2006 proposed regulations that underlie the recommendation to adopt the hybrid approach. Concerns about offsetting amounts recognized at different times under the hybrid approach would not

arise for taxpayers that make the annual deemed termination election set forth in § 1.987–8T(d). A taxpayer that recognizes all section 987 gain or loss with respect to its section 987 QBUs annually would take into account in recognized section 987 gain or loss the exchange rate effects with respect to historic assets that are reflected in the FEEP in the same taxable year in which the offsetting effects are taken into account in section 987 taxable income or loss. Although the hybrid approach could result in differences in character of exchange gain or loss relative to the final regulations even for taxpayers that make the annual deemed termination election, the Treasury Department and the IRS have determined that the administrative convenience of allowing taxpayers to translate a section 987 QBU's taxable income at the yearly average exchange rate outweighs that consideration.

Accordingly, the temporary regulations provide that a taxpayer that is otherwise generally subject to the final regulations may elect to apply the hybrid approach with respect to a section 987 QBU that is subject to the annual deemed termination election. In particular, § 1.987–3T(d) provides that, notwithstanding the rules of § 1.987–3(c) for translating items determined under § 1.987–3(b) in a section 987 QBU's functional currency into the owner's functional currency, a taxpayer may elect to translate all items of income, gain, deduction, and loss of a section 987 QBU with respect to which the annual deemed termination election described in § 1.987–8T(d) is in effect into the owner's functional currency, if necessary, at the yearly average exchange rate for the taxable year. An owner of multiple section 987 QBUs may make the election described in § 1.987–3T(d) with respect to all of its section 987 QBUs or only certain designated section 987 QBUs.

4. Section 988 Transactions of a Section 987 QBU

A. Background Regarding the Treatment of Section 988 Transactions Under the Proposed Regulations

The 2006 proposed regulations reflected a two-pronged approach to the application of section 988 to transactions of a section 987 QBU, with different consequences generally depending on whether a transaction is denominated in (or determined by reference to) the owner's functional currency or a currency that is a nonfunctional currency with respect to both the owner and the section 987 QBU (third currency). As a general rule, § 1.987–3(e)(1) of the 2006 proposed regulations provided that section 988 applies to section 988 transactions attributable to a section 987 QBU and that the timing of any gain or loss is determined under the applicable provisions of the Code, but the 2006 proposed regulations did not clearly specify whether section 988 gain or loss would be determined with respect to the functional currency of the section 987 QBU or the owner's functional currency. Assets and liabilities giving rise to section 988 transactions were defined under proposed § 1.987–1(d) and (e) as historic items. Under § 1.987–3(e)(2) of the 2006 proposed regulations, transactions of a section 987 QBU described in section 988(c)(1)(B)(i) (relating to the acquisition of, or becoming an obligor under, a debt instrument), section 988(c)(1)(B)(ii) (relating to accrual of items of expense or gross income or receipts) or section 988(c)(1)(C) (relating to the disposition of nonfunctional currency) that are denominated in (or determined by reference to) the owner's functional currency, however, were not treated as section 988 transactions of the section 987 QBU, and no gain or loss was recognized under section 988 with respect to such transactions. Assets and liabilities giving rise to such transactions were required to be reflected on the balance sheet of the section 987 QBU in the owner's functional currency under § 1.987–2(d)(2) of the 2006 proposed regulations.

Additionally, § 1.987–3(d) of the 2006 proposed regulations provided that an item of income, gain, deduction, or loss of a section 987 QBU denominated in a currency other than the functional currency of the owner is translated at the spot rate on date the item is appropriately taken into account. Under § 1.987–3(c) of the 2006 proposed regulations, an item of income, gain, deduction, or loss of a section 987 QBU denominated in the owner's functional currency is not translated and is taken into account by the section 987 QBU in the owner's functional currency.

One comment indicated that the 2006 proposed regulations were unclear regarding the interaction of the rules for the treatment of section 988 transactions denominated in a third currency with the treatment of assets that give rise to section 988 transactions as historic assets. Upon the disposition of a historic asset, the 2006 proposed regulations required translation of the basis of the historic asset at the historic rate and the amount realized with respect to the asset at the yearly average exchange rate for the taxable year of the disposition or, if properly elected, the appropriate spot rate. Yet, § 1.987–3(f), *Example 10* of the 2006 proposed regulations illustrated the determination of section 988 gain or loss on a third-currency section 988 transaction in, and by reference to, the section 987 QBU's functional currency and translation of that amount into the owner's functional currency at the yearly average exchange rate. Under the approach of the example, historic asset basis is effectively translated at the yearly average exchange rate rather than the appropriate historic rate.

B. General Rules for Section 988 Transactions in the Temporary Regulations

In light of the comment regarding the uncertain application of section 988 to transactions of a section 987 QBU under the 2006 proposed regulations and further consideration of the appropriate rules, the temporary regulations clarify and elaborate upon the application of section 988 to transactions attributable to a section 987 QBU. In this regard, the Treasury Department and the IRS have determined that computing section 988 gain or loss by reference to the functional currency of the section 987 QBU, rather than the owner's functional currency, and translating that amount at the yearly average exchange rate would be inconsistent with the treatment of items that give rise to section 988 transactions as historic items. Such items were treated as historic items under the 2006 proposed regulations because they do not economically expose the owner to fluctuations in the section 987 QBU's functional currency.

Taking these considerations into account, the Treasury Department and the IRS have determined that it is appropriate to continue to treat assets and liabilities giving rise to section 988 transactions of a section 987 QBU as historic items under §§ 1.987–1(d) and (e) of the final regulations. Thus, for example, a note denominated in a nonfunctional currency that gives rise to a section 988 transaction when acquired is a historic asset. However, the temporary regulations generally provide that section 988 gain or loss arising from section 988 transactions of a section 987 QBU is determined by reference to the owner's functional currency, rather than the functional currency of the section 987 QBU. See § 1.987–3T(b)(4)(i). Accordingly, in determining section 988 gain or loss with respect to a section 988 transaction of a section 987 QBU, the amounts required under section 988 to be translated on the applicable booking date or payment date with respect to the section 988 transaction are translated from the currency in which the amounts are denominated (or by reference to

which they are determined) into the owner's functional currency at the rate required under section 988 and the section 988 regulations, which provide for translation at the appropriate spot rate.

When a section 987 QBU recognizes gain or loss on the disposition of a historic asset that gives rise to a section 988 transaction, some or all of the total gain or loss that is realized on the disposition may be section 988 gain or loss that, under section 988, is ordinary income that is sourced by reference to the residence of the section 987 QBU. For example, on the disposition of a nonfunctional currency note, the total gain or loss realized may be comprised of section 988 gain or loss that reflects exchange rate changes and other gain or loss that reflects other factors, such as changes in prevailing interest rates or in the creditworthiness of the note issuer. The total gain or loss on the disposition of a historic asset that gives rise to a section 988 transaction is determined under the general rules of section 987 by reference to the functional currency of the section 987 QBU. Section 988 gain or loss on the note is determined under §§ 1.988–2(b)(5) and (8) and 1.987–3T(b)(4)(i) by comparing the section 987 QBU's acquisition price for the note in nonfunctional currency translated into the owner's functional currency at the spot rates on the date of acquisition and the date of disposition, respectively. See § 1.987–3T(e), *Example 11.* To provide for consistent translation rates for determining both the total gain or loss on such a historic asset and the portion of the total gain or loss that is section 988 gain or loss, § 1.987–3T(c)(2)(ii) specifies that the spot rate also must be used to translate the amount received with respect to a historic asset if the acquisition of the historic asset gave rise to a section 988 transaction. Additionally, consistent with the regulations under § 1.988–1(d) regarding the use of spot rate conventions for section 988 transactions, § 1.987–1T(c)(1)(ii)(B) specifies that the election in § 1.987–1(c)(1)(ii)(A) to use a spot rate convention generally does not apply for purposes of determining section 987 taxable income or loss with respect to a historic item (as defined in § 1.987–1(e)) if acquiring, accruing, or entering into such item gave rise to a section 988 transaction or a specified owner functional currency transaction (discussed in this Part B).

Because assets and liabilities that give rise to section 988 transactions generally are historic items that have a spot rate as the historic rate under § 1.987–1T(c)(3)(i)(E), such assets and liabilities are translated at historic rates and do not give rise to section 987 gain or loss. Thus, when the general rules for section 988 transactions of a section 987 QBU apply, the owner will take into account under subpart J foreign currency exposure with respect to a section 988 transaction of a section 987 QBU only to the extent of the owner's economic exposure to fluctuations of its functional currency relative to the currency in which the section 988 transaction is denominated.

Additionally, consistent with the 2006 proposed regulations, the temporary regulations confirm that certain transactions that are denominated in (or determined by reference to) the owner's functional currency are not subject to section 988. Specifically, § 1.987–3T(b)(4)(ii) provides that specified owner functional currency transactions, which are defined as transactions described in section 988(c)(1)(B)(i) or (ii) or section 988(c)(1)(C) (including the acquisition of nonfunctional currency described in § 1.988–1(a)(1)) that are denominated in (or determined by reference to) the owner's functional currency, other than certain transactions described in § 1.987–3T(b)(4)(iii)(A) that are subject to a mark-to-market regime (discussed in Part 4.C of this Explanation of Provisions), are not treated as section 988 transactions. Although the temporary regulations do not follow the 2006 proposed regulations in specifying that assets and liabilities that give rise to specified owner functional currency transactions must be reflected on the balance sheet of the section 987 QBU in the owner's functional currency, the temporary regulations treat items that give rise to specified owner functional currency transactions as historic items that generally have a spot rate as the historic rate under § 1.987–1T(c)(3)(i)(E) and provide under § 1.987–3T(b)(2)(ii) that the basis and amount realized of a historic asset that gives rise to a specified owner functional currency transactions are not translated if denominated in the owner's functional currency. Together, these rules have the same effect as the treatment of specified owner functional currency transactions under the 2006 proposed regulations.

C. Special Rules To Allow Greater Conformity With the Financial Accounting Treatment for Certain Section 988 Transactions

As discussed in the preamble to the final regulations, under the financial accounting standard described in Accounting Standards Codification, Foreign Currency Matters, section 830 (ASC 830), gains and losses from changes in exchange rates with respect to transactions that are denominated in a currency other than the entity's functional currency are referred to as ''transaction'' gains and losses. The category of foreign currency transactions that give rise to transaction gains and losses for financial accounting purposes overlaps considerably with the definition of a section 988 transaction for tax purposes, such that transaction gains and losses under financial accounting rules are conceptually similar to section 988 gains and losses. The financial accounting rules require the inclusion of transaction gains and losses in net income for the period in which the exchange rate changes occur. See ASC 830–20–35–1. Moreover, transaction gain or loss is always determined by reference to the functional currency of the entity that entered into the transaction. Thus, the financial accounting rules differ from the general tax rules applicable to section 988 transactions entered into by a section 987 QBU in two respects. First, the financial accounting rules require transaction gain or loss to be determined on a mark-to-market basis, whereas gain or loss from a section 988 transaction generally is not recognized until there is a realization event under general tax principles and the applicable provisions of the Code. Second, the financial accounting rules require transaction gain or loss to be determined by reference to the entity's functional currency, even when it differs from the reporting currency used in the consolidated financial statements and the transaction is denominated in the reporting currency.

As noted in the preamble to the final regulations, comments on the 2006 proposed regulations expressed a preference for greater consistency of the section 987 regulations with financial accounting rules. Taking these comments into account, the Treasury Department and the IRS have determined that providing treatment similar to the financial accounting treatment for certain section 988 transactions of section 987 QBUs will enhance administrability of the section 987 regulations with respect to such transactions and is consistent with the policies of sections 987 and 988.

Accordingly, as discussed in Part 1.C.i of this Explanation of Provisions, the temporary regulations permit a taxpayer to elect to determine section 987 gain or loss with respect to qualified short-term section 988 transactions (described in Part 1.C.i of this Explanation of Provisions) of a section 987 QBU under a foreign currency mark-to-market method of accounting. In addition, as discussed in Part 4.C.ii of this

Explanation of Provisions, the temporary regulations provide that section 988 gain or loss with respect to qualified short-term section 988 transactions that are accounted for under a mark-to-market method of accounting for Federal tax purposes (including the elective method described in Part 1.C.i of this Explanation of Provisions) is determined in, and by reference to, the functional currency of the section 987 QBU rather than the functional currency of its owner.

i. Election To Apply a Foreign Currency Mark-to-Market Method of Accounting for Certain Section 988 Transactions

The Treasury Department and the IRS have determined that allowing a taxpayer to mark to market foreign currency gain or loss with respect to qualified short-term section 988 transactions of a section 987 QBU will enhance administrability by aligning the timing for recognizing gain or loss with respect to such transactions with the financial accounting rules. Accordingly, a taxpayer may elect, on a QBU-by-QBU basis, under § 1.987–3T(b)(4)(iii)(C) to apply the foreign currency mark-to-market method of accounting to qualified short-term section 988 transactions. Under this election, the timing of section 988 gain or loss is determined for applicable transactions under the principles of section 1256(a)(1). Thus, when the election applies, section 988 gain or loss with respect to a qualified short-term section 988 transaction is recognized on an annual basis, but other gain or loss with respect to any property underlying the transaction (*e.g.,* gain or loss on a debt instrument due to interest rate fluctuations) is determined under the otherwise applicable recognition provisions.

A qualified short-term section 988 transaction is defined in § 1.987–3T(b)(4)(iii)(B) as a section 988 transaction, including a transaction denominated in the owner's functional currency, that both (1) occurs in the ordinary course of the section 987 QBU's business and (2) has an original term of one year or less on the day it is entered into by the section 987 QBU. The holding of currency that is nonfunctional currency (within the meaning of section 988(c)(1)(C)(ii)) to the section 987 QBU in the ordinary course of a section 987 QBU's trade or business also is treated as a qualified short-term section 988 transaction.

ii. Special Rule Requiring Gain or Loss From Certain Section 988 Transactions That Are Subject to a Mark-to-Market Method of Accounting To Be Determined by Reference to the Functional Currency of the Section 987 QBU

The temporary regulations include a special rule for determining section 988 gain or loss with respect to qualified short-term section 988 transactions (as described in Part 4.C.i of this Explanation of Provisions) of a section 987 QBU that are accounted for under a mark-to-market method of accounting. Specifically, § 1.987–3T(b)(4)(iii)(A) provides that section 988 gain or loss with respect to qualified short-term section 988 transactions of a section 987 QBU, and certain related hedges, that are accounted for under a mark-to-market method of accounting under section 475, section 1256, or § 1.987–3T(b)(4)(iii)(C) (discussed in Part 4.C.i of this Explanation of Provisions) is determined in, and by reference to, the functional currency of the section 987 QBU rather than the owner's functional currency. Items that give rise to qualified short-term section 988 transactions for which section 988 gain or loss is determined under § 1.987–3T(b)(4)(iii)(A) by reference to the section 987 QBU's functional currency are treated as marked items under § 1.987–1T(d)(3), with the result that gain or loss attributable to such items is translated at the yearly average exchange rate and that such items give rise to net unrecognized section 987 gain or loss.

Under the rules for qualified short-term section 988 transactions accounted for under a mark-to-market method of accounting, a section 987 QBU owner will take into account the full amount of its economic foreign currency exposure arising from such transactions, but the effects of such exposure generally will be bifurcated into a component reflected in section 987 taxable income or loss and a component reflected in the FEEP pool and recognized upon a remittance. These components could offset each other if the currency in which the section 988 transaction is denominated and the owner's functional currency moved in opposite directions relative to the section 987 QBU's functional currency. Restricting this treatment to qualified short-term section 988 transactions accounted for under a mark-to-market method of accounting limits the potential for abusive planning. In particular, the restriction to transactions accounted for under a mark-to-market method of accounting prevents selective realization of section 988 losses that would be taken into account in section 987 taxable income or loss in situations in which an offsetting gain is reflected in the FEEP. Additionally, short-term, ordinary-course section 988 transactions are less likely than other section 988 transactions to give rise to substantial offsetting effects in section 987 taxable income or loss and in the FEEP.

5. Application of Section 987 to QBUs With the U.S. Dollar as a Functional Currency

Consistent with the opening clause of section 987, which indicates that section 987 applies to the determination of the taxable income of any taxpayer ''having 1 or more qualified business units with a functional currency other than the dollar,'' § 1.987–1T(b)(6)(i) sets forth a general rule that section 987 and the regulations thereunder do not apply with respect to an eligible QBU (determined without regard to the scope limitations of § 1.987–1(b)(3)(ii)) that has the U.S. dollar as its functional currency and that would be subject to section 987 if it had a functional currency other than the U.S. dollar (dollar QBU).

The Treasury Department and the IRS have determined, however, that it is appropriate for a CFC that is the owner of a dollar QBU to recognize foreign currency gain or loss with respect to transactions of the dollar QBU that would be section 988 transactions if entered into directly by the owner. Accordingly, pursuant to the authority granted in section 985(a), § 1.987–1T(b)(6)(ii)(A) provides that the CFC owner of a dollar QBU will be subject to section 988 with respect to any item that is properly reflected on the books and records of the dollar QBU and that would give rise to a section 988 transaction if such item were acquired, accrued, or entered into directly by the owner of the dollar QBU. For purposes of applying section 988 to such items, § 1.987–1T(b)(6)(ii)(A) provides that such items are treated as properly reflected on the books and records of the dollar QBU's owner. Thus, except as provided in the special rule described later in this Part 5 of this Explanation of Provisions for computing income that is effectively connected with the conduct of a trade or business within the United States (ECI), a CFC would determine section 988 gain or loss from transactions of a dollar QBU by reference to the CFC's functional currency. For example, for purposes of determining its earnings and profits, a CFC that has a euro functional currency and that is the owner of a dollar QBU with a U.S. dollar-denominated liability

would apply section 988 with respect to that U.S. dollar-denominated liability, measuring section 988 gain or loss on the section 988 transaction arising from the liability by reference to the euro.

As a result of treating such items as properly reflected on the books and records of the CFC, instead of those of the dollar QBU, the CFC's section 988 gain or loss with respect to such items generally would be treated as foreign source income because section 988(a)(3) generally provides that the source of section 988 gain or loss is determined by reference to the residence of the taxpayer or QBU on whose books the asset, liability, or other item giving rise to the section 988 transaction is properly reflected. Section 1.988–4 then would apply to determine whether the section 988 gain or loss would be treated as ECI. Because a QBU with ECI must have the U.S. dollar as its functional currency (§ 1.985–1(b)(1)(v)), section 988 gain or loss measured by reference to the owner CFC's functional currency would not be ECI. However, the temporary regulations provide a special rule for certain section 988 transactions of a dollar QBU (including section 988 transactions denominated in the owner's functional currency) that arise from the conduct of a United States trade or business.

The special rule applies to a CFC owner of a dollar QBU that would have a section 988 transaction that would give rise to section 988 gain or loss that would be treated as ECI under § 1.988–4(c) if the item that would give rise to the section 988 transaction were treated as properly reflected on the books and records of the dollar QBU. Under § 1.987–1T(b)(6)(ii)(B), solely for purposes of determining the amount of section 988 gain or loss of the CFC that is ECI, any section 988 gain or loss that would be determined under section 988 as a result of the acquisition or accrual of any item and treated as ECI if the item were treated as properly reflected on the books and records of the dollar QBU is determined by treating such item as properly reflected on the books and records of the dollar QBU and, consequently, is determined by reference to the U.S. dollar.

The application of § 1.987–1T(b)(6)(ii) to a section 988 transaction that is denominated in a third currency (that is, neither the CFC's functional currency nor the U.S. dollar) could result in the same section 988 transaction generating ECI (determined by reference to the U.S. dollar) and generating subpart F income (determined by reference to the CFC owner's functional currency), subject to any limitation imposed by section 952(b). Under section 952(b), if the amount determined under § 1.987–1T(b)(6)(ii)(A) by reference to the owner's functional currency and the amount of ECI determined under § 1.987–1T(b)(6)(ii)(B) were both gains, only the excess, if any, of the gain determined by reference to the owner's functional currency over the ECI gain would be taken into account in determining subpart F income. If the amount determined under § 1.987–1T(b)(6)(ii)(A) by reference to the owner's functional currency and the amount of ECI determined under § 1.987–1T(b)(6)(ii)(B) were both losses, the loss determined by reference to the owner's functional currency would be taken into account in determining subpart F income only to the extent it exceeds the ECI loss.

The Treasury Department and the IRS recognize the potential administrative burden associated with applying the foregoing rules to a dollar QBU, which may give rise to a large number of section 988 transactions. Accordingly, § 1.987–1T(b)(6)(iii) provides an election for a CFC that directly or indirectly owns a dollar QBU to apply section 987 and the regulations thereunder in lieu of applying section 988 pursuant to § 1.987–1T(b)(6)(ii). The Treasury Department and the IRS have determined that, when this election applies, the source of foreign currency gain or loss that is determined under section 987 pursuant to the election should be consistent with the source that would have been determined under section 988 in the absence of the election. Accordingly, consistent with the source rule in section 988(a)(3), § 1.987–6T(b)(4) provides that the source of section 987 gain or loss determined with respect to a dollar QBU for which the owner has elected to apply section 987 is determined by reference to the residence of the CFC owner. Thus, such section 987 gain or loss will have a foreign source.

As is the case for dollar QBUs of CFCs that do not make the election under § 1.987–1T(b)(6)(iii) to apply section 987, CFCs that make the election and that have a dollar QBU that engages in a U.S. trade or business must apply a special rule to determine the amount of ECI that arises from transactions that would give rise to section 988 gain or loss if determined by reference to the dollar QBU's U.S. dollar functional currency. This special rule for determining the amount of ECI applies only to dollar QBUs that generate ECI because, under § 1.985–1(b)(1)(v), a QBU that produces income or loss that is, or is treated as, ECI must use the dollar as its functional currency. The special rule is needed for dollar QBUs that elect to be treated as section 987 QBUs because, under the general rules of § 1.987–3T(b)(4)(i) and (ii), which apply to all section 987 QBUs other than with respect to certain short-term transactions described in § 1.987–3T(b)(4)(iii)(B) that are accounted for under a mark-to-market method of accounting, section 988 gain or loss of a section 987 QBU with respect to transactions denominated in a third currency is determined in, and by reference to, the functional currency of the owner of the section 987 QBU, and section 988 gain or loss generally is not determined with respect to specified owner functional currency transactions described in Part 4.B of this Explanation of Provisions. Thus, in order to determine the appropriate amount of ECI from transactions of a dollar QBU for which an election to apply section 987 is in effect, § 1.987–1T(b)(6)(iii)(B) provides that, solely for purposes of determining the amount of section 988 gain or loss that is ECI, any section 988 gain or loss that would be determined under section 988 as a result of the acquisition or accrual of any item and treated as ECI under § 1.988–4(c) if the item were treated as properly reflected on the books and records of the dollar QBU is determined by treating the item as properly reflected on the books and records of the dollar QBU. Consequently, solely for that purpose, such section 988 gain or loss is determined by reference to the U.S. dollar. For purposes of determining the amount of section 988 gain or loss for other purposes, including to determine the earnings and profits of the CFC, the rules in § 1.987–3T(b)(4)(i) and (ii) continue to apply. As is the case for a CFC that has not made the election to apply section 987 in lieu of section 988, a transaction to which the special rule applies could generate both ECI and subpart F income.

6. Combinations and Separations of QBUs

A. Combinations and Separations Do Not Give Rise to Transfers

Under § 1.987–2(c), an asset or liability is treated as transferred to a section 987 QBU from its owner if, as a result of a disregarded transaction, the asset or liability is reflected on the books and records of the section 987 QBU. Similarly, an asset or liability is treated as transferred from a section 987 QBU to its owner if, as a result of a disregarded transaction, the asset or liability is no longer reflected on the books and records of the section 987 QBU. For this purpose, a disregarded transaction generally means a

transaction that is not regarded for Federal income tax purposes. Absent a special rule, the combination of multiple section 987 QBUs that have the same owner, or the separation of a section 987 QBU into two or more section 987 QBUs that have the same owner, would give rise to a transfer between an owner and one or more section 987 QBUs under the final regulations.

Consistent with the policy of deferring section 987 gain or loss under § 1.987–12T when assets of a section 987 QBU are reflected on the books and records of another section 987 QBU in the same controlled group as a result of certain transactions that result in deemed transfers, the Treasury Department and the IRS have determined that it would not be appropriate for combinations or separations of section 987 QBUs of the same owner to give rise to transfers to or from the section 987 QBUs. Accordingly, under the temporary regulations, section 987 gain or loss generally is not recognized when two or more section 987 QBUs (combining QBUs) with the same owner combine into a single section 987 QBU (combined QBU) or when a section 987 QBU (separating QBU) separates into multiple section 987 QBUs (each, a separated QBU).

Specifically, notwithstanding the general rule of the final regulations, § 1.987–2T(c)(9)(i) provides that the combination of two or more combining QBUs that have the same owner into a combined QBU does not give rise to a transfer of any combining QBU's assets or liabilities to the owner. In addition, § 1.987–2T(c)(9)(i) provides that transactions between the combining QBUs occurring in the taxable year of the combination, which otherwise would give rise to transfers, do not result in a transfer of the combining QBUs' assets or liabilities to the owner under § 1.987–2(c). For this purpose, a combination occurs when the assets and liabilities that are properly reflected on the books and records of two or more combining QBUs begin to be properly reflected on the books and records of a combined QBU and the separate existence of the combining QBUs ceases. A combination may result from any transaction or series of transactions in which combining QBUs become a combined QBU.

Similarly, § 1.987–2T(c)(9)(iii) provides that the separation of a separating QBU into two or more separated QBUs that have the same owner after the separation does not give rise to a transfer of any of the separating QBU's assets or liabilities to the owner. For this purpose, a separation occurs when assets and liabilities that are properly reflected on the books and records of a separating QBU begin to be properly reflected on the books and records of two or more separated QBUs. A separation may result from any transaction or series of transactions in which the separating QBU becomes two or more separated QBUs.

B. Determination of Net Unrecognized Section 987 Gain or Loss of Combined QBUs and Separated QBUs

The temporary regulations generally require combining the aggregate net unrecognized section 987 gain or loss of combining QBUs for purposes of determining net unrecognized section 987 gain or loss of the combined QBU and require apportioning the net unrecognized section 987 gain or loss of a separating QBU among separated QBUs in proportion to their respective shares of the aggregate adjusted basis of the separating QBU's gross assets. Specifically, § 1.987–4T(f)(1) provides that the net unrecognized section 987 gain or loss of a combined QBU for a taxable year is determined by taking into account the net accumulated unrecognized section 987 gain or loss of each combining QBU for all prior taxable years for which the final regulations apply and treating the combining QBUs as having combined immediately prior to the beginning of the taxable year of combination. Additionally, § 1.987–4T(f)(2) provides that the net unrecognized section 987 gain or loss of a separated QBU for a taxable year is determined by taking into account the separated QBU's share of the net accumulated unrecognized section 987 gain or loss of the separating QBU for all prior taxable years for which the final regulations apply and treating the separating QBU as having separated immediately prior to the beginning of the taxable year of separation. No transactions are deemed to occur between the separating QBUs in the taxable year of separation prior to the completion of the separation. A separated QBU's share of the separating QBU's net accumulated unrecognized section 987 gain or loss for all prior taxable years is determined by apportioning the separating QBU's net accumulated unrecognized section 987 gain or loss for all prior taxable years to each separated QBU in proportion to the aggregate adjusted basis of the gross assets properly reflected on the books and records of each separated QBU immediately after the separation.

The temporary regulations also clarify at § 1.987–2T(c)(9)(ii) that, if a combining section 987 QBU has a different functional currency than the combined QBU, the combining section 987 QBU will be deemed to have automatically changed its functional currency to the functional currency of the combined section 987 QBU immediately prior to the combination. A combining section 987 QBU that is deemed to change its functional currency under this paragraph must make the adjustments described in § 1.985–5.

7. Translation of Foreign Taxes Claimed as a Foreign Tax Credit and Related Income

Under the general rule of § 1.987–3(c)(1), the owner of a section 987 QBU uses the yearly average exchange rate (as defined in § 1.987–1(c)(2)) to translate an item of income, gain, deduction, or loss of a section 987 QBU into the owner's functional currency. Alternatively, the owner of a section 987 QBU may elect to use the spot rate (as defined in § 1.987–1(c)(1)) for the day each item is taken into account.

Under section 986(a)(1)(A), for purposes of determining the amount of its foreign tax credit, a taxpayer that takes foreign income taxes into account when accrued generally translates the amount of any foreign income taxes (and any adjustments thereto) into dollars using the average exchange rate for the taxable year to which such taxes relate. However, sections 986(a)(1)(B) and (C) contain exceptions to this general rule, including for taxes that are not paid within two years of the close of the taxable year to which the taxes relate (two-year rule). In addition, section 986(a)(1)(D) provides that a taxpayer may elect to translate foreign income taxes denominated in a functional currency other than the taxpayer's functional currency using a spot rate in lieu of using the yearly average exchange rate. Section 986(a)(2)(A) generally provides that, for purposes of determining the amount of the foreign tax credit with respect to any foreign income taxes not subject to section 986(a)(1)(A) (or section 986(a)(1)(E), which provides a special rule for regulated investment companies), including by reason of the two-year rule or an election under section 986(a)(1)(D), the taxes are translated into dollars using the spot rate on the date such taxes were paid. Adjustments to such taxes are subject to the same rule, except that any refund or credit is translated into dollars using the exchange rate that applied to the original payment of such foreign income taxes.

Taking into account the translation rules of § 1.987–3(c) and section 986(a),

a mismatch could arise between the owner functional currency value of income used to pay foreign income taxes and the owner functional currency value of the foreign income taxes claimed as a credit. In the case of foreign income taxes deemed paid under section 902, section 78 generally prevents such a mismatch at the level of the domestic shareholder claiming the credit by requiring the domestic shareholder to include in income an amount equal to the taxes deemed paid, but where a U.S. person claims a credit under section 901 that is not for taxes deemed paid under section 902 or section 960, foreign income taxes and the income used to pay those taxes could be translated at different translation rates. To address this potential mismatch, Notice 89–74, 1989–1 C.B. 739, provides that when a U.S. taxpayer with a foreign branch that has a functional currency other than the dollar claims a foreign tax credit with respect to a foreign tax, the taxpayer is required to translate a functional currency amount equal to the foreign taxes paid on branch income using the exchange rate at the time of payment of such taxes.

Consistent with Notice 89–74, § 1.987–3T(c)(2)(v) includes a special translation rule providing that income in an amount equal to the functional currency amount of the section 987 QBU's foreign income taxes claimed as a credit must be translated at the same rate used to translate the taxes. This translation rule applies to the owner of a section 987 QBU claiming a credit under section 901 for foreign income taxes, other than income taxes deemed paid under section 902 or section 960, that are properly reflected on the books of the section 987 QBU. Mechanically, this rule requires the owner to reduce the amount of section 987 taxable income or loss that otherwise would be determined under § 1.987–3 by an amount equal to the creditable tax amount, translated into U.S. dollars at the yearly average exchange rate for the taxable year in which the creditable tax is accrued, and then to increase the resulting amount by an amount equal to the creditable tax amount translated into U.S. dollars at the same exchange rate used to translate the creditable taxes into U.S. dollars under section 986(a). If the foreign taxes and the income are both translated at the same rate (that is, the same yearly average exchange rate), no adjustment is necessary under § 1.987–3T(c)(2)(v).

8. Determination of a Partner's Share of Assets and Liabilities of a Section 987 Aggregate Partnership

As discussed in the preamble to the final regulations, the final regulations apply an aggregate approach with respect to section 987 aggregate partnerships, which are defined in § 1.987–1(b)(5) as partnerships for which all of the capital and profits interests are owned, directly or indirectly, by persons that are related within the meaning of section 267(b) or section 707(b). This approach is consistent with the aggregate approach to partnerships reflected in the 2006 proposed regulations, but the 2006 proposed regulations would have applied to all partnerships. Under the aggregate approach, assets and liabilities reflected on the books and records of an eligible QBU of a partnership are allocated to each partner, which is considered an indirect owner of the eligible QBU. If the eligible QBU has a different functional currency than its indirect owner, then the assets and liabilities of the eligible QBU that are allocated to the partner are treated as a section 987 QBU of the indirect owner.

The 2006 proposed regulations provided a rule for determining a partner's share of the assets and liabilities of an eligible QBU that is owned indirectly through a section 987 aggregate partnership. Specifically, proposed § 1.987–7(b) provided that a partner's share of assets and liabilities reflected on the books and records of an eligible QBU owned through a section 987 aggregate partnership must be determined in a manner consistent with how the partners have agreed to share the economic benefits and burdens corresponding to partnership assets and liabilities, taking into account the rules and principles of subchapter K. One comment noted that this rule for allocating assets and liabilities to a partner's indirectly owned section 987 QBU was ambiguous and that the rules and principles of subchapter K do not provide sufficient guidance in this regard.

The Treasury Department and the IRS acknowledge the ambiguity in the 2006 proposed regulations regarding the manner in which assets and liabilities of a partnership are allocated to a partner's indirectly owned section 987 QBU under the aggregate approach. Accordingly, the temporary regulations provide more specific rules for determining a partner's share of the assets and liabilities reflected on the books and records of an eligible QBU owned indirectly through a section 987 aggregate partnership. Specifically, § 1.987–7T(b) provides that, in any taxable year, a partner's share of each asset and liability of a section 987 aggregate partnership is proportional to the partner's liquidation value percentage with respect to the aggregate partnership. A partner's liquidation value percentage is defined as the ratio of the liquidation value of the partner's interest in the partnership to the aggregate liquidation value of all the partners' interests in the partnership. The liquidation value of the partner's interest in the partnership is the amount of cash the partner would receive with respect to its interest if, immediately following the applicable determination date, the partnership sold all of its assets for cash equal to the fair market value of such assets (taking into account section 7701(g)), satisfied all of its liabilities (other than those described in § 1.752–7), paid an unrelated third party to assume all of its § 1.752–7 liabilities in a fully taxable transaction, and then liquidated.

In general, the temporary regulations provide that the determination date for determining a partner's liquidation value percentage is the date of the most recent event described in § 1.704–1(b)(2)(iv)(*f*)(*5*) or § 1.704–1(b)(2)(iv)(*s*)(*1*) (a revaluation event), irrespective of whether the capital accounts of the partners are adjusted under § 1.704–1(b)(2)(iv)(*f*), or, if there has been no revaluation event, the date of the formation of the partnership. However, if a partnership agreement provides for the allocation of any item of income, gain, deduction, or loss from partnership property to a partner other than in accordance with the partner's liquidation value percentage in a particular taxable year, the determination date is the last day of the partner's taxable year, or, if the partner's section 987 QBU owned indirectly through a section 987 aggregate partnership terminates during the partner's taxable year, the date such section 987 QBU is terminated. Without this requirement to redetermine liquidation value percentages at year-end when such an allocation is in effect, the allocation could result in section 987 taxable income or loss, which necessarily would reflect the allocation, being taken into account in determining section 987 gain or loss under § 1.987–4 even though the allocation was not taken into account in computing the owner functional currency value of the section 987 QBU, such that distortions would arise in the computation of section 987 gain or loss.

The Treasury Department and the IRS have determined that the liquidation value percentage methodology reflected

in § 1.987–7T(b) reflects an administrable approach to allocating assets and liabilities of a section 987 aggregate partnership to eligible QBUs of its partners in a manner consistent with the partners' economic interests in the assets and liabilities of the partnership. The Treasury Department and the IRS request comments on the application of the liquidation value percentage approach reflected in the temporary regulations, including whether any alternative measure could better satisfy the criteria of administrability and consistency with the economics of the partners' arrangement.

9. Deferral of Certain Section 988 Loss Realized by a Debtor With Respect to a Related-Party Loan

Section 267(a)(1) provides that no deduction is allowed in respect of any loss from the sale or exchange of property, directly or indirectly, between persons who have a relationship described in section 267(b). Section 267(f)(2) modifies the general rule of section 267(a)(1) in the case of a sale or exchange of property between corporations that are members of the same controlled group (as defined in section 267(f)(1)), generally providing that a loss realized upon such a sale or exchange is deferred until the property is transferred outside the group such that there would be recognition of loss under consolidated return principles. Section 267(f)(3)(C) provides that, to the extent provided in regulations, section 267(a)(1) does not apply to any loss sustained by a member of a controlled group on the repayment of a loan made to another member of such controlled group if such loan is payable or denominated in a foreign currency and attributable to a reduction in the value of that foreign currency. Section 1.267(f)–1(e) provides that section 267(a) generally does not apply to an exchange loss realized with respect to a loan of nonfunctional currency to another controlled group member if the transaction that causes the realization of the loss does not have as a significant purpose the avoidance of Federal income tax. Additionally, § 1.267(f)–1(h) provides that if a transaction is engaged in with a principal purpose to avoid the purposes of § 1.267(f)–1, including by distorting the timing of losses, adjustments may be made to carry out such purposes. Section 1.988–2(b)(16)(i) cross-references the regulations under section 267 regarding the coordination of sections 267 and 988 with respect to the treatment of a creditor under a debt instrument, but § 1.988–2(b)(16)(ii) is reserved with respect to the treatment of a debtor. The temporary regulations correct the cross-reference in § 1.988–2(b)(16)(i) to refer to § 1.267(f)–1(e) rather than § 1.267(f)–1(h).

The Treasury Department and the IRS have determined that the policy considerations underlying section 267(f)(3)(C) and § 1.267(f)–1(e) with respect to creditors on loans to related persons also apply with respect to debtors on such loans and that there is no reason to distinguish between a creditor and debtor with regard to the application of an anti-avoidance rule to the same transaction. Accordingly, pursuant to the authority granted to the Secretary in section 989(c)(5) to prescribe regulations providing for the appropriate treatment of related-party transactions, § 1.988–2T(b)(16)(ii) provides that exchange loss of a debtor with respect to a loan (original loan) from a person with whom the debtor has a relationship described in section 267(b) or section 707(b) is deferred if the transaction resulting in realization of the loss has a principal purpose of avoiding Federal income tax. Such deferred loss will be recognized at the end of the term of the original loan.

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory assessment is not required. For applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), please refer to the Special Analyses section in the preamble to the cross-referenced notice of proposed rulemaking in the Proposed Rules section of this issue of the **Federal Register**. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Mark E. Erwin of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendment to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 985, 987, 989(c) and 7805 * * *

■ **Par. 2.** Section 1.987–0 is amended by adding entries for §§ 1.987–6(b)(4) and 1.987–12(a) through (h) to read as follows:

§ 1.987–0 Section 987; table of contents.

* * * * *

§ 1.987–6 Character and source of section 987 gain or loss.

* * * * *

(b) * * *

(4) [Reserved].

* * * * *

§ 1.987–12 Deferral of section 987 gain or loss.

(a) through (h) [Reserved].

■ **Par. 3.** Section 1.987–1 is amended by adding paragraphs (b)(1)(iii), (b)(6), (c)(1)(ii)(B), (c)(3)(i)(E), (d)(3), (f), (g)(2)(i)(B) and (C), and (g)(3)(i)(E) through (H) to read as follows:

§ 1.987–1 Scope, definitions, and special rules.

* * * * *

(b) * * *

(1) * * *

(iii) [Reserved]. For further guidance, see § 1.987–1T(b)(1)(iii).

* * * * *

(b) * * *

(6) [Reserved]. For further guidance, see § 1.987–1T(b)(6).

* * * * *

(c) * * *

(1) * * *

(ii) * * *

(B) [Reserved]. For further guidance, see § 1.987–1T(c)(1)(ii)(B).

* * * * *

(c) * * *

(3) * * *

(i) * * *

(E) [Reserved]. For further guidance, see § 1.987–1T(c)(3)(i)(E).

* * * * *

(d) * * *

(3) [Reserved]. For further guidance, see § 1.987–1T(d)(3).

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(f) [Reserved]. For further guidance, see § 1.987–1T(f).

* * * * *

(g) * * *

(2) * * *

(i) * * *

(B) through (C) [Reserved]. For further guidance, see § 1.987–1T(g)(2)(i)(B) through (C).

* * * * *

(g) * * *
(3) * * *
(i) * * *
(E) through (H) [Reserved]. For further guidance, see § 1.987–1T(g)(3)(i)(E) through (H).
* * * * *

■ **Par. 4.** Section 1.987–1T is added to read as follows:

§ 1.987–1T Scope, definitions, and special rules (temporary).

(a) through (b)(1)(ii) [Reserved]. For further guidance, see § 1.987–1(a) through (b)(1)(ii).

(iii) *Certain provisions applicable to all taxpayers.* Notwithstanding § 1.987–1(b)(1)(ii), paragraphs (b)(6) and (g)(3)(i)(E) of this section and § 1.987–6T(b)(4) apply to any taxpayer that is an owner of a dollar QBU (as defined in paragraph (b)(6) of this section), and paragraphs (g)(2)(i)(B) and (g)(3)(i)(H) of this section and §§ 1.987–8T(d) and 1.987–12T apply to any taxpayer that is an owner of an eligible QBU (determined without regard to § 1.987–1(b)(3)(ii)) that is subject to section 987.

(b)(2) through (b)(5) [Reserved]. For further guidance, see § 1.987–1(b)(2) through (b)(5).

(6) *Dollar QBUs*—(i) *In general.* Except as provided in paragraphs (b)(1)(iii) and (b)(6)(iii) of this section, section 987 and the regulations thereunder do not apply with respect to an eligible QBU (determined without regard to § 1.987–1(b)(3)(ii)) that has the U.S. dollar as its functional currency and that would be subject to section 987 if it had a functional currency other than the dollar (dollar QBU). This paragraph (b)(6) applies to all taxpayers, including entities described in § 1.987–1(b)(1)(ii).

(ii) *Application of section 988 to a dollar QBU*—(A) *In general.* Except as provided in paragraphs (b)(6)(ii)(B) and (b)(6)(iii) of this section, a controlled foreign corporation (as defined in section 957(a)) (CFC) that is the owner of a dollar QBU applies section 988 with respect to any item that is properly reflected on the books and records of the dollar QBU and that would give rise to a section 988 transaction if such item were acquired, accrued, or entered into directly by the owner of the dollar QBU. Except as provided in paragraph (b)(6)(ii)(B) of this section, for purposes of determining the amount of section 988 gain or loss of the CFC, any item that is properly reflected on the books and records of the dollar QBU and that would give rise to a section 988 transaction if such item were acquired, accrued, or entered into directly by the owner of the dollar QBU is treated as properly reflected on the books and records of the owner of the dollar QBU, such that the amount of section 988 gain or loss with respect to such item is determined by reference to the owner's functional currency.

(B) *Section 988 gain or loss characterized as effectively connected income.* Solely for the purpose of determining the amount of section 988 gain or loss of a CFC described in paragraph (b)(6)(ii)(A) of this section that is effectively connected with the conduct of a trade or business within the United States (ECI), any section 988 gain or loss that would be determined under section 988 as a result of the acquisition or accrual of any item and treated as ECI under § 1.988–4(c) if the item were treated as properly reflected on the books and records of the dollar QBU is determined by treating such item as properly reflected on the books and records of the dollar QBU. Consequently, solely for that purpose, such section 988 gain or loss is determined by reference to the U.S. dollar.

(iii) *Election for a CFC to apply section 987 to a dollar QBU*—(A) *In general.* A CFC that is the owner of a dollar QBU may elect to apply section 987 and the regulations thereunder with respect to the dollar QBU in lieu of applying section 988 pursuant to paragraph (b)(6)(ii) of this section. If the dollar QBU or CFC is described in § 1.987–1(b)(1)(ii), however, the CFC must apply section 987 to the dollar QBU using the method it applied to the dollar QBU immediately prior to the effective date of this paragraph (b)(6) as provided in paragraph (h) of this section, provided such method was a reasonable interpretation of section 987, or, if no such method exists, a reasonable method.

(B) *Section 988 gain or loss characterized as effectively connected income.* Solely for the purpose of determining the amount of section 988 gain or loss of a dollar QBU that is the subject of an election described in paragraph (b)(6)(iii)(A) of this section that is ECI, § 1.987–3T(b)(4)(i) and (ii) do not apply, and any section 988 gain or loss that would be determined under section 988 as a result of the acquisition or accrual of any item and treated as ECI under § 1.988–4(c) if the item were treated as properly reflected on the books and records of the dollar QBU is determined by treating such item as properly reflected on the books and records of the dollar QBU. Consequently, solely for that purpose, such section 988 gain or loss is determined by reference to the U.S. dollar. See § 1.987–6T(b)(4) for rules regarding the source of section 987 gain or loss with respect to a dollar QBU for which the CFC owner has made the election described in this paragraph.

(b)(7) through (c)(1)(ii)(A) [Reserved]. For further guidance, see § 1.987–1(b)(7) through (c)(1)(ii)(A).

(B) *Election inapplicable with respect to certain amounts.* Except as provided in this paragraph (c)(1)(ii)(B), the election provided in § 1.987–1(c)(1)(ii)(A) does not apply for purposes of determining section 987 taxable income or loss (as defined in § 1.987–3(a)) with respect to a historic item (as defined in § 1.987–1(e)) if acquiring, accruing, or entering into such item gives rise to a section 988 transaction or specified owner functional currency transaction. However, the election provided in § 1.987–1(c)(1)(ii)(A) does apply for purposes of determining section 987 taxable income or loss with respect to a payable or receivable described in § 1.988–1(d)(3) under the circumstances described in § 1.988–1(d)(3).

(c)(2) through (c)(3)(i)(D) [Reserved]. For further guidance, see § 1.987–1(c)(2) through (c)(3)(i)(D).

(E) *Section 988 transactions and specified owner functional currency transactions.* If acquiring, accruing, or entering into a historic item gives rise to a section 988 transaction of a section 987 QBU or a specified owner functional currency transaction described in § 1.987–3T(b)(4)(ii), the historic rate is the spot rate (as defined in paragraph (c)(1) of this section) on the date such item is acquired, accrued, or entered into. For this purpose, use of a spot rate convention under § 1.987–1(c)(1)(ii) is permitted only with respect to a payable or receivable described in § 1.988–1(d)(3) and only to the extent provided therein.

(c)(3)(ii) through (d)(2) [Reserved]. For further guidance, see § 1.987–1(c)(3)(ii) through (d)(2).

(3) Gives rise to a qualified short-term section 988 transaction (as defined in § 1.987–3T(b)(4)(iii)(B)) of the section 987 QBU, whether denominated in the functional currency of the owner or other nonfunctional currency with respect to the section 987 QBU, for which section 988 gain or loss is determined under § 1.987–3T(b)(4)(iii)(A) in, and by reference to, the functional currency of the section 987 QBU.

(e) [Reserved]. For further guidance, see § 1.987–1(e).

(f) *Examples.* The following examples illustrate the application of § 1.987–1(d) and (e).

Example 1. U.S. Corp is a domestic corporation with the U.S. dollar as its

functional currency and is the owner of Business A, a section 987 QBU that has the pound as its functional currency. Assume all transactions of Business A are entered into in the ordinary course of its business. U.S. Corp has not made an election under § 1.987–3T(b)(4)(iii)(C) to adopt a foreign currency mark-to-market method of accounting for qualified short-term section 988 transactions. Items reflected on Business A's balance sheet include £10,000, $1,000, a building with a basis of £100,000, a light general purpose truck with a basis of £30,000, a computer with a basis of £1,000, a 60-day receivable for ¥15,000, an account payable of £5,000, and a foreign currency contract within the meaning of section 1256(g)(2) that requires Business A to exchange £100 for $125 in 90 days. Under paragraph (d) of this section, the £10,000, the £5,000 account payable and the £/$ section 1256 foreign currency contract are marked items. The other items are historic items under this paragraph (e) of this section.

Example 2. The facts are the same as *Example 1* except that U.S. Corp has elected under § 1.987–3T(b)(4)(iii)(C) to adopt the foreign currency mark-to-market method of accounting for qualified short-term section 988 transactions of Business A. Under paragraphs (d) and (e) of this section, the £10,000, the $1,000, the ¥15,000 receivable, the £5,000 account payable, and the £/$ section 1256 foreign currency contract are marked items.

(g)(1) through (g)(2)(i)(A) [Reserved]. For further guidance, see § 1.987–1(g)(1) through (g)(2)(i)(A).

(B) *Annual deemed termination election*—(*1*) *In general.* Except as provided in paragraph (g)(2)(i)(B)(*2*) of this section, an election under § 1.987–8T(d) (annual deemed termination election) applies to all section 987 QBUs owned by the taxpayer, as well as to all section 987 QBUs owned by any person that has a relationship to the taxpayer described in section 267(b) or section 707(b) (substituting ''and the profits interest'' for ''or the profits interest'' in section 707(b)(1)(A) and substituting ''and profits interests'' for ''or profits interests'' in section 707(b)(1)(B)) on the last day of the first taxable year for which the election applies (a related person). If a taxpayer makes the election under § 1.987–8T(d), the first taxable year of a related person for which the election applies is the first taxable year that ends with or within a taxable year of the taxpayer for which the taxpayer's election applies. An election under § 1.987–8T(d) may not be revoked.

(*i*) *Fresh start taxpayers.* A taxpayer to which § 1.987–10 applies that is required under § 1.987–10(a) to apply the fresh start transition method described in § 1.987–10(b) (fresh start taxpayer) may make the election under § 1.987–8T(d) only if the first taxable year for which the election would apply to the taxpayer is either the first taxable year beginning on or after the transition date (as defined in § 1.987–11(c)) in which the election is relevant or a subsequent taxable year in which the taxpayer's controlled group aggregate section 987 loss, if any, does not exceed $5 million. For purposes of this paragraph (g)(2)(i)(B), a taxpayer's controlled group aggregate section 987 loss means the aggregate net amount of section 987 loss that would be recognized pursuant to the election by the taxpayer and all other persons to whom the taxpayer's election would apply in the first taxable year of each person for which the election would apply.

(*ii*) *Other taxpayers.* Other taxpayers, including taxpayers described in § 1.987–1(b)(1)(ii) and taxpayers described in § 1.987–10(c), must follow the election rules provided in paragraph (g)(2)(i)(B)(*1*)(*i*) of this section if any related party is a fresh start taxpayer. If no related party is a fresh start taxpayer, the election under § 1.987–8T(d) may be made only if the first taxable year for which the election would apply to the taxpayer is either the first taxable year beginning on or after December 7, 2016, in which the election is relevant or a subsequent taxable year in which the taxpayer's controlled group aggregate section 987 loss, if any, does not exceed $5 million.

(*2*) *QBU-by-QBU elections in certain circumstances.* Notwithstanding paragraph (g)(2)(i)(B)(*1*) of this section, a taxpayer may make a separate election under § 1.987–8T(d) with respect to any section 987 QBU owned by the taxpayer if the first taxable year for which the election would apply to the taxpayer with respect to the section 987 QBU is a taxable year in which there is a section 987 gain recognized with respect to the section 987 QBU pursuant to the election, or is a taxable year in which there is a section 987 loss of $1 million or less that would be recognized with respect to the section 987 QBU pursuant to the election

(C) *Election to translate all items at the yearly average exchange rate.* An election under § 1.987–3T(d) (election to translate all items at the yearly average exchange rate) may be made with respect to a section 987 QBU only if the first taxable year for which the election would apply is the first taxable year for which an election under § 1.987–8T(d) (annual deemed termination election) applies with respect to the section 987 QBU.

(g)(2)(ii) through (g)(3)(i)(D) [Reserved]. For further guidance, see § 1.987–1(g)(2)(ii) through (g)(3)(i)(D).

(E) *Election for a CFC to apply section 987 to a dollar QBU.* An election under § 1.987–1T(b)(6)(iii) for a CFC to apply section 987 to a dollar QBU must be titled ''Section 987 Election for a CFC to Apply Section 987 to a Dollar QBU Under § 1.987–1T(b)(6)(iii)'' and must provide the name and address of each QBU for which the election is being made.

(F) *Election to apply the foreign currency mark-to-market method of accounting for qualified short-term section 988 transactions.* An election under § 1.987–3T(b)(4)(iii)(C) to apply the foreign currency mark-to-market method of accounting for qualified short-term section 988 transactions must be titled ''Section 987 Election to Use Foreign Currency Mark-to-Market Method of Accounting for Qualified Short-Term Section 988 Transactions Under § 1.987–3(b)T(4)(iii)(C)'' and must provide the name and address of each section 987 QBU for which the election is being made.

(G) *Election to translate all items at the yearly average exchange rate.* An election under § 1.987–3T(d) to translate all items at the yearly average exchange rate must be titled ''Section 987 Election to Translate All Items at the Yearly Average Exchange Rate Under § 1.987–3T(d)'' and must provide the name and address of each section 987 QBU for which the election is being made.

(H) *Annual deemed termination election.* An election under § 1.987–8T(d) for an owner to deem all of its section 987 QBUs to terminate on the last day of each taxable year must be titled ''Section 987 Annual Deemed Termination Election Under § 1.987–8T(d)'' and must provide the name and address of each section 987 QBU to which the election applies, including a section 987 QBU owned by a related person (within the meaning of paragraph (g)(2)(i)(B)(*1*) of this section).

(g)(4) through (6) [Reserved]. For further guidance, see § 1.987–1(g)(4) through (6).

(h) *Effective/applicability date.* Paragraphs (g)(2)(i)(B) and (g)(3)(i)(H) of this section apply to the first taxable year beginning on or after December 7, 2016. Paragraphs (b)(1)(iii), (b)(6), (c)(1)(ii)(B), (c)(3)(i)(E), (d)(3), (f), (g)(2)(i)(C), and (g)(3)(i)(E) through (G) of this section apply to taxable years beginning one year after the first day of the first taxable year following December 7, 2016. Notwithstanding the preceding sentence, if a taxpayer makes an election under § 1.987–11(b), then paragraphs (b)(1)(iii), (b)(6), (c)(1)(ii)(B), (c)(3)(i)(E), (d)(3), (f), (g)(2)(i)(C), and (g)(3)(i)(E) through (G) of this section apply to taxable years to which §§ 1.987–1 through 1.987–10 apply as a result of such election.

(i) *Expiration date.* The applicability of this section expires on December 6, 2019.

■ **Par. 5.** Section 1.987–2 is amended by adding paragraph (c)(9) to read as follows:

§ 1.987–2 Attribution of items to eligible QBUs; definition of a transfer and related rules.

* * * * *

(c) * * *

(9) [Reserved]. For further guidance, see § 1.987–2T(c)(9).

* * * * *

■ **Par. 6.** Section 1.987–2T is added to read as follows:

§ 1.987–2T Attribution of items to eligible QBUs; definition of a transfer and related rules (temporary).

(a) through (c)(8) [Reserved]. For further guidance, see § 1.987–2(a) through (c)(8).

(9) *Certain disregarded transactions not treated as transfers*—(i) *Combinations of section 987 QBUs.* The combination of two or more separate section 987 QBUs (combining QBUs) that are directly owned by the same owner, or that are indirectly owned by the same partner through a single section 987 aggregate partnership, into one section 987 QBU (combined QBU) does not give rise to a transfer of any combining QBU's assets or liabilities to the owner under § 1.987–2(c). In addition, transactions between the combining QBUs occurring in the taxable year of the combination do not result in a transfer of the combining QBUs' assets or liabilities to the owner under § 1.987–2(c). For this purpose, a combination occurs when the assets and liabilities that are properly reflected on the books and records of two or more combining QBUs begin to be properly reflected on the books and records of a combined QBU and the separate existence of the combining QBUs ceases. A combination may result from any transaction or series of transactions in which the combining QBUs become a combined QBU. For rules regarding the determination of net unrecognized section 987 gain or loss of a combined QBU, see § 1.987–4T(f)(1).

(ii) *Change in functional currency from a combination.* If, following a combination of section 987 QBUs described in paragraph (c)(9)(i) of this section, the combined section 987 QBU has a different functional currency than one or more of the combining section 987 QBUs, any such combining section 987 QBU is treated as changing its functional currency and the owner of the combined section 987 QBU must comply with the regulations under section 985 regarding the change in functional currency. See §§ 1.985–1(c)(6) and 1.985–5.

(iii) *Separation of section 987 QBUs.* The separation of a section 987 QBU (separating QBU) into two or more section 987 QBUs (separated QBUs) that, after the separation, are directly owned by the same owner, or that are indirectly owned by the same partner through a single section 987 aggregate partnership, does not give rise to a transfer of the separating QBU's assets or liabilities to the owner under § 1.987–2(c). Additionally, transactions that occurred between the separating QBUs in the taxable year of the separation prior to the completion of the separation do not give rise to transfers for purposes of section 987. For this purpose, a separation occurs when the assets and liabilities that are properly reflected on the books and records of a separating QBU begin to be properly reflected on the books and records of two or more separated QBUs. A separation may result from any transaction or series of transactions in which a separating QBU becomes two or more separated QBUs. A separation may also result when a section 987 QBU that is subject to a grouping election under § 1.987–1(b)(2)(ii)(A) changes its functional currency. For rules regarding the determination of net unrecognized section 987 gain or loss of a separated QBU, see § 1.987–4T(f)(2).

(c)(10) through (d) [Reserved]. For further guidance see § 1.987–2(c)(10) through (d).

(e) *Effective/applicability date.* This section applies to taxable years beginning on or after one year after the first day of the first taxable year following December 7, 2016. Notwithstanding the preceding sentence, if a taxpayer makes an election under § 1.987–11(b), then this section applies to taxable years to which §§ 1.987–1 through 1.987–10 apply as a result of such election.

(f) *Expiration date.* The applicability of this section expires on December 6, 2019.

■ **Par. 7.** Section 1.987–3 is amended by adding paragraphs (b)(2)(ii), (b)(4), (c)(2)(ii) and (v), and (d), and *Example 9* through *Example 14* at the end of paragraph (e) to read as follows:

§ 1.987–3 Determination of section 987 taxable income or loss of an owner of a section 987 QBU.

* * * * *

(b) * * *

(2) * * *

(ii) [Reserved]. For further guidance, see § 1.987–3T(b)(2)(ii).

* * * * *

(b) * * *

(4) [Reserved]. For further guidance, see § 1.987–3T(b)(4).

* * * * *

(c) * * *

(2) * * *

(ii) [Reserved]. For further guidance, see § 1.987–3T(c)(2)(ii).

* * * * *

(c) * * *

(2) * * *

(v) through (d) [Reserved]. For further guidance, see § 1.987–3T(c)(2)(v) through (d).

(e) *Examples.* * * *

Example 9 through *Example 14* [Reserved]. For further guidance, see § 1.987–3T(e), *Example 9* through *Example 14.*

■ **Par. 8.** Section 1.987–3T is added to read as follows:

§ 1.987–3T Determination of section 987 taxable income or loss of an owner of a section 987 QBU (temporary).

(a) through (b)(2)(i) [Reserved]. For further guidance, see § 1.987–3(a) through (b)(2)(i).

(ii) *No translation of basis or amount realized with respect to a specified owner functional currency transaction treated as a historic asset.* If the acquisition of a historic asset gives rise to a specified owner functional currency transaction described in paragraph (b)(4)(ii) of this section, the basis of the historic asset, and any amount realized on a disposition of the historic asset, is not translated if the amount is denominated in the owner's functional currency.

(3) [Reserved]. For further guidance, see § 1.987–3(b)(3).

(4) *Special rule for section 988 transactions*—(i) *In general.* Section 988 and the regulations thereunder apply to section 988 transactions of a section 987 QBU. For this purpose, whether a transaction is a section 988 transaction is determined by reference to the functional currency of the section 987 QBU. (But see paragraph (b)(4)(ii) of this section, providing that specified owner functional currency transactions are not treated as section 988 transactions.) However, except as provided in paragraph (b)(4)(iii)(A) of this section, section 988 gain or loss is determined in, and by reference to, the functional currency of the owner of the section 987 QBU rather than the functional currency of the section 987 QBU. Accordingly, in determining section 988 gain or loss of a section 987 QBU with respect to a section 988 transaction of the section 987 QBU, the amounts required under section 988 and the regulations thereunder to be translated on the

applicable booking date or payment date with respect to the section 988 transaction are translated into the owner's functional currency at the rate required under section 988 and the regulations thereunder.

(ii) *Specified owner functional currency transactions not treated as section 988 transactions.* Transactions of a section 987 QBU described in sections 988(c)(1)(B)(i), 988(c)(1)(B)(ii), and 988(c)(1)(C) (including the acquisition of nonfunctional currency as described in § 1.988–1(a)(1)), other than transactions described in paragraph (b)(4)(iii)(A) of this section, that are denominated in (or determined by reference to) the owner's functional currency (specified owner functional currency transactions) are not treated as section 988 transactions. Thus, no currency gain or loss is recognized by a section 987 QBU under section 988 with respect to such transactions.

(iii) *Determination of section 988 gain or loss for qualified short-term section 988 transactions*—(A) *Determination by reference to the section 987 QBU's functional currency for certain transactions subject to a mark-to-market method of accounting.* Section 988 gain or loss with respect to section 988 transactions described in paragraph (b)(4)(iii)(B) of this section that are accounted for under a mark-to-market method of accounting for Federal income tax purposes or under the foreign currency mark-to-market method of accounting described in paragraph (b)(4)(iii)(C) of this section, and any hedges entered into to manage risk with respect to such transactions within the meaning of § 1.1221–2(c)(4) (related hedges), must be determined in, and by reference to, the functional currency of the section 987 QBU (rather than the functional currency of its owner).

(B) *Qualified short-term section 988 transaction.* A qualified short-term section 988 transaction is a section 988 transaction that occurs in the ordinary course of a section 987 QBU's business and has an original term of one year or less on the date the transaction is entered into by the section 987 QBU. The holding of currency that is nonfunctional currency (within the meaning of section 988(c)(1)(C)(ii)) to the section 987 QBU in the ordinary course of a section 987 QBU's trade or business also is treated as a qualified short-term section 988 transaction. Any transaction that is denominated in, or determined by reference to, a hyperinflationary currency, including the holding of hyperinflationary currency, is not considered a qualified short-term section 988 transaction. See §§ 1.988–2(b)(15), 1.988–2(d)(5), and 1.988–2(e)(7) for rules relating to transactions denominated in, or determined by reference to, a hyperinflationary currency.

(C) *Election to use a foreign currency mark-to-market method of accounting.* A taxpayer may elect under this paragraph (b)(4)(iii)(C) to apply the foreign currency mark-to-market method of accounting described in this paragraph for all qualified short-term section 988 transactions described in paragraph (b)(4)(iii)(B) of this section, and any related hedges, that are properly attributable to a section 987 QBU on or after the effective date of the election and that are not otherwise accounted for under a mark-to-market method of accounting under section 475 or section 1256. Under the foreign currency mark-to-market method of accounting, the timing of section 988 gain or loss on section 988 transactions is determined under the principles of section 1256(a)(1). Thus, only section 988 gain or loss is taken into account under the foreign currency mark-to-market method of accounting. Appropriate adjustments must be made to prevent the section 988 gain or loss from being taken into account again under section 988 or another provision of the Code or regulations. A section 988 transaction subject to this election is not subject to the ''netting rule'' of section 988(b) and § 1.988–2(b)(8), under which exchange gain or loss is limited to overall gain or loss realized in a transaction, in taxable years prior to the taxable year in which section 988 gain or loss would be recognized with respect to such section 988 transaction but for this election.

(iv) *Examples.* Examples 10 through 13 of paragraph (e) of this section illustrate the application of this paragraph (b)(4).

(c)(1) through (c)(2)(i) [Reserved]. For further guidance, see § 1.987–3(c)(1) through (c)(2)(i).

(ii) *Amount realized with respect to historic assets that are section 988 transactions.* If the acquisition of a historic asset gave rise to a section 988 transaction described in paragraph (b)(4)(i) of this section, then in computing the total gain or loss on a disposition of the historic asset (some or all of which total gain or loss may be section 988 gain or loss described in section 988(b) and paragraph (b)(4)(i) of this section), the amount realized (determined, if necessary, under § 1.987–3(b)(2)(i)) is translated into the owner's functional currency using the spot rate on the date such item is properly taken into account, subject to the limitation under § 1.987–1T(c)(1)(ii)(B) regarding the use of a spot rate convention.

(iii) through (iv) [Reserved]. For further guidance, see § 1.987–3(c)(2)(iii) through (iv).

(v) *Translation of income to account for certain foreign income tax claimed as a credit.* The owner of a section 987 QBU claiming a credit under section 901 for foreign income taxes, other than foreign income taxes deemed paid under section 902 or section 960, that are properly reflected on the books and records of the section 987 QBU (the creditable tax amount) must determine section 987 taxable income or loss attributable to the section 987 QBU by reducing the amount of section 987 taxable income or loss that otherwise would be determined under this section by an amount equal to the creditable tax amount, translated into U.S. dollars using the yearly average exchange rate for the taxable year in which the creditable tax is accrued, and by increasing the resulting amount by an amount equal to the creditable tax amount, translated using the same exchange rate that is used to translate the creditable taxes into U.S. dollars under section 986(a). See *Example 14* of paragraph (e) of this section,, for an illustration of this rule.

(d) *Election to translate all items at the yearly average exchange rate.* Notwithstanding § 1.987–3(c), a taxpayer that has made the annual deemed termination election described in § 1.987–8T(d) may elect under this paragraph (d) to translate all items of income, gain, deduction, and loss with respect to a section 987 QBU determined under § 1.987–3(b) in the functional currency of the section 987 QBU into the owner's functional currency, if necessary, at the yearly average exchange rate for the taxable year. *Example 9* of paragraph (e) of this section illustrates the application of this election.

(e) *Example 1* through *Example 8* [Reserved]. For further guidance, see § 1.987–3(e), *Example 1* through *Example 8.*

Example 9. The facts are the same as in *Example 7,* except that U.S. Corp properly elects under paragraph (d) of this section to translate all items of income, gain, deduction, and loss with respect to Business A at the yearly average exchange rate. Accordingly, Business A's €2,000 gain on the sale of the land is translated at the yearly average exchange rate for 2021 of €1 = $1.05, and the amount of gain reported by U.S. Corp on the sale of the land is $2,100.

Example 10. Business A acquires £100 on August 27, 2021, for €120 and sells the pounds on November 17, 2021, for €125. The dollar-pound spot rate (without the use of a spot rate convention) is £1 = $1 on August

27, 2021, and £1 = $1.10 on November 17, 2021. The disposition of the pounds is a section 988 transaction of Business A under paragraph (b)(4)(i) of this section, and the pounds are a historic asset under § 1.987–1(e). Section 988 gain or loss with respect to the disposition of the pounds is determined under paragraph (b)(4)(i) of this section and § 1.988–2(a)(2) by reference to the dollar functional currency of Business A's owner. The dollar amount realized for the pounds is determined under paragraph (c)(2)(ii) of this section by translating £100 into $110 using the dollar-pound spot rate on November 17, 2021, without the use of a spot rate convention. The dollar basis in the pounds is determined under § 1.987–3(c)(2)(i) by translating £100 into $100 using the historic rate described in § 1.987–1T(c)(3)(i)(E), which is the dollar-pound spot rate on August 27, 2021, without the use of a spot rate convention. Thus, U.S. Corp takes into account $10 of section 988 gain with respect to Business A's disposition of £100.

Example 11. (i) Business A purchases a £100 2-year note for €75 on October 1, 2021, and receives a £100 repayment of principal with respect to the note on December 31, 2021. At the spot rates on October 1, 2021 (as defined in § 1.987–1(c)(1)), without the use of a spot rate convention, Business A's €75 purchase price translates into £80 and $95. At the spot rates on December 31, 2021, without the use of a spot rate convention, the £100 principal amount on the note translates into €90 and $130, and £80 translates into $104.

(ii) The acquisition of the note is a section 988 transaction of Business A under paragraph (b)(4)(i) of this section, and the note is a historic asset under § 1.987–1(e). To determine its section 987 taxable income or loss with respect to Business A, U.S. Corp must determine Business A's total gain or loss on the disposition of the note in U.S. Corp's dollar functional currency. Consistent with § 1.988–2(b)(8), U.S. Corp also must determine whether some or all of that gain or loss constitutes section 987 gain or loss described in section 988(b).

(iii) To determine Business A's total gain or loss on the disposition of the note, Business A's basis and amount realized on the note must be determined in euros under § 1.987–3(b), if necessary, and translated into dollars under § 1.987–3(c). Business A has a €75 basis in the note that is translated into $95 under § 1.987–3(c)(2)(i) at the historic rate described in § 1.987–1T(c)(3)(i)(E), which is the spot rate on the date the note was acquired without the use of a spot rate convention. Business A's £100 amount realized on the note is translated into €90 under § 1.987–3(b)(2)(i) using the spot rate on December 31, 2021, without the use of a spot rate convention. That €90 amount realized is then translated into $130 under paragraph (c)(2)(ii) of this section using the spot rate on December 31, 2021, without the use of a spot rate convention. Accordingly, the total gain with respect to the disposition of the note that is included in section 987 taxable income is $35 ($130 less $95).

(iv) U.S. Corp must determine whether some or all of the $35 total gain with respect to the note constitutes section 988 gain. The amount of section 988 gain realized with respect to the note is determined under § 1.988–2(b)(5), which requires a comparison of the functional currency value of the principal amount of the note on the booking date and payment date spot rates, respectively, and defines the principal amount of the note as Business A's purchase price in units of nonfunctional currency, which is £80. Under paragraph (b)(4)(i) of this section, section 988 gain or loss with respect to the note is determined by reference to U.S. Corp's dollar functional currency, such that the amounts required under section 988 to be translated on the booking date and payment date are translated into the dollars at the booking date and payment date spot rates. Accordingly, Business A's £80 principal amount with respect to the note is translated at the booking date and payment date spots rates into $95 and $104, respectively. Thus, $9 ($104 less $95) of the $35 total gain taken into account by U.S. Corp as section 987 taxable income with respect to the note is section 988 gain. The remaining $26 of gain, which may be attributable to credit risk or another factor unrelated to currency fluctuations, is sourced and characterized without regard to section 988.

Example 12. The facts are the same as in *Example 11,* except that Business A is owned by a foreign corporation with a pound functional currency. Under paragraph (b)(4)(ii) of this section, the acquisition of the £100 2-year note is a specified owner functional currency transaction that is not treated as a section 988 transaction of Business A. Because the note is a historic asset under § 1.987–1(e), Business A's €75 basis in the note translates into £80 at the historic rate described in § 1.987–1T(c)(3)(i)(E), which provides that the historic rate is the spot rate for the date the note was acquired without the use of a spot rate convention. (If, instead, Business A had purchased the 5-year note for £80 rather than €75, then pursuant to paragraph (b)(2)(ii) of this section, Business A's basis in the note would have been determined without translating the £80 purchase price because it is denominated in the owner's functional currency.) Under paragraph (b)(2)(ii) of this section, the £100 amount realized with respect to the note is not translated because it is denominated in the owner's functional currency. Thus, the owner takes into account £20 (£100 less £80) of section 987 taxable income in 2021 with respect to the note.

Example 13. (i) Business A receives and accrues $100 of income from the provision of services on January 1, 2021. Business A continues to hold the $100 as a U.S. dollar-denominated demand deposit at a bank on December 31, 2021. U.S. Corp has elected under paragraph (b)(4)(iii)(C) of this section to use the foreign currency mark-to-market method of accounting for qualified short-term section 988 transactions entered into by Business A. The euro-dollar spot rate without the use of a spot rate convention is €1 = $1 on January 1, 2021, and €1 = $2 on December 31, 2021, and the yearly average exchange rate for 2021 is €1 = $1.50.

(ii) Under § 1.987–3(b)(2)(i), the $100 earned by Business A is translated into €100 at the spot rate on January 1, 2021, as defined in § 1.987–1(c)(1) without the use of a spot rate convention. In determining U.S. Corp's taxable income, the €100 of service income is translated into $150 at the yearly average exchange rate for 2021, as provided in § 1.987–3(c)(1).

(iii) The $100 demand deposit constitutes a qualified short-term section 988 transaction under paragraph (b)(4)(iii)(B) of this section because the demand deposit is treated as nonfunctional currency within the meaning of section 988(c)(1)(C)(ii). Because Business A uses the foreign currency mark-to-market method of accounting for qualified short-term section 988 transactions, under paragraph (b)(4)(iii)(A) of this section, section 988 gain or loss for such transactions is determined in, and by reference to, euros, the functional currency of Business A. Accordingly, section 988 gain or loss must be determined on Business A's holding of the $100 demand deposit in, and by reference to, the euro. Under § 1.988–2(a)(2), Business A is treated as having an amount realized of €50 when the $100 is marked to market at the end of 2021 under paragraph (b)(4)(iii)(C) of this section. Marking the dollars to market gives rise to a section 988 loss of €50 (€50 amount realized, less Business A's €100 basis in the $100). In determining U.S. Corp's taxable income, that €50 loss is translated into a $75 loss at the yearly average exchange rate for 2021, as provided in § 1.987–3(c)(1).

Example 14. (i) *Facts.* Business A earns €100 of revenue from the provision of services and incurs €30 of general expenses and €10 of depreciation expense during 2021. Except as otherwise provided, U.S. Corp uses the yearly average exchange rate described in § 1.987–1(c)(2) to translate items of income, gain, deduction, and loss of Business A. Business A is subject to income tax in Country X at a 25 percent rate. U.S. Corp claims a credit with respect to Business A's foreign income taxes and elects under section 986(a)(1)(D) to translate the foreign income taxes at the spot rate on the date the taxes were paid. The yearly average exchange rate for 2021 is €1 = $1.50. The historic rate used to translate the depreciation expense is €1 = $1.00. The spot rate on the date that Business A paid its foreign income taxes was €1 = $1.60.

(ii) *Analysis.* Because U.S. Corp has elected to translate foreign income taxes at the spot rate on the date such taxes were paid rather than at the yearly average exchange rate, U.S. Corp must make the adjustments described in paragraph (c)(2)(v) of this section. Accordingly, U.S. Corp determines its section 987 taxable income by reducing the section 987 taxable income or loss that otherwise would be determined under this section by €15, translated into U.S. dollars at the yearly average exchange rate (€1 = $1.50), and increasing the resulting amount by €15, translated using the same exchange rate that is used to translate the creditable taxes into U.S. dollars under section 986(a) (€1 = $1.60). Following these adjustments, Business A's section 987 taxable income for 2021 is $96.50, computed as follows:

	Amount in €	Translation rate	Amount in $
Revenue	€100	€1 = $1.50	$150.00
General Expenses	(30)	€1 = $1.50	(45.00)
Depreciation	(10)	€1 = $1.00	(10.00)
Tentative section 987 taxable income	€60		$95.00
Adjustments under paragraph (c)(2)(v) of this section:			
Decrease by €15 tax translated at yearly average exchange rate (€1 = $1.50)			($22.50)
Increase by €15 tax translated at spot rate on payment date (€1 = $1.60)			24.00
Section 987 taxable income			$96.50

(f) *Effective/applicability date.* This section applies to taxable years beginning on or after one year after the first day of the first taxable year following December 7, 2016. Notwithstanding the preceding sentence, if a taxpayer makes an election under § 1.987–11(b), then this section applies to taxable years to which §§ 1.987–1 through 1.987–10 apply as a result of such election.

(g) *Expiration date.* The applicability of this section expires on December 6, 2019.

■ **Par. 9.** Section 1.987–4 is amended by adding paragraphs (c)(2) and (f) to read as follows:

§ 1.987–4 Determination of net unrecognized section 987 gain or loss of a section 987 QBU.

* * * * *

(c) * * *

(2) [Reserved]. For further guidance, see § 1.987–4T(c)(2).

* * * * *

(f) [Reserved]. For further guidance, see § 1.987–4T(f).

* * * * *

■ **Par. 10.** Section 1.987–4T is added to read as follows:

§ 1.987–4T Determination of net unrecognized section 987 gain or loss of a section 987 QBU (temporary).

(a) through (c)(1) [Reserved]. For further guidance, see § 1.987–4(a) through (c)(1).

(2) *Coordination with § 1.987–12T.* For purposes of paragraph (c)(1) of this section, amounts taken into account under § 1.987–5 are determined without regard to § 1.987–12T.

(d) through (e) [Reserved]. For further guidance, see § 1.987–4(d) through (e).

(f) *Combinations and separations*—(1) *Combinations.* The net unrecognized section 987 gain or loss of a combined QBU (as defined in § 1.987–2T(c)(9)(i)) for a taxable year is determined under § 1.987–4(b) by taking into account the net accumulated unrecognized section 987 gain or loss of each combining QBU (as defined in § 1.987–2T(c)(9)(i)) for all prior taxable years to which the regulations under section 987 apply, as determined under § 1.987–4(c), and by treating the combining QBUs as having combined immediately prior to the beginning of the taxable year of combination.

(2) *Separations.* The net unrecognized section 987 gain or loss of a separated QBU (as defined in § 1.987–2T(c)(9)(iii)) for a taxable year is determined under § 1.987–4(b) by taking into account the separated QBU's share of the net accumulated unrecognized section 987 gain or loss of the separating QBU (as defined in § 1.987–2T(c)(9)(iii)) for all prior taxable years to which the regulations under section 987 apply, as determined under § 1.987–4(c), and by treating the separating QBU as having separated immediately prior to the beginning of the taxable year of separation. A separated QBU's share of the separating QBU's net accumulated unrecognized section 987 gain or loss for all such prior taxable years is determined by apportioning the separating QBU's net accumulated unrecognized section 987 gain or loss for all such prior taxable years to each separated QBU in proportion to the aggregate adjusted basis of the gross assets properly reflected on the books and records of each separated QBU immediately after the separation. For purposes of determining the owner functional currency net value of the separated QBUs on the last day of the taxable year preceding the taxable year of separation under § 1.987–5(d)(1)(B) and (e), the balance sheets of the separated QBUs on that day will be deemed to reflect the assets and liabilities reflected on the balance sheet of the separating QBU on that day, apportioned between the separated QBUs in a reasonable manner that takes into account the assets and liabilities reflected on the balance sheets of the separated QBUs immediately after the separation.

(3) *Examples.* The following examples illustrate the rules of paragraphs (f)(1) and (2) of this section.

Example 1. Combination of two section 987 QBUs that have the same owner. (i) *Facts.* DC1, a domestic corporation, owns Entity A, a DE. Entity A conducts a business in France that constitutes a section 987 QBU (French QBU) that has the euro as its functional currency. French QBU has a net accumulated unrecognized section 987 loss from all prior taxable years to which the regulations under section 987 apply of $100. DC1 also owns Entity B, a DE. Entity B conducts a business in Germany that constitutes a section 987 QBU (German QBU) that has the euro as its functional currency. German QBU has a net accumulated unrecognized section 987 gain from all prior taxable years to which the regulations under section 987 apply of $110. During the taxable year, Entity A and Entity B merge under local law. As a result, the books and records of French QBU and German QBU are combined into a new single set of books and records. The combined entity has the euro as its functional currency.

(ii) *Analysis.* Pursuant to § 1.987–2T(c)(9)(i), French QBU and German QBU are combining QBUs, and their combination does not give rise to a transfer that is taken into account in determining the amount of a remittance (as defined in § 1.987–5(c)). For purposes of computing net unrecognized section 987 gain or loss under § 1.987–4 for the year of the combination, the combination is deemed to have occurred on the last day of the owner's prior taxable year, such that the owner functional currency net value of the combined section 987 QBU at the end of that taxable year described under § 1.987–4(d)(1)(B) takes into account items reflected on the balance sheets of both French QBU and German QBU at that time. Additionally, any transactions between French QBU and German QBU occurring during the year of the merger will not result in transfers to or from a section 987 QBU. Pursuant to paragraph (f)(1) of this section, the combined QBU will have a net accumulated unrecognized section 987 gain from all prior taxable years of $10 (the $100 loss from French QBU plus the $110 gain from German QBU).

Example 2. Separation of two section 987 QBUs that have the same owner. (i) *Facts.* DC1, a domestic corporation, owns Entity A, a DE. Entity A conducts a business in the Netherlands that constitutes a section 987 QBU (Dutch QBU) that has the euro as its functional currency. The business of Dutch QBU consists of manufacturing and selling bicycles and scooters and is recorded on a single set of books and records. On the last day of Year 1, the adjusted basis of the gross assets of Dutch QBU is €1,000. In Year 2, the

net accumulated unrecognized section 987 loss of Dutch QBU from all prior taxable years is $200. During Year 2, Entity A separates the bicycle and scooter business such that each business begins to have its own books and records and to meet the definition of a section 987 QBU under § 1.987–1(b)(2) (hereafter, ''bicycle QBU'' and ''scooter QBU''). There are no transfers between DC1 and Dutch QBU before the separation. After the separation, the aggregate adjusted basis of bicycle QBU's assets is €600 and the aggregate adjusted basis of scooter QBU's assets is €400. Each section 987 QBU continues to have the euro as its functional currency.

(ii) *Analysis.* Pursuant to § 1.987–2T(c)(9)(iii), bicycle QBU and scooter QBU are separated QBUs, and the separation of Dutch QBU, a separating QBU, does not give rise to a transfer taken into account in determining the amount of a remittance (as defined in § 1.987–5(c)). For purposes of computing net unrecognized section 987 gain or loss under § 1.987–4 for Year 2, the separation will be deemed to have occurred on the last day of the owner's prior taxable year, Year 1. Pursuant to paragraph (f)(2) of this section, bicycle QBU will have a net accumulated unrecognized section 987 loss of $120 (€600/€1,000 × $200), and scooter QBU will have a net accumulated unrecognized section 987 loss of $80 (€400/€1,000 × $200).

(g) [Reserved]. For further guidance, see § 1.987–4(g).

(h) *Effective/applicability date.* This section applies to taxable years beginning on or after one year after the first day of the first taxable year following December 7, 2016. Notwithstanding the preceding sentence, if a taxpayer makes an election under § 1.987–11(b), then this section applies to taxable years to which §§ 1.987–1 through 1.987–10 apply as a result of such election.

(i) *Expiration date.* The applicability of this section expires on December 6, 2019.

■ **Par. 11.** Section 1.987–6 is amended by adding paragraph (b)(4) to read as follows:

§ 1.987–6 Character and source of section 987 gain or loss.

* * * * *

(b) * * *

(4) [Reserved]. For further guidance, see § 1.987–6T(b)(4).

* * * * *

■ **Par. 12.** Section 1.987–6T is added to read as follows:

§ 1.987–6T Character and source of section 987 gain or loss (temporary)

(a) through (b)(3) [Reserved]. For further guidance, see § 1.987–6(a) through (b)(3).

(4) *Source of section 987 gain or loss with respect to a dollar QBU.* The source of section 987 gain or loss with respect to a dollar QBU (as defined in § 1.987–1T(b)(6)(i)) for which the CFC owner has elected under § 1.987–1T(b)(6)(iii) to apply section 987 is determined by reference to the residence of the CFC owner. This paragraph (b)(4) applies to any CFC that has made the election under § 1.987–1T(b)(6)(iii), including a CFC described in § 1.987–1(b)(1)(ii).

(c) [Reserved]. For further guidance, see § 1.987–6(c).

(d) *Effective/applicability date.* This section applies to taxable years beginning on or after one year after the first day of the first taxable year following December 7, 2016. Notwithstanding the preceding sentence, if a taxpayer makes an election under § 1.987–11(b), then this section applies to taxable years to which §§ 1.987–1 through 1.987–10 apply as a result of such election.

(e) *Expiration date.* The applicability of this section expires on December 6, 2019.

■ **Par. 13.** Section 1.987–7 is amended by adding paragraph (b) to read as follows:

§ 1.987–7 Section 987 aggregate partnerships.

* * * * *

(b) [Reserved]. For further guidance, see § 1.987–7T(b).

* * * * *

■ **Par. 14.** Section 1.987–7T is added to read as follows:

§ 1.987–7T Section 987 aggregate partnerships (temporary).

(a) [Reserved]. For further guidance, see § 1.987–7(a).

(b) *Liquidation value percentage methodology*—(1) *In general.* In any taxable year, a partner's share of each asset, including its basis in each asset, and the amount of each liability reflected under § 1.987–2(b) on the books and records of an eligible QBU owned indirectly through a section 987 aggregate partnership is proportional to the partner's liquidation value percentage with respect to the aggregate partnership for that taxable year, as determined under paragraph (b)(2) of this section.

(2) *Liquidation value percentage*—(i) *In general.* For purposes of this paragraph (b), a partner's liquidation value percentage is the ratio (expressed as a percentage) of the liquidation value of the partner's interest in the partnership to the aggregate liquidation value of all of the partners' interests in the partnership. The liquidation value of a partner's interest in a partnership is the amount of cash the partner would receive with respect to the interest if, immediately following the applicable determination date, the partnership sold all of its assets for cash equal to the fair market value of such assets (taking into account section 7701(g)), satisfied all of its liabilities (other than those described in § 1.752–7), paid an unrelated third party to assume all of its § 1.752–7 liabilities in a fully taxable transaction, and then liquidated.

(ii) *Determination date.*—(A) *In general.* Except as provided in paragraph (b)(2)(ii)(B) of this section, the determination date is the date of the most recent event described in § 1.704–1(b)(2)(iv)(*f*)(*5*) or § 1.704–1(b)(2)(iv)(*s*)(*1*) (a revaluation event), irrespective of whether the capital accounts of the partners are adjusted under § 1.704–1(b)(2)(iv)(*f*), or, if there has been no revaluation event, the date of the formation of the partnership.

(B) *Allocations not in accordance with liquidation value percentage.* If a partnership agreement provides for the allocation of any item of income, gain, deduction, or loss from partnership property to a partner other than in accordance with the partner's liquidation value percentage, the determination date is the last day of the partner's taxable year, or, if the partner's section 987 QBU owned indirectly through a section 987 aggregate partnership terminates during the partner's taxable year, the date such section 987 QBU is terminated.

(3) *Example.* The following example illustrates the rule of this paragraph (b).

Example. (i) *Facts.* DC, a domestic corporation, owns all of the stock of FS, a controlled foreign corporation (as defined in section 957(a)) with the U.S. dollar as its functional currency. FS owns a capital and profits interest in FPRS, a foreign partnership. The remaining capital and profits interest in FPRS is owned by DC. FPRS is a section 987 aggregate partnership with the euro as its functional currency. The balance sheet of FPRS reflects one asset (Asset A) with a basis of €60x and a fair market value of €100x, another asset (Asset B) with a basis of €100x and a fair market value of €200x, and a liability (Liability) of €50x. At the end of year 1, the liquidation value percentage, as determined under paragraph (b)(2) of this section, of DC with respect to FPRS is 75 percent, and the liquidation value percentage of FS with respect to FPRS is 25 percent.

(ii) *Result.* Under § 1.987–1(b)(4), DC and FS are each treated as indirectly owning an eligible QBU with a balance sheet that reflects their respective shares of any assets and liabilities of FPRS. Under paragraph (b)(1) of this section, DC and FS's shares of FPRS's assets and liabilities are determined in accordance with DC and FS's respective liquidation value percentages. Accordingly, because DC has a liquidation value percentage of 75 percent with respect to FPRS, €75x of Asset A (with a €45x basis), €150x of Asset B (with a €75x basis), and

€37.50x of Liability will be attributed to the DC–FPRS QBU. Additionally, because FS has a liquidation value percentage of 25 percent with respect to FPRS, €25x of Asset A (with a €15x basis), €50x of Asset B (with a €25x basis), and €12.50x of Liability will be attributed to the FS–FPRS QBU.

(c) [Reserved]. For further guidance, see § 1.987–7(c).

(d) *Effective/applicability date.* This section applies to taxable years beginning on or after one year after the first day of the first taxable year following December 7, 2016. Notwithstanding the preceding sentence, if a taxpayer makes an election under § 1.987–11(b), then this section applies to taxable years to which §§ 1.987–1 through 1.987–10 apply as a result of such election.

(e) *Expiration date.* The applicability of this section expires on December 6, 2019.

■ **Par. 15.** Section 1.987–8 is amended by adding paragraph (d) to read as follows:

§ 1.987–8 Termination of a section 987 QBU.

* * * * *

(d) [Reserved]. For further guidance, see § 1.987–8T(d).

* * * * *

■ **Par. 16.** Section 1.987–8T is added to read as follows

§ 1.987–8T Termination of a section 987 QBU (temporary).

(a) through (c) [Reserved]. For further guidance, see § 1.987–8(a) through (c).

(d) *Annual deemed termination election.* A taxpayer, including a taxpayer described in § 1.987–1(b)(1)(ii) to which §§ 1.987–1 through 1.987–11 generally do not apply, may elect under this paragraph (d) to deem all of the section 987 QBUs of which it is an owner to terminate on the last day of each taxable year for which the election is in effect. See § 1.987–8(e) regarding the effect of such a deemed termination. The owner of a section 987 QBU that is deemed to terminate under this paragraph is treated as having transferred all of the assets and liabilities attributable to such section 987 QBU to a new section 987 QBU on the first day of the following taxable year.

(e) through (f) [Reserved]. For further guidance, see § 1.987–8(e) through (f).

(g) *Effective/applicability date.* This section applies to taxable years beginning on or after December 7, 2016.

(h) *Expiration date.* The applicability of this section expires on December 6, 2019.

■ **Par. 17.** Section 1.987–12 is added to read as follows:

§ 1.987–12 Deferral of section 987 gain or loss.

(a) through (h) [Reserved]. For further guidance, see § 1.987–12T(a) through (h).

■ **Par. 18.** Section 1.987–12T is added to read as follows:

§ 1.987–12T Deferral of section 987 gain or loss (temporary).

(a) *In general*—(1) *Overview.* This section provides rules that defer the recognition of section 987 gain or loss that, but for this section, would be recognized in connection with certain QBU terminations and certain other transactions involving partnerships. This paragraph (a) provides an overview of this section and describes the section's scope of application, including with respect to QBUs subject to section 987 but to which §§ 1.987–1 through 1.987–11 generally do not apply. Paragraph (b) of this section describes the extent to which section 987 gain or loss is recognized under § 1.987–5 or similar principles in the taxable year of a deferral event (as defined in paragraph (b)(2) of this section) with respect to a QBU. Paragraph (c) of this section describes the extent to which section 987 gain or loss that, as a result of paragraph (b), is not recognized under § 1.987–5 or similar principles is recognized upon the occurrence of subsequent events. Paragraph (d) of this section describes the extent to which section 987 loss is recognized under § 1.987–5 or similar principles in the taxable year of an outbound loss event (as defined in paragraph (d)(2) of this section) with respect to a QBU. Paragraph (e) of this section provides rules for determining the source and character of gains and losses that, as a result of this section, are not recognized under § 1.987–5 or similar principles in the taxable year of a deferral event or outbound loss event. Paragraph (f) of this section defines controlled group and qualified successor for purposes of this section. Paragraph (g) of this section provides an anti-abuse rule. Paragraph (h) of this section provides examples illustrating the rules described in this section.

(2) *Scope.* This section applies to any foreign currency gain or loss realized under section 987(3), including foreign currency gain or loss of an entity described in § 1.987–1(b)(1)(ii). References in this section to section 987 gain or loss refer to any foreign currency gain or loss realized under section 987(3), references to a section 987 QBU refer to any eligible QBU (as defined in § 1.987–1(b)(3)(i), but without regard to § 1.987–1(b)(3)(ii)) that is subject to section 987, and references to a section 987 aggregate partnership refer to any partnership for which the acquisition or disposition of a partnership interest could give rise to foreign currency gain or loss realized under section 987(3). Additionally, references to recognition of section 987 gain or loss under § 1.987–5 encompass any determination and recognition of gain or loss under section 987(3) that would occur but for this section. Accordingly, the principles of this section apply to a QBU subject to section 987 regardless of whether the QBU otherwise is subject to §§ 1.987–1 through 1.987–11. An owner of a QBU that is not subject to § 1.987–5 must adapt the rules set forth in this section as necessary to recognize section 987 gains or losses that are subject to this section consistent with the principles of this section.

(3) *Exceptions*—(i) *Annual deemed termination elections.* This section does not apply to section 987 gain or loss of a section 987 QBU with respect to which the annual deemed termination election described in § 1.987–8T(d) is in effect.

(ii) *De minimis exception.* This section does not apply to a section 987 QBU for a taxable year if the net unrecognized section 987 gain or loss of the section 987 QBU that, as a result of this section, would not be recognized under § 1.987–5 in the taxable year does not exceed $5 million.

(b) *Gain and loss recognition in connection with a deferral event*—(1) *In general.* Notwithstanding § 1.987–5, the owner of a section 987 QBU with respect to which a deferral event occurs (a deferral QBU) includes in taxable income section 987 gain or loss in connection with the deferral event only to the extent provided in paragraphs (b)(3) and (c) of this section. However, if the deferral event also constitutes an outbound loss event described in paragraph (d) of this section, the amount of loss recognized by the owner may be further limited under that paragraph.

(2) *Deferral event*—(i) *In general.* A deferral event with respect to a section 987 QBU means any transaction or series of transactions that satisfy the conditions described in paragraphs (b)(2)(ii) and (b)(2)(iii) of this section.

(ii) *Transactions.* The transaction or series of transactions include either:

(A) A termination of the section 987 QBU other than any of the following terminations: a termination described in § 1.987–8(b)(3), a termination described in § 1.987–8(c), or a termination described solely in § 1.987–8(b)(1); or

(B) A disposition of part of an interest in a section 987 aggregate partnership or DE through which the section 987 QBU is owned or any contribution by another

person to such a partnership or DE of assets that, immediately after the contribution, are not considered to be included on the books and records of an eligible QBU, provided that the contribution gives rise to a deemed transfer from the section 987 QBU to the owner.

(iii) *Assets on books of successor QBU.* Immediately after the transaction or series of transactions, assets of the section 987 QBU are reflected on the books and records of a successor QBU (as defined in paragraph (b)(4) of this section).

(3) *Gain or loss recognized under § 1.987–5 in the taxable year of a deferral event.* In the taxable year of a deferral event with respect to a deferral QBU, the owner of the deferral QBU recognizes section 987 gain or loss as determined under § 1.987–5, except that, solely for purposes of applying § 1.987–5, all assets and liabilities of the deferral QBU that, immediately after the deferral event, are reflected on the books and records of a successor QBU are treated as not having been transferred and therefore as remaining on the books and records of the deferral QBU notwithstanding the deferral event.

(4) *Successor QBU.* For purposes of this section, a section 987 QBU (potential successor QBU) is a successor QBU with respect to a section 987 QBU referred to in paragraph (b)(2)(ii) of this section if, immediately after the transaction or series of transactions described in that paragraph, the potential successor QBU satisfies all of the conditions described in paragraphs (b)(4)(i) through (b)(4)(iii) of this section.

(i) The books and records of the potential successor QBU reflect assets that, immediately before the transaction or series of transactions described in paragraph (b)(2)(ii) of this section, were reflected on the books and records of the section 987 QBU referred to in that paragraph.

(ii) The owner of the potential successor QBU and the owner of the section 987 QBU referred to in paragraph (b)(2)(ii) of this section immediately before the transaction or series of transactions described in that paragraph are members of the same controlled group.

(iii) In the case of a section 987 QBU referred to in paragraph (b)(2)(ii)(A) of this section, if the owner of the section 987 QBU immediately before the transaction or series of transactions described in that paragraph was a U.S. person, the potential successor QBU is owned by a U.S. person.

(c) *Recognition of deferred section 987 gain or loss in the taxable year of a deferral event and in subsequent taxable years*—(1) *In general*—(i) *Deferred section 987 gain or loss.* A deferral QBU owner (as defined in paragraph (c)(1)(ii) of this section) recognizes section 987 gain or loss attributable to the deferral QBU that, as a result of paragraph (b) of this section, is not recognized in the taxable year of the deferral event under § 1.987–5 (deferred section 987 gain or loss) in the taxable year of the deferral event and in subsequent taxable years as provided in paragraphs (c)(2) through (4) of this section.

(ii) *Deferral QBU owner.* For purposes of this paragraph (c), a deferral QBU owner means, with respect to a deferral QBU, the owner of the deferral QBU immediately before the deferral event, or the owner's qualified successor.

(2) *Recognition upon a subsequent remittance*—(i) *In general.* Except as provided in paragraph (c)(3) of this section, a deferral QBU owner recognizes deferred section 987 gain or loss in the taxable year of the deferral event and in subsequent taxable years upon a remittance from a successor QBU to the owner of the successor QBU (successor QBU owner) in the amount described in paragraph (c)(2)(ii) of this section.

(ii) *Amount.* The amount of deferred section 987 gain or loss that is recognized pursuant to this paragraph (c)(2) in a taxable year of the deferral QBU owner is the outstanding deferred section 987 gain or loss (that is, the amount of deferred section 987 gain or loss not previously recognized) multiplied by the remittance proportion of the successor QBU owner with respect to the successor QBU for the taxable year ending with or within the taxable year of the deferral QBU owner, as determined under § 1.987–5(b) (and, to the extent relevant, paragraphs (b) and (c)(2)(iii) of this section) without regard to any election under § 1.987–8T(d). For purposes of computing this remittance proportion, multiple successor QBUs of the same deferral QBU are treated as a single successor QBU.

(iii) *Deemed remittance when a successor QBU ceases to be owned by a member of the deferral QBU owner's controlled group.* For purposes of this paragraph (c)(2), in a taxable year of the deferral QBU owner in which a successor QBU ceases to be owned by a member of a controlled group that includes the deferral QBU owner, the successor QBU owner is treated as having a remittance proportion of 1. Accordingly, if there is only one successor QBU with respect to a deferral QBU and that successor QBU ceases to be owned by a member of the controlled group that includes the deferral QBU owner, all outstanding deferred section 987 gain or loss with respect to that deferral QBU will be recognized. This paragraph (c)(2)(iii) does not affect the application of §§ 1.987–1 through 1.987–11 to the successor QBU owner with respect to its ownership of the successor QBU.

(3) *Recognition of deferred section 987 loss in certain outbound successor QBU terminations.* Notwithstanding paragraph (c)(2) of this section, if assets of the successor QBU (transferred assets) are transferred (or deemed transferred) in a transaction that would constitute an outbound loss event if the successor QBU had a net accumulated section 987 loss at the time of the exchange, then the deferral QBU owner recognizes outstanding deferred section 987 loss, if any, to the extent it would recognize loss under paragraph (d)(1) of this section if (i) the deferral QBU owner owned the successor QBU, (ii) the deferral QBU owner had net unrecognized section 987 loss with respect to the successor QBU equal to its outstanding deferred section 987 loss with respect to the deferral QBU, and (iii) the transferred assets were transferred (or deemed transferred) in an outbound loss event. Any outstanding deferred section 987 loss with respect to the deferral QBU that is not recognized as a result of the preceding sentence is recognized by the deferral QBU owner in the first taxable year in which the deferral QBU owner (including any qualified successor) ceases to be a member of a controlled group that includes the acquirer of the transferred assets or any qualified successor of such acquirer.

(4) *Special rules regarding successor QBUs*—(i) *Successor QBU with respect to a deferral QBU that is a successor QBU.* If a section 987 QBU is a successor QBU with respect to a deferral QBU that is a successor QBU with respect to another deferral QBU, the first-mentioned section 987 QBU is considered a successor QBU with respect to the second-mentioned deferral QBU. For example, if QBU A is a successor QBU with respect to QBU B, and QBU B is a successor QBU with respect to QBU C, then QBU A is a successor QBU with respect to QBU C.

(ii) *Separation of a successor QBU.* If a successor QBU with respect to a deferral QBU separates into two or more separated QBUs (as defined in § 1.987–2T(c)(9)(iii)), each separated QBU is considered a successor QBU with respect to the deferral QBU.

(iii) *Combination of a successor QBU.* If a successor QBU with respect to a deferral QBU combines with another

section 987 QBU of the same owner, resulting in a combined QBU (as defined in § 1.987–2T(c)(9)(i)), the combined QBU is considered a successor QBU with respect to the deferral QBU.

(d) *Loss recognition upon an outbound loss event*—(1) *In general.* Notwithstanding § 1.987–5, the owner of a section 987 QBU with respect to which an outbound loss event occurs (an outbound loss QBU) includes in taxable income in the taxable year of an outbound loss event section 987 loss with respect to that section 987 QBU only to the extent provided in paragraph (d)(3) of this section.

(2) *Outbound loss event.* An outbound loss event means, with respect to a section 987 QBU:

(i) Any termination of the section 987 QBU in connection with a transfer by a U.S. person of assets of the section 987 QBU to a foreign person that is a member of the same controlled group as the U.S. transferor immediately before the transaction or, if the transferee did not exist immediately before the transaction, immediately after the transaction (related foreign person), provided that the termination would result in the recognition of section 987 loss with respect to the section 987 QBU under § 1.987–5 and paragraph (b) of this section but for this paragraph (d);

(ii) Any transfer by a U.S. person of part of an interest in a section 987 aggregate partnership or DE through which the U.S. person owns the section 987 QBU to a related foreign person that has the same functional currency as the section 987 QBU, or any contribution by such a related foreign person to such a partnership or DE of assets that, immediately after the contribution, are not considered to be included on the books and records of an eligible QBU, provided that the transfer would result in the recognition of section 987 loss with respect to the section 987 QBU under § 1.987–5 and paragraph (b) of this section but for this paragraph (d).

(3) *Loss recognized upon an outbound loss event.* In the taxable year of an outbound loss event with respect to an outbound loss QBU, the owner of the outbound loss QBU recognizes section 987 loss as determined under § 1.987–5 and paragraphs (b) and (c) of this section, except that, solely for purposes of applying § 1.987–5, the following assets and liabilities of the outbound loss QBU are treated as not having been transferred and therefore as remaining on the books and records of the outbound loss QBU notwithstanding the outbound loss event:

(i) In the case of an outbound loss event described in paragraph (d)(2)(i) of this section, assets and liabilities that, immediately after the outbound loss event, are reflected on the books and records of the related foreign person described in that paragraph or of a section 987 QBU owned by such related foreign person; and

(ii) In the case of an outbound loss event described in paragraph (d)(2)(ii) of this section, assets and liabilities that, immediately after the outbound loss event, are reflected on the books and records of the eligible QBU from which the assets and liabilities of the outbound loss QBU are allocated and not on the books and records of a section 987 QBU.

(4) *Adjustment of basis of stock received in certain nonrecognition transactions.* If an outbound loss event results from the transfer of assets of the outbound loss QBU in a transaction described in section 351 or section 361, the basis of the stock that is received in the transaction is increased by an amount equal to the section 987 loss that, as a result of this paragraph (d), is not recognized with respect to the outbound loss QBU in the taxable year of the outbound loss event (outbound section 987 loss).

(5) *Recognition of outbound section 987 loss that is not converted into stock basis.* Outbound section 987 loss attributable to an outbound loss event that is not described in paragraph (d)(4) of this section is recognized by the owner of the outbound loss QBU in the first taxable year in which the owner or any qualified successor of the owner ceases to be a member of a controlled group that includes the related foreign person referred to in paragraph (d)(2)(i) or (ii) of this section, or any qualified successor of such person.

(e) *Source and character*—(1) *Deferred section 987 gain or loss and certain outbound section 987 loss.* The source and character of deferred section 987 gain or loss recognized pursuant to paragraph (c) of this section, and of outbound section 987 loss recognized pursuant to paragraph (d)(5) of this section, is determined under § 1.987–6 as if such deferred section 987 gain or loss were recognized pursuant to § 1.987–5 without regard to this section on the date of the related deferral event or outbound loss event.

(2) *Outbound section 987 loss reflected in stock basis.* If loss is recognized on the sale or exchange of stock described in paragraph (d)(4) of this section within two years of the outbound loss event described in that paragraph, then, to the extent of the outbound section 987 loss, the source and character of the loss recognized on the sale or exchange is determined under § 1.987–6 as if such loss were section 987 loss recognized pursuant to § 1.987–5 without regard to this section on the date of the outbound loss event.

(f) *Definitions*—(1) *Controlled group.* For purposes of this section, a controlled group means all persons with the relationships to each other specified in sections 267(b) or 707(b).

(2) *Qualified successor.* For purposes of this section, a qualified successor with respect to a corporation (transferor corporation) means another corporation (acquiring corporation) that acquires the assets of the transferor corporation in a transaction described in section 381(a), but only if (A) the acquiring corporation is a domestic corporation and the transferor corporation was a domestic corporation, or (B) the acquiring corporation is a controlled foreign corporation (as defined in section 957(a)) (CFC) and the transferor corporation was a CFC. A qualified successor of a corporation includes the qualified successor of a qualified successor of the corporation.

(g) *Anti-abuse.* No section 987 loss is recognized under § 1.987–5 or this section in connection with a transaction or series of transactions that are undertaken with a principal purpose of avoiding the purposes of this section.

(h) *Examples.* The following examples illustrate the application of this section. For purposes of the examples, DC1 is a domestic corporation that owns all of the stock of DC2, which is also a domestic corporation, and CFC1 and CFC2 are CFCs. In addition, DC1, DC2, CFC1, and CFC2 are members of a controlled group as defined in paragraph (f)(1) of this section, and the de minimis rule of paragraph (a)(3)(ii) of this section is not applicable. Finally, except as otherwise provided, Business A is a section 987 QBU with the euro as its functional currency, there are no transfers between Business A and its owner, and Business A's assets are not depreciable or amortizable.

Example 1. Contribution of a section 987 QBU to a member of the controlled group. (i) *Facts.* DC1 owns all of the interests in Business A. The balance sheet of Business A reflects assets with an aggregate adjusted basis of €1,000x and no liabilities. DC1 contributes €900x of Business A's assets to DC2 in an exchange to which section 351 applies. Immediately after the contribution, the remaining €100x of Business A's assets are no longer reflected on the books and records of a section 987 QBU. DC2, which has the U.S. dollar as its functional currency, uses the former Business A assets in a business (Business B) that constitutes a section 987 QBU. At the time of the contribution, Business A has net accumulated unrecognized section 987 gain of $100x.

(ii) *Analysis.* (A) Under § 1.987–2(c)(2)(ii), DC1's contribution of €900x of Business A's

assets to DC2 is treated as a transfer of all of the assets of Business A to DC1, immediately followed by DC1's contribution of €900x of Business A's assets to DC2. The contribution of Business A's assets is a deferral event within the meaning of paragraph (b)(2) of this section because: (1) The transfer from Business A to DC1 is a transfer of substantially all of Business A's assets to DC1, resulting in a termination of Business A under § 1.987–8(b)(2); and (2) immediately after the transaction, assets of Business A are reflected on the books and records of Business B, a section 987 QBU owned by a member of DC1's controlled group and a successor QBU within the meaning of paragraph (b)(4) of this section. Accordingly, Business A is a deferral QBU within the meaning of paragraph (b)(1) of this section, and DC1 is a deferral QBU owner of Business A within the meaning of paragraph (c)(1)(ii) of this section.

(B) Under paragraph (b)(3) of this section, DC1's taxable income in the taxable year of the deferral event includes DC1's section 987 gain or loss determined with respect to Business A under § 1.987–5, except that, for purposes of applying § 1.987–5, all assets and liabilities of Business A that are reflected on the books and records of Business B immediately after Business A's termination are treated as not having been transferred and therefore as though they remained on Business A's books and records (notwithstanding the deemed transfer of those assets under § 1.987–8(e)). Accordingly, in the taxable year of the deferral event, DC1 is treated as making a remittance of €100x, corresponding to the assets of Business A that are no longer reflected on the books and records of a section 987 QBU, and is treated as having a remittance proportion with respect to Business A of 0.1, determined by dividing the €100x remittance by the sum of the remittance and the €900x aggregate adjusted basis of the gross assets deemed to remain on Business A's books at the end of the year. Thus, DC1 recognizes $10x of section 987 gain in the taxable year of the deferral event. DC1's deferred section 987 gain equals $90x, which is the amount of section 987 gain that, but for the application of paragraph (b) of this section, DC1 would have recognized under § 1.987–5 ($100x), less the amount of section 987 gain recognized by DC1 under § 1.987–5 and this section ($10x).

Example 2. Election to be classified as a corporation. (i) *Facts.* DC1 owns all of the interests in Entity A, a DE. Entity A conducts Business A, which has net accumulated unrecognized section 987 gain of $500x. Entity A elects to be classified as a corporation under § 301.7701–3(a). As a result of the election and pursuant to § 301.7701–3(g)(1)(iv), DC1 is treated as contributing all of the assets and liabilities of Business A to newly-formed CFC1, which has the euro as its functional currency. Immediately after the contribution, the assets and liabilities of Business A are reflected on CFC1's balance sheet.

(ii) *Analysis.* Under § 1.987–2(c)(2)(ii), DC1's contribution of all of the assets and liabilities of Business A to CFC1 is treated as a transfer of all of the assets and liabilities of Business A to DC1, followed immediately by DC1's contribution of those assets and liabilities to CFC1. Because the deemed transfer from Business A to DC1 is a transfer of substantially all of Business A's assets to DC1, the Business A QBU terminates under § 1.987–8(b)(2). The contribution of Business A's assets is not a deferral event within the meaning of paragraph (b)(2) of this section because, immediately after the transaction, no assets of Business A are reflected on the books and records of a successor QBU within the meaning of paragraph (b)(4) of this section due to the fact that the assets of Business A are not reflected on a section 987 QBU immediately after the termination as well as the fact that the requirement of paragraph (b)(4)(iii) of this section is not met. Accordingly, DC1 recognizes section 987 gain with respect to Business A under § 1.987–5 without regard to this section. Because the requirement of paragraph (b)(4)(iii) of this section is not met, the result would be the same even if the assets of Business A were transferred in a section 351 exchange to an existing foreign corporation that had a different functional currency than Business A.

Example 3. Outbound loss event. (i) *Facts.* The facts are the same as in *Example 2,* except that Business A has net accumulated unrecognized section 987 loss of $500x rather than net accumulated unrecognized section 987 gain of $500x.

(ii) *Analysis.* (A) The analysis of the transactions under §§ 1.987–2(c)(2)(ii), 1.987–8(b)(2), and paragraph (b) of this section is the same as in *Example 2.* However, the termination of Business A as a result of the transfer of the assets of Business A by a U.S. person (DC1) to a foreign person (CFC1) that is a member of DC1's controlled group is an outbound loss event described in paragraph (d)(2) of this section.

(B) Under paragraphs (d)(1) and (d)(3) of this section, in the taxable year of the outbound loss event, DC1 includes in taxable income section 987 loss recognized with respect to Business A as determined under § 1.987–5, except that, for purposes of applying § 1.987–5, all assets and liabilities of Business A that are reflected on the books and records of CFC1, a related foreign person described in paragraph (d)(2) of this section, are treated as not having been transferred. Accordingly, DC1's remittance proportion with respect to Business A is 0, and DC1 recognizes no section 987 loss with respect to Business A. DC1's outbound section 987 loss is $500x, which is the amount of section 987 loss that DC1 would have recognized under § 1.987–5 ($500x) without regard to paragraph (d) of this section, less the amount of section 987 loss recognized by DC1 under paragraph (d)(3) of this section ($0). Under paragraph (d)(4) of this section, DC1 must increase its basis in its CFC1 shares by the amount of the outbound section 987 loss ($500x).

Example 4. Conversion of a DE to a partnership. (i) *Facts.* DC1 owns all of the interests in Entity A, a DE that conducts Business A. On the last day of Year 1, DC1 sells 50 percent of its interest in Entity A to DC2 (the Entity A sale).

(ii) *Analysis.* (A) For Federal income tax purposes, Entity A is converted to a partnership when DC2 purchases the 50 percent interest in Entity A. DC2's purchase is treated as the purchase of 50 percent of the assets of Entity A (that is, the assets of Business A), which, prior to the purchase, were treated as held directly by DC1 for Federal income tax purposes. Immediately after DC2's deemed purchase of 50 percent of Business A assets, DC1 and DC2 are treated as contributing their respective interests in Business A assets to a partnership. See Rev. Rul. 99–5 (1999–1 CB 434) (situation 1). These deemed transactions are not taken into account for purposes of this section, but the Entity A sale and resulting existence of a partnership have consequences under section 987 and this section, as described in paragraphs (ii)(B) through (D) of this *Example 4.*

(B) Immediately after the Entity A sale, Entity A is a section 987 aggregate partnership within the meaning of § 1.987–1(b)(5) because DC1 and DC2 own all the interests in partnership capital and profits, DC1 and DC2 are related within the meaning of section 267(b), and the partnership has an eligible QBU (Business A) that would be a section 987 QBU with respect to a partner if owned by the partner directly. As a result of the Entity A sale, 50 percent of the assets and liabilities of Business A ceased to be reflected on the books and records of DC1's Business A section 987 QBU. As a result, such assets and liabilities are treated as if they were transferred from DC1's Business A section 987 QBU to DC1. Additionally, following DC2's acquisition of 50 percent of the interest in Entity A, DC2 is allocated 50 percent of the assets and liabilities of Business A under §§ 1.987–2(b), 1.987–7(a), and 1.987–7T(b). Because DC2 and Business A have different functional currencies, DC2's portion of the Business A assets and liabilities constitutes a section 987 QBU. Accordingly, 50 percent of the assets and liabilities of Business A are treated as transferred by DC2 to DC2's Business A section 987 QBU.

(C) The Entity A sale is a deferral event described in paragraph (b)(2) of this section because: (1) The sale constitutes the disposition of part of an interest in a DE; and (2) immediately after the transaction, assets of DC1's Business A section 987 QBU are reflected on the books and records of DC1's Business A section 987 QBU and DC2's Business A section 987 QBU, each of which is a successor QBU with respect to DC1's Business A section 987 QBU within the meaning of paragraph (b)(4) of this section. Accordingly, DC1's Business A section 987 QBU is a deferral QBU within the meaning of paragraph (b)(1) of this section, and DC1 is a deferral QBU owner within the meaning of paragraph (c)(1)(ii) of this section. Under paragraph (b)(1) of this section, DC1 includes in taxable income section 987 gain or loss with respect to Business A in connection with the deferral event to the extent provided in paragraphs (b)(3) and (c) of this section.

(D) Under paragraph (b) of this section, in the taxable year of the Entity A sale, DC1 includes in taxable income section 987 gain or loss with respect to Business A as determined under § 1.987–5, except that, for purposes of applying § 1.987–5, all assets and liabilities of Business A that, immediately

after the Entity A sale, are reflected on the books and records of successor QBUs are treated as though they were not transferred and therefore as remaining on the books and records of DC1's Business A section 987 QBU notwithstanding the Entity A sale. Accordingly, DC1's remittance amount under § 1.987–5 is $0, and DC1 recognizes no section 987 gain or loss with respect to Business A.

Example 5. Partial recognition of deferred gain or loss. (i) *Facts.* DC1 owns all of the interests in Entity A, a DE that conducts Business A in Country X. During Year 1, DC1 contributes all of its interests in Entity A to DC2 in an exchange to which section 351 applies. At the time of the contribution, Business A has net accumulated unrecognized section 987 gain of $100x. After the contribution, Entity A continues to conduct business in Country X (Business B). In Year 3, as a result of a net transfer of property from Business B to DC2, DC2's remittance proportion with respect to Business B, as determined under § 1.987–5, is 0.25.

(ii) *Analysis.* (A) For the reasons described in *Example 1,* the contribution of Entity A by DC1 to DC2 results in a termination of Business A and a deferral event with respect to Business A, a deferral QBU; DC1 is a deferral QBU owner within the meaning of paragraph (c)(1)(ii) of this section; Business B is a successor QBU with respect to Business A; DC2 is a successor QBU owner; and the $100x of net accumulated unrecognized section 987 gain with respect to Business A becomes deferred section 987 gain as a result of the deferral event.

(B) Under paragraph (c)(1) of this section, DC1 recognizes deferred section 987 gain with respect to Business A in accordance with paragraphs (c)(2) through (4) of this section. Under paragraph (c)(2)(i) of this section, DC1 recognizes deferred section 987 gain in Year 3 as a result of the remittance from Business B to DC2. Under paragraph (c)(2)(ii) of this section, the amount of deferred section 987 gain that DC1 recognizes is $25x, which is DC1's outstanding deferred section 987 gain or loss ($100x) with respect to Business A multiplied by the remittance proportion (0.25) of DC2 with respect to Business B for the taxable year as determined under § 1.987–5(b).

(i) *Coordination with fresh start transition method*—(1) *In general.* If a taxpayer is a deferral QBU owner, or is or was the owner of an outbound loss QBU, and the taxpayer is required under § 1.987–10(a) to apply the fresh start transition method described in § 1.987–10(b) to the deferral QBU or outbound loss QBU, or would have been so required if the taxpayer had owned the deferral QBU or outbound loss QBU on the transition date (as defined in § 1.987–11(c)), the adjustments described in paragraphs (i)(2) and (i)(3) of this section, as applicable, must be made on the transition date.

(2) *Adjustment to deferred section 987 gain or loss.* The amount of any outstanding deferred section 987 gain or loss of a deferral QBU owner with respect to a deferral QBU described in paragraph (i)(1) of this section must be adjusted to equal the amount of outstanding deferred section 987 gain or loss that the deferral QBU owner would have had with respect to the deferral QBU on the transition date if, immediately before the deferral event, the deferral QBU had transitioned to the method prescribed by §§ 1.987–1 through 1.987–10 pursuant to the fresh start transition method.

(3) *Adjustments in the case of an outbound loss event.* The basis of any stock described in paragraph (d)(4) of this section that was received in connection with the transfer (or deemed transfer) of assets of an outbound loss QBU described in paragraph (i)(1) of this section and that is held on the transition date must be adjusted to equal the basis that such stock would have had on the transition date if, immediately prior to the outbound loss event, the outbound loss QBU had transitioned to the method prescribed by §§ 1.987–1 through 1.987–10 pursuant to the fresh start transition method. If no such stock was received, the amount of any outbound section 987 loss with respect to the outbound loss QBU that may be recognized on or after the transition date pursuant to paragraph (d)(5) of this section must be adjusted to equal the amount of such loss that would be outstanding and that may be recognized pursuant to that paragraph if, immediately before the outbound loss event, the outbound loss QBU had transitioned to the method prescribed by §§ 1.987–1 through 1.987–10 pursuant to the fresh start transition method.

(j) *Effective/applicability date*—(1) *In general.* Except as described in paragraph (j)(2) of this section, this section applies to any deferral event or outbound loss event that occurs on or after January 6, 2017.

(2) *Exception.* This section applies to any deferral event or outbound loss event that occurs on or after December 7, 2016, if such deferral event or outbound loss event is undertaken with a principal purpose of recognizing section 987 loss.

(k) *Expiration date.* The applicability of this section expires December 6, 2019.

■ **Par. 19.** Section 1.988–0 is amended by revising the entry for § 1.988–2(b)(16) and adding an entry for § 1.988–2(i) to read as follows:

§ 1.988–0 Taxation of gain or loss from a section 988 transaction; Table of contents.

* * * * *

§ 1.988–2 Recognition and computation of exchange gain or loss.

* * * * *

(b) * * *

(16) [Reserved].

* * * * *

(i) [Reserved].

■ **Par. 20.** Section 1.988–1 is amended by adding paragraph (a)(3) to read as follows:

§ 1.988–1 Certain definitions and special rules.

* * * * *

(a) * * *

(3) [Reserved]. For further guidance, see § 1.988–1T(a)(3).

* * * * *

■ **Par. 21.** Section 1.988–1T is added to read as follows:

§ 1.988–1T Certain definitions and special rules (temporary).

(a)(1) through (a)(2) [Reserved]. For further guidance, see § 1.988–1(a)(1) through (2).

(3) *Specified owner functional currency transactions of a section 987 QBU not treated as section 988 transactions.* Specified owner functional currency transactions, as defined in § 1.987–3T(b)(4)(ii), held by a section 987 QBU are not treated as section 988 transactions. Thus, no currency gain or loss shall be recognized by a section 987 QBU under section 988 with respect to such transactions.

(4) through (i) [Reserved]. For further guidance, see § 1.988–1(a)(4) through (i).

(j) *Effective/applicability date.* This section applies to taxable years beginning on or after one year after the first day of the first taxable year following December 7, 2016. Notwithstanding the preceding sentence, if a taxpayer makes an election under § 1.987–11(b), then this section applies to taxable years to which §§ 1.987–1 through 1.987–10 apply as a result of such election.

(k) *Expiration date.* The applicability of this section expires on December 6, 2019.

■ **Par. 22.** Section 1.988–2 is amended by revising paragraph (b)(16) and adding paragraph (i) to read as follows:

§ 1.988–2 Recognition and computation of exchange gain or loss.

* * * * *

(b) * * *

(16) [Reserved]. For further guidance, see § 1.988–2T(b)(16).

* * * * *

(i) [Reserved]. For further guidance, see § 1.988–2T(i).

■ **Par. 23.** Section 1.988–2T is added to read as follows:

§ 1.988–2T Recognition and computation of exchange gain or loss (temporary).

(a) through (b)(15) [Reserved]. For further guidance, see § 1.988–2(a) through (b)(15).

(16) *Deferral of loss on certain related-party debt instruments.*—(i) *Treatment of creditor.* For rules applicable to a corporation included in a controlled group that is a creditor under a debt instrument see § 1.267(f)–1(e).

(ii) *Treatment of debtor*—(A) *In general.* Exchange loss realized under § 1.988–2(b)(4) or (b)(6) is deferred if—

(*1*) The loss is realized by a debtor with respect to a loan from a person that has a relationship to the debtor described in section 267(b) or section 707(b); and

(*2*) The transaction resulting in the realization of exchange loss has as a principal purpose the avoidance of Federal income tax.

(B) *Recognition of deferred loss.* Any exchange loss that is deferred under paragraph (b)(16)(ii)(A) of this section is deferred until the end of the term of the loan, determined immediately prior to the transaction.

(17) through (h) [Reserved]. For further guidance, see § 1.988–2(b)(17) through (h).

(i) *Special rules for section 988 transactions of a section 987 QBU.* For rules regarding section 988 transactions of a section 987 QBU, see § 1.987–3T(b)(4) for section 987 QBUs in general and § 1.987–1T(b)(6) for dollar QBUs.

(j) *Effective/applicability date.* Paragraph (b)(16) of this section applies to any exchange loss realized on or after December 7, 2016. Paragraph (i) of this section applies to taxable years beginning on or after one year after the first day of the first taxable year following December 7, 2016. Notwithstanding the preceding sentence, if a taxpayer makes an election under § 1.987–11(b), then paragraph (i) of this section applies to taxable years to which §§ 1.987–1 through 1.987–10 apply as a result of such election.

(k) *Expiration date.* The applicability of this section expires on December 6, 2019.

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: November 14, 2016.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2016–28380 Filed 12–7–16; 8:45 am]

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FEDERAL REGISTER

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Part V

Department of the Treasury

Internal Revenue Service

26 CFR Part 1
Recognition and Deferral of Section 987 Gain or Loss; Proposed Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–128276–12]

RIN 1545–BL11

Recognition and Deferral of Section 987 Gain or Loss

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: Published elsewhere in this issue of the **Federal Register**, the Treasury Department and the IRS are issuing temporary regulations under section 987 of the Code relating to the recognition and deferral of foreign currency gain or loss under section 987 with respect to a qualified business unit (QBU) in connection with certain QBU terminations and certain other transactions involving partnerships. The temporary regulations also contain rules providing: An annual deemed termination election for a section 987 QBU; an elective method, available to taxpayers that make the annual deemed termination election, for translating all items of income or loss with respect to a section 987 QBU at the yearly average exchange rate; rules regarding the treatment of section 988 transactions of a section 987 QBU; rules regarding QBUs with the U.S. dollar as their functional currency; rules regarding combinations and separations of section 987 QBUs; rules regarding the translation of income used to pay creditable foreign income taxes; and rules regarding the allocation of assets and liabilities of certain partnerships for purposes of section 987. Finally, the temporary regulations contain rules under section 988 requiring the deferral of certain section 988 loss that arises with respect to related-party loans. The text of the temporary regulations serves as the text of these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by March 8, 2017.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–128276–12), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–128276–12), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–128276–12).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Steven D. Jensen at (202) 317–6938; concerning submissions of comments or requests for a public hearing, Regina Johnson, (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by February 6, 2017. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collection of information in this proposed regulation is in: (1) §§ 1.987–1(b)(6)(iii)(A) and 1.987–1(g)(3)(i)(E); (2) §§ 1.987–3(b)(4)(iii)(C) and 1.987–1(g)(3)(i)(F); (3) §§ 1.987–3(d) and 1.987–1(g)(3)(i)(G); and (4) §§ 1.987–8(d) and 1.987–1(g)(3)(i)(H). Sections 1.987–1(b)(6)(iii)(A) and 1.987–1(g)(3)(i)(E) allow a controlled foreign corporation to elect to apply section 987 and the regulations thereunder (with certain exceptions) to a dollar QBU. Sections 1.987–3(b)(4)(iii)(C) and 1.987–1(g)(3)(i)(F) allow a taxpayer to elect to apply a foreign currency mark-to-market method of accounting for qualified short-term section 988 transactions. Sections 1.987–3(d) and 1.987–1(g)(3)(i)(G) allow a taxpayer to elect to translate all items of income, gain, deduction, and loss of the section 987 QBU at the yearly average exchange rate. Sections 1.987–8(d) and 1.987–1(g)(3)(i)(H) allow a taxpayer to elect to deem all of its section 987 QBUs to terminate on the last day of each taxable year. The preceding elections are to be made pursuant to § 1.987–1(g). The collection of information is voluntary to obtain a benefit. The likely respondents are business or other for-profit institutions.

Estimated total annual reporting burden: 1,000 hours.

Estimated average annual burden hours per respondent: 1 hour.

Estimated number of respondents: 1,000.

Estimated annual frequency of responses: On occasion.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background and Explanation of Provisions

The temporary regulations (published in the Rules and Regulations section of this issue of the **Federal Register**) contain rules relating to the recognition and deferral of section 987 gain or loss with respect to a QBU. The temporary regulations also contain rules regarding an annual deemed termination election, an elective method for translating taxable income or loss with respect to a QBU, section 988 transactions of a section 987 QBU, QBUs with the U.S. dollar as their functional currency, combinations and separations of section 987 QBUs, translation of income used to pay creditable foreign income taxes, the allocation of assets and liabilities of certain partnerships for purposes of section 987, and the deferral of section 988 loss with respect to certain related-party loans. The text of the temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations

explains those regulations and these proposed regulations.

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (5 U.S.C. chapter 6). Accordingly, a regulatory flexibility analysis is not required. This certification is based on the fact that these regulations will primarily affect U.S. corporations that have foreign operations, which tend to be larger businesses. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules. In addition, the Treasury Department and the IRS request comments on the application of section 987 to entities and QBUs described in § 1.987–1(b)(1)(ii) to which the final regulations are not applicable (excluded entities and QBUs). Comments are requested on whether the Treasury Department and the IRS should issue regulations applying the foreign exchange exposure pool methodology described in §§ 1.987–3 and –4 to excluded entities and QBUs. Comments are also requested on the modifications, if any, that should be made to the foreign exchange exposure pool methodology adopted in the final regulations with respect to excluded entities and QBUs. All comments will be available at *www.regulations.gov* or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Mark E. Erwin of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1, as amended elsewhere in this issue of the **Federal Register**, is proposed to be further amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 985, 987, 989(c) and 7805 * * *

■ **Par. 2.** Section 1.987–1 is amended by adding paragraphs (b)(1)(iii), (b)(6), (c)(1)(ii)(B), (c)(3)(i)(E), (d)(3), (f), (g)(2)(i)(B) and (C), and (g)(3)(i)(E) through (H) to read as follows:

§ 1.987–1 Scope, definitions, and special rules.

* * * * *

(b) * * *

(1) * * *

(iii) [The text of the proposed amendment to § 1.987–1(b)(1)(iii) is the same as the text of § 1.987–1T(b)(1)(iii) published elsewhere in this issue of the **Federal Register**].

* * * * *

(6) [The text of the proposed amendment to § 1.987–1(b)(6) is the same as the text of § 1.987–1T(b)(6) published elsewhere in this issue of the **Federal Register**].

* * * * *

(c) * * *

(1) * * *

(ii) * * *

(B) [The text of the proposed amendment to § 1.987–1(c)(1)(ii)(B) is the same as the text of § 1.987–1T(c)(1)(ii)(B) published elsewhere in this issue of the **Federal Register**]

* * * * *

(c) * * *

(3) * * *

(i) * * *

(E) [The text of the proposed amendment to § 1.987–1(c)(3)(i)(E) is the same as the text of § 1.987–1T(c)(3)(i)(E) published elsewhere in this issue of the **Federal Register**].

* * * * *

(d) * * *

(3) [The text of the proposed amendment to § 1.987–1(d)(3) is the same as the text of § 1.987–1T(d)(3) published elsewhere in this issue of the **Federal Register**].

* * * * *

(f) [The text of the proposed amendment to § 1.987–1(f) is the same as the text of § 1.987–1T(f) published elsewhere in this issue of the **Federal Register**].

* * * * *

(g) * * *

(2) * * *

(i) * * *

(B) [The text of the proposed amendment to § 1.987–1(g)(2)(i)(B) is the same as the text of § 1.987–1T(g)(2)(i)(B) published elsewhere in this issue of the **Federal Register**].

(C) [The text of the proposed amendment to § 1.987–1(g)(2)(i)(C) is the same as the text of § 1.987–1T(g)(2)(i)(C) published elsewhere in this issue of the **Federal Register**].

* * * * *

(3) * * *

(i) * * *

(E) [The text of the proposed amendment to § 1.987–1(g)(3)(i)(E) is the same as the text of § 1.987–1T(g)(3)(i)(E) published elsewhere in this issue of the **Federal Register**].

(F) [The text of the proposed amendment to § 1.987–1(g)(3)(i)(F) is the same as the text of § 1.987–1T(g)(3)(i)(F) published elsewhere in this issue of the **Federal Register**].

(G) [The text of the proposed amendment to § 1.987–1(g)(3)(i)(G) is the same as the text of § 1.987–1T(g)(3)(i)(G) published elsewhere in this issue of the **Federal Register**].

(H) [The text of the proposed amendment to § 1.987–1(g)(3)(i)(H) is the same as the text of § 1.987–1T(g)(3)(i)(H) published elsewhere in this issue of the **Federal Register**].

* * * * *

■ **Par. 3.** Section 1.987–2 is amended by adding paragraph (c)(9) to read as follows:

§ 1.987–2 Attribution of items to eligible QBUs; definition of a transfer and related rules.

* * * * *

(c) * * *

(9) [The text of the proposed amendment to § 1.987–2(c)(9) is the same as the text of § 1.987–2T(c)(9) published elsewhere in this issue of the **Federal Register**].

* * * * *

■ **Par. 4.** Section 1.987–3 is amended by adding paragraphs (b)(2)(ii), (b)(4), (c)(2)(ii) and (v), (d), and *Example 9* through *Example 14* of paragraph (e) to read as follows:

§ 1.987–3 Determination of section 987 taxable income or loss of an owner of a section 987 QBU.

* * * * *

(b) * * *

(2) * * *

(ii) [The text of the proposed amendment to § 1.987–3(b)(2)(ii) is the same as the text of § 1.987–3T(b)(2)(ii) published elsewhere in this issue of the **Federal Register**].

* * * * *

(4) [The text of the proposed amendment to § 1.987–3(b)(4) is the same as the text of § 1.987–3T(b)(4) published elsewhere in this issue of the **Federal Register**].

* * * * *

(c) * * *

(2) * * *

(ii) [The text of the proposed amendment to § 1.987–3(c)(2)(ii) is the same as the text of § 1.987–3T(c)(2)(ii) published elsewhere in this issue of the **Federal Register**].

* * * * *

(v) [The text of the proposed amendment to § 1.987–3(c)(2)(v) is the same as the text of § 1.987–3T(c)(2)(v) published elsewhere in this issue of the **Federal Register**].

(d) [The text of the proposed amendment to § 1.987–3(d) is the same as the text of § 1.987–3T(d) published elsewhere in this issue of the **Federal Register**].

(e) *Examples.* * * *

Example 9 The text of the proposed amendment to § 1.987–3(e) *Example 9* is the same as the text of § 1.987–3T(e) *Example 9* published elsewhere in this issue of the **Federal Register**].

Example 10 [The text of the proposed amendment to § 1.987–3(e) *Example 10* is the same as the text of § 1.987–3T(e) *Example 10* published elsewhere in this issue of the **Federal Register**].

Example 11 [The text of the proposed amendment to § 1.987–3(e) *Example 11* is the same as the text of § 1.987–3T(e) *Example 11* published elsewhere in this issue of the **Federal Register**].

Example 12 [The text of the proposed amendment to § 1.987–3(e) *Example 12* is the same as the text of § 1.987–3T(e) *Example 12* published elsewhere in this issue of the **Federal Register**].

Example 13 [The text of the proposed amendment to § 1.987–3(e) *Example 13* is the same as the text of § 1.987–3T(e) *Example 13* published elsewhere in this issue of the **Federal Register**].

Example 14 [The text of the proposed amendment to § 1.987–3(e) *Example 14* is the same as the text of § 1.987–3T(e) *Example 14* published elsewhere in this issue of the **Federal Register**].

■ **Par. 5.** Section 1.987–4 is amended by adding paragraphs (c)(2) and (f) to read as follows:

§ 1.987–4 Determination of net unrecognized section 987 gain or loss of a section 987 QBU.

* * * * *

(c) * * *

(2) [The text of the proposed amendment to § 1.987–4(c)(2) is the same as the text of § 1.987–4T(c)(2) published elsewhere in this issue of the **Federal Register**].

* * * * *

(f) [The text of the proposed amendment to § 1.987–4(f) is the same as the text of § 1.987–4T(f) published elsewhere in this issue of the **Federal Register**].

* * * * *

■ **Par. 6.** Section 1.987–6 is amended by adding paragraph (b)(4) to read as follows:

§ 1.987–6 Character and source of section 987 gain or loss.

* * * * *

(b) * * *

(4) [The text of the proposed amendment to § 1.987–6(b)(4) is the same as the text of § 1.987–6T(b)(4) published elsewhere in this issue of the **Federal Register**].

* * * * *

■ **Par. 7.** Section 1.987–7 is amended by adding paragraph (b) to read as follows:

§ 1.987–7 Section 987 aggregate partnerships.

* * * * *

(b) [The text of the proposed amendment to § 1.987–7(b) is the same as the text of § 1.987–7T(b) published elsewhere in this issue of the **Federal Register**].

* * * * *

■ **Par. 8.** Section 1.987–8 is amended by adding paragraph (d) to read as follows:

§ 1.987–8 Termination of a section 987 QBU.

* * * * *

(d) [The text of the proposed amendment to § 1.987–8(d) is the same as the text of § 1.987–8T(d) published elsewhere in this issue of the **Federal Register**].

* * * * *

■ **Par. 9.** Section 1.987–12 is revised to read as follows:

§ 1.987–12 Deferral of section 987 gain or loss.

[The text of the proposed amendment to § 1.987–12 is the same as the text of § 1.987–12T published elsewhere in this issue of the **Federal Register**].

■ **Par. 10.** Section 1.988–1 is amended by adding paragraph (a)(3) to read as follows:

§ 1.988–1 Certain definitions and special rules.

* * * * *

(a) * * *

(3) [The text of the proposed amendment to § 1.988–1(a)(3) is the same as the text of § 1.988–1T(a)(3) published elsewhere in this issue of the **Federal Register**].

* * * * *

■ **Par. 11.** Section 1.988–2 is amended by revising paragraph (b)(16) and adding paragraph (i) to read as follows:

§ 1.988–2 Recognition and computation of exchange gain or loss.

* * * * *

(b) * * *

(16) [The text of the proposed amendment to § 1.988–2(b)(16) is the same as the text of § 1.988–2T(b)(16) published elsewhere in this issue of the **Federal Register**].

* * * * *

(i) [The text of the proposed amendment to § 1.988–2(i) is the same as the text of § 1.988–2T(i) published elsewhere in this issue of the **Federal Register**].

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2016–28377 Filed 12–7–16; 8:45 am]

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FEDERAL REGISTER

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Part VI

Department of Education

34 CFR Part 200
Title I—Improving the Academic Achievement of the Disadvantaged—Academic Assessments; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 200

RIN 1810–AB32

[Docket ID ED–2016–OESE–0053]

Title I—Improving the Academic Achievement of the Disadvantaged—Academic Assessments

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations implementing academic assessment requirements under title I, part A of the Elementary and Secondary Education Act of 1965 (ESEA) to implement changes to the ESEA by the Every Student Succeeds Act (ESSA) enacted on December 10, 2015.

DATES: These regulations are effective January 9, 2017.

FOR FURTHER INFORMATION CONTACT: Jessica McKinney, U.S. Department of Education, 400 Maryland Avenue SW., Room 3W107, Washington, DC 20202–2800. Telephone: (202) 401–1960 or by email: *jessica.mckinney@ed.gov*.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of This Regulatory Action: On December 10, 2015, President Barack Obama signed the ESSA into law. The ESSA reauthorizes the ESEA, which provides Federal funds to improve elementary and secondary education in the Nation's public schools. The ESSA builds on the ESEA's legacy as a civil rights law and seeks to ensure every child, regardless of race, socioeconomic status, disability, English proficiency, background, or residence, has an equal opportunity to obtain a high-quality education. Though the reauthorization made significant changes to the ESEA for the first time since the ESEA was reauthorized through the No Child Left Behind Act of 2001 (NCLB), including significant changes to title I, it made limited changes to the academic assessment provisions of part A of title I. Many of these changes were aligned with President Obama's Testing Action Plan released in October 2015, which was designed to make assessments fewer, better and fairer.[1] In particular, the ESSA added new exceptions to allow a State to approve its local educational agencies (LEAs) to administer a locally selected, nationally recognized high school academic assessment in lieu of the statewide high school assessment and, to reduce the burden of unnecessary testing, to allow a State to avoid double-testing eighth graders taking advanced mathematics coursework. In the spirit of making assessments as fair as possible and inclusive of all students, the ESSA also imposed a cap to limit, to 1.0 percent of the total number of students who are assessed in a State in each assessed subject, the number of students with the most significant cognitive disabilities whose performance may be assessed with an alternate assessment aligned with alternate academic achievement standards (AA–AAAS), if the State has adopted alternate academic achievement standards. With the goal of making tests better, the ESSA also included special considerations for computer-adaptive assessments. Finally, also with the goal of making assessments fair, the ESSA amended the provisions of the ESEA related to assessing English learners in their native language. Unless otherwise noted, references in this document to the ESEA refer to the ESEA, as amended by the ESSA.

We amend §§ 200.2–200.6 and §§ 200.8–200.9 of title 34 of the Code of Federal Regulations (CFR) in order to implement these statutory changes, as well as other key statutory provisions, including those related to the assessment of English learners and students in Native American language schools and programs. We are changing these regulations to provide clarity and support to State educational agencies (SEAs), LEAs, and schools as they implement the ESEA requirements regarding statewide assessment systems, and to ensure that key requirements in title I of the ESEA are implemented in a manner consistent with the purposes of the law—''to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.''

Section 1601(b) of the ESEA required the Secretary, before publishing proposed regulations on the assessment requirements under title I, part A of the ESEA, to establish a negotiated rulemaking process. Consistent with this section, the Department subjected the proposed assessment regulations to a negotiated rulemaking process, through which the Department convened a diverse committee of stakeholders representing Federal, State, and local administrators, tribal leaders, teachers and paraprofessionals, principals and other school leaders, parents, the civil rights community, and the business community that met in three sessions during March and April 2016. The negotiating committee's protocols provided that it would operate by consensus, which meant unanimous agreement—that is, with no dissent by any voting member. Under the protocols, if the negotiating committee reached final consensus on regulatory language for assessments, the Department would use the consensus language in the proposed regulations. The negotiating committee reached consensus on all of the proposed regulations related to assessments. Accordingly, the Department published the consensus language to which the negotiated rulemaking committee agreed as a notice of proposed rulemaking (NPRM) and took public comment from July 11 through September 9, 2016.

Summary of the Major Provisions of This Regulatory Action: The following is a summary of the major substantive changes in these final regulations from the regulations proposed in the NPRM. The rationale for each of these changes is discussed in the *Analysis of Comments and Changes* section elsewhere in this preamble.

- Section 200.2(b)(7) has been revised to provide a number of examples to describe higher-order thinking skills.
- Section 200.3(b)(1)(v) has been revised to clarify that comparability between a locally selected, nationally recognized high school academic assessment and the statewide assessment is expected at each academic achievement level.
- Section 200.3(b)(3) has been revised to explicitly permit an SEA to disapprove or revoke approval of, for good cause, an LEA's request to administer a locally selected, nationally recognized high school academic assessment.
- Section 200.5(a)(2) has been revised to clarify that a State must administer its English language proficiency (ELP) assessments annually to all English learners in schools served by the State, kindergarten through grade 12.
- Section 200.6(b)(2)(i) has been revised to clarify that a State must develop appropriate accommodations for students with disabilities; disseminate information and resources about such accommodations to, at a minimum, LEAs, schools, and parents; and promote the use of those

[1] For more information regarding President Obama's Testing Action Plan, please see: *http://www2.ed.gov/admins/lead/account/saa.html;* see also: *www.ed.gov/news/press-releases/fact-sheet-testing-action-plan.*

accommodations to ensure that all students with disabilities are able to participate in academic instruction and assessments.

• Section 200.6(b)(2)(ii) has been revised to include teachers of English learners among those who should receive necessary training regarding administering assessments, including training on how to administer appropriate accommodations and alternate assessments.

• Section 200.6(c)(4) has been revised by making a number of changes to the list of criteria a State would need to meet in seeking a waiver to exceed the State-level cap on the number of students with the most significant cognitive disabilities taking an AA–AAAS in each subject area:

• Section 200.6(c)(4)(i) has been revised to clarify that a State must submit a waiver request 90 days prior to the start of the testing window for the relevant subject.

• Section 200.6(c)(4)(iii) has been revised to require that a State only verify that each LEA that the State anticipates will assess more than 1.0 percent of its assessed students in a subject using an AA–AAAS followed the State's guidelines and will address disproportionality in use of the AA–AAAS.

• Proposed § 200.6(c)(4)(iii)(B) has been removed to no longer require a State to verify that an LEA that the State anticipates will exceed the State cap on using an AA–AAAS will not significantly increase that use from the prior year.

• Section 200.6(c)(4)(iv)(B) has been revised to require that a State only include a plan and timeline to support and provide appropriate oversight to each LEA that the State anticipates will exceed the State cap using an AA–AAAS.

• Section 200.6(d)(1)(i) has been clarified so that a student's status as an English learner may not determine whether the student is a ''student with the most significant cognitive disabilities,'' as defined by each State.

• Proposed § 200.6(f)–(h) has been renumbered and reorganized as § 200.6(f)–(k) to contain all the requirements regarding English learners and students in Native American language schools and programs. Proposed § 200.6(i) regarding highly mobile student populations has also been moved to new § 200.2(b)(1)(ii)(A)–(D). Revisions to the renumbered paragraphs are described below.

• Section 200.6(f)(1)(i) has been added to require a State to develop appropriate accommodations for English learners; disseminate information and resources about such accommodations to, at a minimum, LEAs, schools, and parents; and promote the use of those appropriate accommodations to ensure that all English learners are able to participate in academic instruction and assessments.

• Section 200.6(h)(4)(ii) (proposed § 200.6(f)(3)(iv)) has been revised to clarify that where a determination has been made, on an individualized basis by the student's IEP team, 504 team, or for students covered under title II of the ADA, by the team or individual designated by the LEA to make those decisions, as set forth in § 200.6(b)(1), that an English learner has a disability that precludes assessment of the student in one or more domains of the English language proficiency (ELP) assessment such that there are no appropriate accommodations for the affected domain(s), a State must assess the student's English proficiency based on the remaining domains in which it is possible to assess the student.

• Section 200.6(j) (proposed § 200.6(g)) permits students in Native American language schools and programs to be assessed in their Native American language in any subject area, including reading/language arts, mathematics, and science, with evidence pertaining to these assessments required to be submitted for assessment peer review and approval, consistent with § 200.2(d).

• Section 200.6(j)(2) (proposed § 200.6(g)) requires assessment of students in Native American language schools and programs in reading/language arts in English in at least high school, instead of beginning in eighth grade.

Please refer to the *Analysis of Comments and Changes* section of this preamble for a detailed discussion of the comments received and changes made in the final regulations.

Costs and Benefits: The Department believes that the benefits of this regulatory action outweigh any associated costs to States and LEAs, which would be financed with Federal education funds. These benefits include the administration of assessments that produce valid and reliable information on the achievement of all students, including English learners and students with disabilities. States can use this information to effectively measure school performance and identify underperforming schools; LEAs and schools can use it to inform and improve classroom instruction and student supports; and parents and other stakeholders can use it to hold schools accountable for progress, ultimately leading to improved academic outcomes and the closing of achievement gaps, consistent with the purpose of title I of the ESEA. In addition, the regulations address statutory provisions intended to limit assessment burden, including by avoiding the double testing of eighth-grade students taking advanced mathematics coursework in certain circumstances. Please refer to the *Regulatory Impact Analysis* section of this document for a more detailed discussion of costs and benefits. Consistent with Executive Order 12866, the Office of Management and Budget (OMB) has determined that this action is significant and, thus, is subject to review by OMB under the Executive order.

Public Comment: In response to our invitation to comment in the NPRM, 232 parties submitted comments on the proposed regulations (including Tribal Consultation, further described below, as a comment).

We discuss substantive issues under the sections of the regulations to which they pertain, with the exception of a number of cross-cutting issues, which are discussed together under the heading ''Cross-Cutting Issues.'' Generally, we do not address technical and other minor changes, or suggested changes the law does not authorize us to make under the applicable statutory authority. In addition, we do not address general comments that raised concerns not directly related to the proposed regulations or that were otherwise outside the scope of the regulations, including comments that raised concerns pertaining to particular sets of academic standards or assessments or the Department's authority to require a State to adopt a particular set of academic standards or assessments, as well as comments pertaining to the Department's regulations on statewide accountability systems.

Tribal Consultation: The Department held four tribal consultation sessions on April 24, April 28, May 12, and June 27, 2016, pursuant to Executive Order 13175 (''Consultation and Coordination with Indian Tribal Governments''). The purpose of these tribal consultation sessions was to solicit tribal input on the ESEA, including input on several changes that the ESSA made to the ESEA that directly affect Indian students and tribal communities. The Department specifically sought input on: The new grant program for Native language immersion schools and projects; the report on Native American language medium education; and the report on responses to Indian student suicides. The Department announced the tribal consultation sessions via

listserv emails and Web site postings on *www.edtribalconsultations.org/.* The Department considered the input provided during the consultation sessions in developing the proposed regulations.

Analysis of Comments and Changes: An analysis of the comments and of the changes in the regulations since publication of the NPRM follows.

Cross-Cutting Issues

Parental Rights

Comments: One commenter noted the importance of parental involvement in issues pertaining to required State assessments, including test design, reporting, and use, and voiced support for a parent's right to make decisions regarding a child's participation in State assessments. However, the commenter did not provide any suggested changes to the proposed regulations in this area.

Discussion: We agree that seeking and considering input from parents when designing and implementing State assessment systems and policies is important in ensuring tests are fair and worth-taking. In fact, because a State assessment system is part of the State plan, section 1111(a)(1)(A) of the ESEA requires a State to consult with a wide variety of stakeholders, including parents, in designing and implementing its system. Moreover, section 1111(b)(2)(B)(x) requires a State assessment system to produce and provide individual student interpretive, descriptive, and diagnostic reports to parents so that they understand their child's specific academic needs. In addition, the new authority for an LEA to request to administer a locally selected, nationally recognized high school academic assessment in place of the statewide high school assessment requires the LEA to notify parents of its decision to administer such an assessment. See section 1111(b)(2)(H)(vi) of the ESEA and § 200.3(c). Accordingly, we believe no further clarification is needed in the regulations. We also note that, under section 1111(b)(2)(K) of the ESEA, the requirements for State assessment systems do not pre-empt a State or local law regarding parental decisions related to their child's participation in those assessments.

Changes: None.

Overtesting

Comments: One commenter noted that the ESEA expands opportunities to reduce testing, including allowing States to exempt eighth graders taking advanced mathematics coursework from double testing and allowing LEAs to administer a locally selected, nationally recognized assessment instead of the statewide assessment, so long as the State approves use of such an assessment. This commenter encouraged SEAs to consider the Administration's recommendation to reduce the overuse and misuse of tests, and recommended the Department continue to promote this message as it enforces the assessment regulations. Other commenters articulated concerns about the total time students spend taking assessments required by Federal, State, and local entities, including some commenters who expressed these concerns regarding particular grade levels or subject areas. One commenter proposed replacing standardized testing with testing related to the Response to Intervention framework. Other commenters advocated that States, and not the Federal government, be the ones selecting academic standards and assessments, or that there be no Federal testing requirements at all. One commenter requested reductions in testing to allow for instructional time in social studies.

Discussion: We strongly agree with the commenter who expressed that, while the ESEA presents States with opportunities to streamline testing, each State and LEA should continue to consider additional action it may take to reduce burdensome or unnecessary testing. Annual assessments, as required by the ESEA, are tools for learning and promoting equity when they are done well and thoughtfully. When assessments are done poorly, in excess, or without a clear purpose, they take time away from teaching and learning. As discussed previously, President Obama's Testing Action Plan provides a set of principles and actions that can help protect the vital role that good assessment plays in guiding progress for students and evaluating schools, while providing help in reducing practices that have burdened classroom time or not served students or educators well (see footnote 1).

We do wish to clarify, however, that the ESEA does include Federal testing requirements under section 1111(b)(2)(B)(v)(I)–(II), to assess all students in a State annually in reading/language arts and mathematics in grades 3–8 and once in grades 9–12 and to assess all students in the State in science at least once in each grade span (*i.e.,* grades 3–5, 6–9, and 10–12). It would be inconsistent with the statute for the Department to use its regulatory authority to relieve States of these requirements, which provide important information to support teaching and learning, increase transparency, and protect civil rights benefits when used appropriately. The Department does not now, and never has, required any specific set of standards or assessments under title I, part A. Similarly, nothing in these regulations promotes any particular set of standards or assessments; rather, the regulations define requirements, based in the statute that a State-determined assessment must meet.

Changes: None.

Plain Language

Comments: One commenter requested that the Department simplify the language of the regulation, indicating concern that the average teacher or parent may not understand the text. Specifically, the commenter requested that the regulation be written at a sixth grade reading level.

Discussion: While we appreciate that this regulation is specific and, at times, technical, we note that the language is intended to be both accessible and clear. We further note that, in negotiated rulemaking, representatives of both teachers and parents participated on the negotiated rulemaking committee and actively engaged in drafting and developing the language of the proposed regulation on which this final rule is based.

Changes: None.

Section 200.2 State Responsibilities for Assessment

Accessibility

Comments: Multiple commenters wrote in support of provisions in § 200.2(b)(2) related to developing assessments, to the extent practicable, consistent with the principles of universal design for learning (UDL) as a way to promote greater test accessibility for students with disabilities.

Discussion: Section 1111(b)(2)(B)(xiii) of the ESEA requires a State to develop its assessment system, to the extent practicable, using the principles of UDL. Using principles of UDL can help ensure that all students, including students with disabilities and English learners, are able to access high-quality State assessment systems, and we appreciate the commenters' support.

Changes: None.

Comments: One commenter requested a change in § 200.2(b)(2)(ii) regarding the meaning of UDL. Specifically, the commenter asked that we add language regarding UDL to require that assessments designed in accordance with the principles of UDL maintain high standards, validity, and reliability.

Discussion: The Department declines to make the requested change for three

reasons. First, all assessments under this subpart must be valid and reliable, as set forth in § 200.2(b)(4)(i). Therefore, it is unnecessary to restate such a requirement with regard to use of the principles of UDL in assessment development. Second, section 8101(51) of the ESEA states that the term ''universal design for learning'' as used in the ESEA has the meaning given it in section 103 of the Higher Education Act of 1965, the definition of which we incorporated directly into § 200.2(b)(2)(ii). Since the statute defines this term, we decline to make any edits to that definition. Finally, while we agree with the commenter that it is critical to hold all students to high standards, we believe this is clear throughout the regulation, particularly as required in §§ 200.2 and 200.6.

Changes: None.

Alignment With State Academic Standards

Comments: Numerous commenters expressed support for the requirements in § 200.2(b)(3)(i)(B), (b)(3)(ii)(A)(*2*), and (c)(1)(i) that require a State's assessments, including computer-adaptive assessments, to provide information about student attainment of the full depth and breadth of the State's academic content standards and how students are performing against the State's academic achievement standards for the grade in which they are enrolled. Several commenters, as described in response to comments on § 200.6, believed these provisions were particularly important for students with disabilities, for whom expectations were in the past lower than for their peers. A few commenters noted that these provisions will help build consistency with the statutory requirement to use a measure of grade-level proficiency for school accountability and reporting, without limiting a State's ability to consider measures of growth or the achievement of students who are above or below grade-level proficiency. One commenter expressed specific concern about whether the instructional standards were aligned to the assessment used in the commenter's State, particularly at the high school level. An additional commenter expressed a preference for more consistency across State standards in order to better support highly mobile students whose parents are in the military. Another commenter, however, felt the focus on grade-level proficiency was inappropriate and would prefer for assessments to match a student's level of instruction, rather than the grade in which the student is enrolled.

Discussion: We agree with the commenters that it is critically important for all students, including children with disabilities, to have access to the same challenging, grade-level academic content standards and be assessed against the same high standards for their academic achievement, except as noted below. Further, we believe that requiring State assessment systems to measure the depth and breadth of the academic content standards is one way to ensure that these goals of equitable access to challenging content and high achievement standards are met. We note that although students with the most significant cognitive disabilities must be assessed against the State's academic content standards for the grade in which a student is enrolled, the performance of these students may be assessed with an AA–AAAS if a State has adopted such alternate academic achievement standards. We strongly disagree with the commenter who felt it would be more appropriate for assessments to match a student's instructional level, as this could stifle educational opportunity and access to grade-level content for student populations, such as students from minority backgrounds, students from low-income families, English learners, and students with disabilities, who have been historically underserved and not given instruction aligned with academic content standards for the grade in which they are enrolled. Further, allowing out-of-level assessments would be inconsistent with section 1111(b)(2)(B)(ii) of the ESEA, which provides that the assessment system must be aligned with the State's challenging academic standards and provide information about whether a student has attained such standards and whether the student is performing ''at the student's grade level.'' We are unable to comment on whether the academic standards and assessments in a particular State are aligned. Instead, the assessment peer review process offers an opportunity for the Department to provide feedback on technical evidence regarding State assessment systems, including alignment, based on outside experts' review of State-submitted evidence. While we acknowledge the commenter's point regarding the utility of consistent standards and assessments across States for military families, we reaffirm that each State has the sole discretion to develop and adopt its own challenging State academic standards, provided they meet the relevant statutory and regulatory requirements.

Changes: None.

Comments: One commenter recommended adding to § 200.2(b)(3)(ii)(A) a requirement that each State document continued alignment with its State academic content standards over time, indicating that such an addition is necessary to ensure the Department receives appropriate evidence that a State's assessment system is aligned to the full depth and breadth of the State's academic content standards.

Discussion: We agree with the commenter that a State is continuously responsible for ensuring that its assessments are aligned with its challenging State academic content standards. We believe that these issues are sufficiently addressed in the technical requirements for assessments in § 200.2. Moreover, section 1111(a)(6)(B)(i) of the ESEA, clearly requires a State to submit its assessment system for assessment peer review if the State makes significant changes such as the adoption of new challenging State academic standards or new academic assessments, which is reflected in the Department's Peer Review of State Assessment Systems Non-regulatory Guidance for States (see *http://www2.ed.gov/policy/elsec/guid/assessguid15.pdf*). The Department anticipates updating this non-regulatory assessment peer review guidance in the future to fully incorporate changes to the ESEA made by the ESSA and to align with these regulations.

Changes: None.

Comments: Some commenters strongly supported § 200.2(b)(3)(ii)(B), which requires assessment systems to be based on challenging State academic achievement standards that are aligned with entrance requirements for credit-bearing coursework in the State's system of public higher education and relevant career and technical education standards, asserting that setting standards and aligning assessments to meet expectations for student readiness in postsecondary coursework is appropriate and necessary for States to ensure students acquire the knowledge and skills they will need to be successful beyond high school. However, one commenter stated that the provision severely narrows the goals of schooling and overlooks many important skills that students need to be successful.

Discussion: We appreciate the support for this provision, and agree that it is appropriate for State assessment systems to be aligned to standards that measure students' college and career readiness. In response to the commenter's concern that this provision narrows certain goals and overlooks

important skills, we note that section 1111(b)(1)(D)(i) of the ESEA requires a State to demonstrate that its challenging State academic standards are aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards. Furthermore, because a State assessment system must be aligned to the State's challenging academic standards under section 1111(b)(2)(B)(ii) of the ESEA, § 200.2(b)(3)(ii)(B) is fully consistent with the law.

Changes: None.

Comments: Several commenters strongly supported § 200.2(b)(3)(ii)(B)(*2*), which specifies that a State's AA–AAAS for students with the most significant cognitive disabilities measure performance in such a way that a student who meets those standards is on track to pursue postsecondary education or competitive integrated employment, consistent with the purposes of the Rehabilitation Act of 1973, as amended by the Workforce Innovation and Opportunity Act (WIOA). They contended such a requirement will greatly benefit students with the most significant cognitive disabilities who have often been held to lower standards and given few opportunities beyond ''sheltered workshops.''

However, a few commenters objected to the proposed regulation, contending it would narrow the focus of education for these students to employability and would ignore important outcomes other than competitive integrated employment that they felt were more fair and attainable for some students with the most significant cognitive disabilities. One commenter also noted that the statute requires alignment of academic achievement standards to the purposes of the Rehabilitation Act and that competitive integrated employment is but one of those purposes. These commenters recommended that the final regulations only include the statutory language and reference the purposes, generally, of WIOA.

Discussion: Section 200.2(b)(3)(ii)(B)(*2*) requires that an AA–AAAS for students with the most significant cognitive disabilities measure student performance based on alternate academic achievement standards defined by the State that reflect professional judgment as to the highest possible standards achievable by such students to ensure that a student who meets the standards is on track to pursue postsecondary education or competitive integrated employment, consistent with the purposes of the Rehabilitation Act of 1973, as amended by WIOA. The Department believes it is critical to maintain a focus on the highest expectations for all students in order to ensure that students have the greatest possible opportunities. Higher expectations have been shown to lead to better results for students.[2] The focus on competitive integrated employment is critical to emphasize that standards for students with the most significant cognitive disabilities must be rigorous and structured such that the students are prepared to earn competitive wages alongside their peers without disabilities. Such language is intended to clarify the connection between alternate academic achievement standards and preparation for competitive integrated employment, recognizing there was significance to this heightened expectation as expressed throughout the Rehabilitation Act, as amended by WIOA, and the importance of maintaining high expectations for students with the most significant cognitive disabilities in the ESEA.

Changes: None.

Comments: One commenter recommended that the final regulations include greater specificity regarding the comparability and quality of academic achievement standards across States, noting considerable differences between State determinations of student proficiency and proficiency as measured by the National Assessment of Educational Progress (NAEP) that indicate low and uneven expectations for students, particularly across State lines. Another commenter, however, recommended leaving all decisions regarding standards for student proficiency to the discretion of States.

Discussion: The ESEA leaves discretion for setting academic achievement standards to the States, so long as they meet all applicable statutory and regulatory requirements under section 1111(b)(1) of the ESEA. For this reason, we decline to make any further changes to the final regulations to provide greater specificity as to how a State must set its standards. Under section 1111(b)(1)(D), each State must demonstrate alignment between its challenging academic standards and its statewide assessments through assessment peer review under section 1111(a)(4). In this manner, a State will also demonstrate that the academic achievement standards it adopts reflect college- and career-ready expectations for all students.

Changes: None.

Comments: One commenter suggested that, in order to facilitate meaningful use of assessment results by local administrators and educators, the Department clarify in § 200.2(b)(3)(i)(B) that providing timely information on student attainment of the State's challenging academic standards means that LEAs will receive results of State assessments at least 30 days prior to the beginning of each school year.

Discussion: We agree with the commenter that timely access to information from student assessments is critical to ensure the results are meaningful and actionable for stakeholders, but believe such a requirement is best addressed in requirements for reporting results of assessments on State and LEA report cards under section 1111(h) of the ESEA.

Changes: None.

Characteristics of High-Quality Assessments

Comments: Several commenters supported the addition of fairness in § 200.2(b)(4)(i), along with validity and reliability, as a criterion for State assessments required by the ESEA, particularly to ensure all students have equal access to rigorous instruction, curricula, and assessments.

One commenter, however, recommended deleting § 200.2(b)(4)(i), stating that separate requirements for validity, reliability, and fairness were unnecessary as § 200.2(b)(4)(ii) (which requires State assessments to be consistent with relevant, nationally recognized professional and technical testing standards) adequately covers topics of validity, reliability, and fairness. Other commenters recommended deleting ''fair'' from § 200.2(b)(4)(i), contending that it has no basis in the statute and adds confusion. One of these commenters also argued that the addition of ''fair'' was in conflict with the prohibition in section 1111(e)(2) of the ESEA, related to the

[2] U.S. Department of Education (2015). Improving the Academic Achievement of the Disadvantaged; Assistance to States for the Education of Children with Disabilities. 80 FR 50774–50775 and 50777. Available at *https://www.federalregister.gov/documents/2015/08/21/2015-20736/improving-the-academic-achievement-of-the-disadvantaged-assistance-to-states-for-the-education-of.*

Rubie-Davies, C.M., Peterson, E.R., Sibley, C.G., & Rosenthal, R. (2015). A teacher expectation intervention: Modelling the practices of high expectation teachers. *Contemporary Educational Psychology, 40,* 72–85.

Klehm, M. (2014). The effects of teacher beliefs on teaching practices and achievement of students with disabilities. *Teacher Education and Special Education, 37*(3), 216–240.

Courtade, G, Spooner, F., Browder, D., & Jimenez, B. (2012). Seven reasons to promote standards-based instruction for students with severe disabilities: A Reply to Ayres, Lowrey, Douglas, & Sievers (2011). *Education and Training in Autism and Developmental Disabilities, 47*(1), 3–13.

Secretary's authority to define terms that are inconsistent with or outside the scope of the law.

Discussion: The Department agrees with the commenters who pointed out that relevant, nationally recognized professional and technical testing standards—such as the *Standards for Educational and Psychological Testing* developed jointly by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education—address the topics of validity, reliability, and fairness.[3] The Department disagrees that it is unnecessary to include those factors explicitly in the regulations. Validity, reliability, and fairness are the cornerstones of effective and appropriate educational assessment, so we think it is worthwhile to specifically emphasize these attributes. As to the contention that adding ''fair'' is confusing, the *Standards for Educational and Psychological Testing* make clear that ''fairness'' has a technical definition—specifically that, ''the validity of test score interpretations for intended use(s) for individuals from all relevant subgroups. A test that is fair minimizes the construct-irrelevant variance associated with individual characteristics and testing contexts that otherwise would compromise the validity of scores for some individuals'' [4]—that is well accepted in the professional assessment community and does not create confusion. Moreover, because fairness is part of the *Standards for Educational and Psychological Testing,* it is within the scope of section 1111(b)(2)(B)(iii) of the ESEA, which requires consistency with relevant nationally recognized professional and technical testing standards.

We also disagree with the contention that requiring that assessments be ''fair'' is in conflict with the prohibition in section 1111(e)(2) of the ESEA on defining terms that are inconsistent with or outside the scope of the law. Rather, the law itself affirms the importance of fair assessment, for example, by requiring the use of principles of UDL (section 1111(b)(2)(B)(xiii) of the ESEA), prohibiting assessments that would evaluate personal or family beliefs (section 1111(b)(2)(B)(iii) of the ESEA), and requiring that the State provide for the participation of all students (section 1111(b)(2)(B)(vii) of the ESEA).

[3] American Educational Research Association, American Psychological Association, National Council on Measurement in Education (2014). *Standards for Educational and Psychological Testing.*

[4] Ibid, p. 219.

Moreover, the regulations do not, in fact, propose a definition of ''fair.'' For these reasons, we believe highlighting the importance that assessments be ''fair'' in addition to valid and reliable is consistent with the requirements in section 1111(b)(2) of the ESEA and not outside the scope of title I, part A.

Changes: None.

Comments: A few commenters wrote in general support of § 200.2(b)(5)(i), which requires State assessment systems to be supported with evidence that the assessments are of adequate technical quality.

Discussion: We appreciate the commenters' support for § 200.2(b)(5)(i) and agree that providing evidence of a State assessment system's technical quality is a critical requirement to maintain in the final regulations.

Changes: None.

Public Posting of Technical Information

Comments: A commenter requested that the Department require a State's technical review process regarding locally selected, nationally recognized high school academic assessments under § 200.3 be made public on the State's Web site, including by requiring the State to post the technical criteria against which an LEA's requested assessment would be evaluated. The same commenter and another commenter requested that the results of any technical reviews a State completes be made publicly available.

Discussion: We agree that it is important that a State post information about technical quality related to assessments under § 200.3. Transparency fosters collaboration and productive civic engagement. However, since § 200.3(b)(1)(iv) specifies that all requirements of § 200.2(b) (except for § 200.2(b)(1)) apply to locally selected, nationally recognized high school academic assessments, if a State chooses to allow such assessments, the requirement under § 200.2(b)(5)(ii) that technical information be posted on the State's Web site already applies. Therefore, a State will need to make at least as much information available regarding assessments under § 200.3 as it would provide regarding other assessments the State uses to meet the requirements of this subpart.

Changes: We have revised § 200.2(b)(5)(ii) to make clear that the requirement to post technical information applies to each assessment administered under this subpart.

Multiple Measures of Student Achievement

Comments: A few commenters recommended further specifying ''higher-order thinking skills'' under § 200.2(b)(7) by providing examples of these skills, such as critical thinking, complex problem-solving applied to authentic problems, communication, and academic mindsets. Commenters stated this would help support students' college and career readiness, as these skills are valuable for long-term success after high school.

Discussion: We agree that providing examples of higher-order thinking skills will clarify the meaning of this phrase in the regulations and have added critical thinking, reasoning, analysis, complex problem solving, effective communication, and understanding of challenging content to § 200.2(b)(7) to help illustrate what is meant by higher-order thinking skills.

Changes: We have revised § 200.2(b)(7) to include illustrative examples of higher-order thinking skills.

Comments: A number of commenters supported provisions that offer flexibility to States to develop assessment systems that measure student growth, in addition to achievement, and encouraged the broad use of growth measures. Further, some of these commenters suggested modifying § 200.2(b)(7)(i) and (b)(10)(ii) to require States' assessment systems to measure student growth. Commenters wrote that such a requirement would be consistent with statutory and proposed regulatory requirements for accountability systems under the ESEA, and would help ensure assessments provide results that can be used to inform instruction and meet the learning needs of all students. Another commenter suggested that if a State uses its assessment system to measure both student growth and achievement, the State should be required to report publicly both measures to give parents and the public a more comprehensive picture of students' learning.

Discussion: We agree with commenters that measures of student growth can provide valuable insight into how well students are progressing against the State's challenging academic standards to inform instruction. However, section 1111(b)(2)(B)(vi) of the ESEA makes clear that measuring student academic growth is a State's decision. Moreover, contrary to the commenters' assertion, measures of student growth are not required to be used in the statewide accountability system under section 1111(c) of the ESEA; also, section 1111(e)(1)(B)(iii)(III) prohibits the Secretary from requiring States to measure student growth for accountability purposes as a condition of approval of a State plan, or revisions or amendments to such plan, or

approval of a waiver request. Accordingly, we agree with commenters that a State's discretion to measure student growth based on its assessment systems is valuable, but decline to make any revisions to § 200.2(b)(7)(i) or (b)(10)(ii). Further, any change in reporting requirements for States that elect to measure student academic growth is outside the scope of these regulations, as such requirements are specified in section 1111(h) of the ESEA, for which the Department has recently issued final regulations. We note that if a State were to elect to measure student academic growth as an accountability indicator, section 1111(h)(1)(C)(iii)(I) of the ESEA requires that performance on those indicators be included on State and LEA report cards.

Changes: None.

Comments: Several commenters wrote in support of assessment systems that include forms of assessments, such as portfolios and performance-based tasks as described in § 200.2(b)(7)(ii), as opposed to a single, summative, standardized assessment and encouraged the Department to find ways to incentivize and promote their widespread use. A few commenters noted that these forms of assessments are particularly helpful for assessing students with disabilities who may struggle to demonstrate what they know using traditional standardized tests.

One commenter, however, urged caution about the use of portfolios, projects, or extended performance tasks in State assessment systems and recommended the Department revise § 200.2(b)(7)(ii) to require States seeking to use these forms of assessment to develop and submit a plan to the Department for approval that would describe the efficacy, reliability, and comparability of these assessments and how the State will monitor their implementation.

Discussion: Section 1111(b)(2)(B)(vi) of the ESEA, specifies that State assessments may be partially delivered in the form of projects, portfolios, or extended performance tasks, and we appreciate the commenters' support for reiterating this provision in the regulations. Because projects, portfolios, and extended performance tasks would be part of a State's assessment system, evidence about these items would need to be included in a State's submission for assessment peer review, as described in § 200.2(d), to determine whether the assessment system as a whole meets all applicable regulatory requirements (including those related to validity, reliability, and technical quality). Therefore, we disagree with the commenter that additional language is needed in the final regulations to require each State that uses portfolios, projects, or extended performance tasks in its assessments to submit a separate plan describing their quality and use.

Changes: None.

Comments: One commenter suggested requiring that all State assessment systems include a performance-based component in mathematics in order to ensure all parts of mathematical knowledge, such as reasoning and procedural skills, are assessed. Another commenter suggested that State assessments be able to be fully delivered in the form of portfolios or projects, believing that this type of format may be most appropriate for certain students, such as those with very low levels of English proficiency. Other commenters suggested that further clarity would be helpful to ensure that assessments including portfolios, projects, or performance tasks could be used by States while still meeting the requirement in § 200.2(b)(1)(i) to administer the same assessment to all students; one commenter recommended that so long as these assessments measure the same standards, the various items, prompts, or tasks, as well as scoring rubrics and training for evaluators, need not be the same.

Discussion: Section 1111(b)(2)(B)(vi) of the ESEA, specifies that State assessments may be partially delivered in the form of projects, portfolios, or extended performance tasks. As the statute leaves the decision about whether to use any of these formats up to each State and qualifies their inclusion with ''partially,'' we decline to require a State to use them when developing its assessment system or to modify the regulations so that assessments may be fully delivered in these formats. Further, we are declining to make revisions to the final regulations to address the commenter's concern that § 200.2(b)(7)(ii) may be perceived as inconsistent with the statutory and regulatory requirements for the State to use the same assessment to measure the achievement of all public school students, as we believe such clarification is better suited for non-regulatory assessment peer review guidance. States may use assessments that include portfolios, projects, or performance tasks in a manner that is consistent with the statutory and regulatory requirements, examples of which we think would be best suited to such non-regulatory guidance.

Changes: None.

Comments: Two commenters recommended clarifying that State assessments partially delivered in the form of portfolios, projects, or extended performance tasks be excluded from any calculations of time students spend taking assessments, as required to be reported, when available, under the ''parents right-to-know'' provisions under section 1112(e)(2)(B)(iv)(I) of the ESEA, and as part of any assessment audit under section 1202 of the ESEA—noting that these assessments are often administered over the course of a semester or year, and not in a single, discrete test-taking period.

Discussion: Although we appreciate the commenters' suggestions regarding the use of portfolios, projects, and extended performance tasks, which are permitted in State assessments under these regulations, the regulations pertain to requirements for State assessment systems in general under section 1111(b)(2) of the ESEA. Thus, comments on how the Department should implement the ''parents right-to-know'' and assessment audit requirements in sections 1112(e)(2) and 1202 of the ESEA, respectively, are outside the scope of these regulations.

Changes: None.

State Flexibility for Assessment Format

Comments: Multiple commenters supported the proposed regulations regarding State flexibility to administer a single summative assessment or multiple interim assessments throughout the year that result in a single summative score, noting that greater discretion in the time and format of assessments may help reduce the time students spend taking required assessments, could promote innovative assessment formats among States rather than traditional large-scale summative assessments taken at the end of the year, and may support particular student groups, like students with disabilities, who may be better able to demonstrate their knowledge when assessments occur throughout the year as students master academic material. One commenter supported this flexibility for States, but felt that a single summative score for each student was unnecessary. Another commenter expressed that it should not be necessary for all students to take the same test across schools in the State due to variations in instructional methods.

Another commenter, however, urged caution about the use of multiple, interim assessments throughout the year that result in a summative score. This commenter suggested the Department revise § 200.2(b)(10) to require States seeking to use these forms of assessment to develop and submit a plan to the Department for approval that would describe the efficacy, reliability, and comparability of these assessments and

how the State will monitor their implementation.

Discussion: Section 1111(b)(2)(B)(viii) of the ESEA, specifies that State assessments may be administered through a single summative assessment or multiple statewide interim assessments during the course of the year that result in a single summative score, and we appreciate the commenters' support of reiterating this provision in the proposed regulations. Given that the requirement for multiple interim assessments to produce a single summative score is statutory, we decline to strike this requirement in the final regulations. Moreover, because multiple statewide interim assessments administered throughout the school year would be part of a State's assessment system, they would be included in a State's submission for assessment peer review, as described in § 200.2(d), to determine whether the assessments meet all applicable regulatory requirements (including those related to validity, reliability, and technical quality), we disagree with the commenter that additional language is needed in the final regulations to require each State that uses multiple interim statewide assessments to submit a separate plan describing their quality and use. Rather, validity, reliability, and technical quality will be considered as part of the assessment peer review process for each State, regardless of a particular State's test design.

We reaffirm the statutory and regulatory requirements to assess all students in the State using the same assessments, except in specific circumstances outlined in § 200.2(b)(1)(i). This is essential to promote ongoing transparency, meaningful and fair school accountability, and equity.

Changes: None.

Disaggregated Data

Comments: Several commenters recommended requiring more detailed disaggregated data for various subgroups of students specified under § 200.2(b)(11). One commenter recommended requiring further disaggregation of assessment data by gender, to better identify and support students of different sexes or gender identities. Another commenter suggested that the children with disabilities subgroup be disaggregated by each category of disability specified under section 602(3) of the Individuals with Disabilities Education Act (IDEA), given the broad range of cognitive and functional abilities among students in the subgroup. An additional commenter objected to the use of the term ''subgroups'' with regard to students.

Discussion: The statute uses the term ''subgroup'' to identify students based on certain characteristics. Accordingly, the regulations use the same language. The individual subgroups of students for which State assessments are required to be able to be disaggregated in the regulations are consistent with those required under section 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the ESEA. While we understand that requiring further disaggregation of assessment data for additional subgroups of students may help focus needed attention on underserved students with unique academic and non-academic needs, we believe States should have discretion over the disaggregation of any additional subgroups.

Changes: None.

Comments: Two commenters recommended allowing States and districts flexibility regarding when assessment data must be available in a disaggregated fashion for certain new subgroups, such as students who are homeless, are in foster care, or have military-connected families in proposed § 200.2(b)(11)(vii)–(ix).

Discussion: Given that the requirement to report assessment results disaggregated for students who are homeless, are in foster care, or have military-connected families is found in section 1111(h)(1)(C)(ii) of the ESEA, which specifies requirements for State and LEA report cards, we are declining to make the suggested changes as the comments are outside the scope of the regulations on State assessments under title I, part A.

Changes: None.

Comments: None.

Discussion: In reviewing the final regulations, the Department realized that § 200.2(b)(11) did not include language from section 1111(b)(2)(B)(xi) of the ESEA which states that disaggregation is not required if the number of students in a subgroup in a State, LEA, or school is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student. The statute and, accordingly, the regulations stipulate disaggregation of student data by many student subgroups, including subgroups that cause students to be highly mobile. While transparent information about students in specific circumstances is important for promoting equity and access for all students, student data privacy is also critical. Incorporating this statutory language will help ensure that States and LEAs appropriately balance public reporting and privacy by not showing results for a particular subgroup if doing so would reveal personally identifiable student information.

Changes: We have added § 200.2(b)(11)(ii) to incorporate statutory language stating that disaggregation by subgroups is not required if the number of students in a subgroup in a State, LEA, or school is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student.

Computer-Adaptive Assessments

Comments: Multiple commenters strongly supported the proposed requirements for computer-adaptive assessments in § 200.2(c), noting that these forms of assessments may help reduce the time students spend taking required assessments and support States in more accurately measuring student learning and growth over time, particularly for students with disabilities who may be behind grade level or gifted students who are well above the proficient level for their enrolled grade. Several of these commenters also supported the fact that the regulations require States, when using computer-adaptive assessments, to provide a determination of a student's achievement against the academic content standards for the grade in which the student is enrolled to ensure all students are held to high expectations for their learning. One of these commenters supported the flexibility for States to use computer-adaptive tests, but did not think that a single summative score from a computer-adaptive assessment for each student was necessary.

However, a couple of commenters were concerned that the proposed requirements for computer-adaptive assessments to produce a grade-level determination would mean such assessments would not also produce a valid result for a student's performance above or below grade level and advocated for allowing computer-adaptive tests that primarily assess performance above or below grade level, potentially with reduced focus on grade level content.

Discussion: We appreciate the commenters' support and agree that computer-adaptive assessments could promote positive change in the design and delivery of State assessment systems. Section 1111(b)(2)(J) of the ESEA gives each State the discretion to adopt a computer-adaptive assessment so long as it measures, at a minimum, each student's academic proficiency based on challenging State academic

standards for the student's grade level and growth toward such standards; in addition, the adaptive assessment may measure a student's level of proficiency and growth using items above or below the student's grade level. As this statutory language, which emphasizes the importance of a determination of grade-level proficiency for each student against the State's challenging academic standards, is included nearly verbatim in the proposed regulations, we believe the commenters' suggested changes would be inconsistent with the statute.

Changes: None.

Comments: A commenter expressed concern that the requirements for computer-adaptive assessments in § 200.2(c)(1) do not require such assessments to measure the depth and breadth of the State's academic content standards, contending this will undermine full alignment of the assessments with the State's grade-level expectations and their accuracy in measuring student performance against those expectations.

Discussion: Section 1111(b)(2)(J) of the ESEA requires that, if a State chooses to use computer-adaptive assessments, those assessments meet all requirements of ''this paragraph''—*i.e.,* section 1111(b)(2)—which include requirements related to addressing the depth and breadth of State academic content standards. We have incorporated this expectation into § 200.2(c)(1)(i). Therefore, we disagree that the regulations will undermine full alignment with grade-level expectations or accuracy, and believe that no change is warranted.

Changes: None.

Comments: One commenter recommended that the Department revise the regulations to make clear that a State may assess students against academic content standards above and below their enrolled grade level on all forms of assessments, not only if the State administers computer-adaptive tests. The commenter believed this flexibility is needed to promote competency-based approaches to education.

Discussion: A State must, at a minimum, assess students in a valid and reliable manner against grade-level content standards consistent with the Federal assessment requirements under title I, part A. Generally, a State may also assess a student against academic content standards above and below the grade in which the student is enrolled provided the State meets all applicable requirements for assessment relative to the grade in which the student is enrolled, regardless of whether the assessment is computer-adaptive. The Federal assessment requirements under title I, part A include: Producing a summative score that measures a student's academic achievement against the State's academic achievement standards; reporting that score and the corresponding achievement level to parents and educators, in the aggregate and disaggregated by subgroups; reporting student academic achievement information based on the enrolled grade on State and local report cards; and using that score in the Academic Achievement indicator and long-term goals in the State's school accountability determinations. While we urge a State to use assessment time judiciously, in keeping with President Obama's Testing Action Plan (see footnote 1), a State does not need specific authority to offer a student assessment items in addition to those items that produce the student's annual summative score based on grade-level achievement standards. Since any assessment, including any computer-adaptive assessment, must provide a measure of student academic achievement against the challenging State academic standards for the grade in which a student is enrolled, items above or below a student's grade level would be administered in addition to items needed to meet the requirements of this subpart. While students with the most significant cognitive disabilities may be assessed with an AA–AAAS, if the State has adopted such standards, such an assessment must also be aligned with the challenging State academic content standards for the grade in which the student is enrolled. In any circumstance, a State must ensure that it demonstrates that all of its assessments meet all technical quality requirements regarding measurement of a student's grade-level academic achievement. We therefore decline to make any additional changes.

Changes: None.

Assessment Peer Review

Comments: One commenter supported § 200.2(d) that requires each State to submit evidence for assessment peer review that its English language proficiency (ELP) assessment meets all applicable requirements, which will help ensure that these assessments (used for both school accountability and to help determine whether students are ready to exit English learner services) are of the highest technical quality.

Discussion: We appreciate the commenter's support and agree that peer review of a State's ELP assessment will be critically important to ensuring that assessment is fair, valid, reliable, and high quality.

Changes: None.

Comments: One commenter recommended revising § 200.2(d) so that the peer review of assessments would allow for States to use innovative assessments that depart from traditional forms of standardized testing, believing such assessments to be preferable to traditional large-scale assessment systems.

Discussion: States have broad discretion to design and implement assessment systems that effectively measure student academic achievement related to a State's challenging academic content and academic achievement standards. Neither the statute nor the regulations apply any specific limits on test design; rather, the statute and regulations focus on the technical quality of assessments, including validity, reliability, and fairness for all students and high technical quality. In fact, section 1111(b)(2)(B)(vi) of the ESEA specifically directs States to ''involve multiple up-to-date measures of student academic achievement, including measures that address higher-order thinking skills and understanding, which may include measures of student academic growth and may be partially delivered in the form of portfolios, projects, or extended performance tasks,'' and the regulations incorporate this authority. A State may apply innovative principles to academic assessments without any additional specific authority.

As previously discussed, annual assessments, as required by the ESEA, are tools for learning and promoting equity when they are done well and thoughtfully. When assessments are done poorly, in excess, or without a clear purpose, they take time away from teaching and learning. President Obama's Testing Action Plan (see footnote 1), released in October 2015, provides a set of principles and actions that the Department put forward to help protect the vital role that good assessment plays in guiding progress for students and evaluating schools, while providing help in reducing practices that have burdened classroom time or not served students or educators well.

Further, section 1204 of the ESEA allows States granted Innovative Assessment Demonstration Authority to begin administering them in some schools or LEAs and then take such assessments to scale statewide over several years. The Department wishes to emphasize, however, that a State does not need to be granted such authority in order to innovate or improve its assessments, provided it annually assesses all students in each required grade level and subject area using the

same assessment, in keeping with all applicable statutes and regulations.

Finally, the Department offers competitive grant funds to State applicants to support specific kinds of assessment development. Under the ESEA, as amended by the NCLB, these grants were called the Enhanced Assessment Grants; in the ESEA, as amended by the ESSA, similar authority exists in section 1203. The most recent competition included a competitive preference priority for applicants proposing projects that develop innovative assessment items, which a State would incorporate into its statewide assessment system (for more information, see *www.ed.gov/programs/eag*).

Changes: None.

Comments: One commenter suggested revising § 200.2(d) to include requirements related to the background and expertise of individuals who serve as assessment peer reviewers to ensure that the reviewers are well positioned to determine whether a State has met all applicable requirements. Another commenter suggested, in particular, that stakeholders from diverse backgrounds be included in the assessment peer review process, to the extent practicable.

Discussion: We recognize the commenters' intent to ensure that the individuals who serve as assessment peer reviewers of State assessments possess the necessary skills and background to make informed determinations, but we believe such specificity is unnecessary in the final regulations. The individuals best suited to evaluate State assessments may vary depending on the type of assessment under review (*i.e.,* AA–AAAS versus ELP assessments), and further regulation in this area could unintentionally inhibit the Department from selecting the most knowledgeable and appropriate peer review teams based on the context of the State assessments under review.

Changes: None.

Comments: A few commenters contended that assessment peer review is too burdensome for States and advocated reducing or eliminating it.

Discussion: Assessment peer review, as required under section 1111(a)(4) of the ESEA, is the Department's primary mechanism for ensuring that States implement high-quality academic assessments that meet the requirements of the law. Since these assessments are a factor in school accountability systems and provide a critical window into student educational opportunity and progress in closing achievement gaps, a key purpose of title I of the ESEA, we think it is important to administer the process in a thorough manner. That said, as the Department considers future non-regulatory assessment peer review guidance aligned with the ESEA and these regulations, we welcome stakeholder input into how to support States in meeting all requirements under the law and in these regulations.

Changes: None.

Information to Parents

Comments: Multiple commenters wrote in support of § 200.2(e), which requires information provided to parents to be (1) in an understandable and uniform format, (2) written, to the extent practicable, in a language and format that parents can understand or, if it is not practicable for a written translation, orally translated, and (3) available in alternate formats accessible to parents with disabilities upon request. These commenters cited the importance of ensuring parents receive information about assessments that is clear, transparent, and in formats and languages they can access and understand in order to facilitate meaningful parental engagement and involvement in their child's education and improve student outcomes. One commenter specifically recommended we revise the final regulations to require States to make available a written translation of notices to parents in at least the most populous language in the State. This commenter argued that such a requirement is consistent with provisions related to assessments in languages other than English under proposed § 200.6(f) and would not be overly burdensome. Another commenter recommended that the Department develop guidance to offer additional clarity and best practices in this area, including examples of model notices, to help support States in making information to parents fully accessible. Some commenters also recommended requiring that all written notices include information on how a parent can request free language assistance from a school or district if a written translation is not available. Another commenter requested that the regulations explicitly note that the requirements apply to making information available in Native American languages.

However, a few commenters argued the opposite—that compliance with § 200.2(e) would be overly burdensome and costly for local districts, particularly those requirements related to providing information in a language that parents can understand. One commenter noted that these provisions could be particularly challenging to implement in States with Native American populations, and sought additional guidance from the Department on circumstances in which a language is more common at a local level, yet rare nationally, and where some languages are primarily oral and not written. In addition, another commenter recommended only including the statutory language, thereby removing requirements related to written and oral translations and alternate formats.

Discussion: We appreciate the strong support of many commenters for § 200.2(e) and the suggestions for future non-regulatory guidance on providing accessible information to parents. Section 1111(b)(2)(B)(x) of the ESEA requires each State to produce individual student interpretive, descriptive, and diagnostic reports on achievement on assessments that allow parents, teachers, principals, and other school leaders to understand and address students' specific academic needs. In order to ensure that a parent receives needed information about a child's academic progress, section 1111(b)(2)(B)(x) further requires a State to provide this information in an understandable and uniform format, and to the extent practicable, in a language that parents can understand. We believe these requirements for meaningful access to assessment information—and the clarifications provided by § 200.2(e)—are critical in order to help parents meaningfully engage in supporting their children's education and provide consistency between these regulations and applicable civil rights laws, as explained below.

Given that such information is essential for meaningful parent engagement and involvement in decision-making related to their child's education, we disagree with the contention that compliance with § 200.2(e) would be overly burdensome and costly. Likewise, we note that if this information is provided through an LEA Web site, the information is required to be accessible for individuals with a disability not only by the ESEA, but also based on the Federal civil rights requirements of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (section 504), title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.* (title II of the ADA), as amended, and their implementing regulations, all of which are enforced by the Department's Office for Civil Rights.

We disagree with commenters that we should require only written translations and not allow for oral translations, or require oral translations and alternate formats only to the extent practicable. Parents with disabilities or limited

English proficiency have the right to request information in accessible formats. Whenever practicable, written translations of printed information must be provided to parents with limited English proficiency in a language they understand, and the term ''language'' includes all languages, including Native American languages. However, if written translations are not practicable for a State to provide, it is permissible to provide information to limited English proficient parents orally in a language that they understand. This requirement is not only consistent with the Department's longstanding interpretation of the phrase ''to the extent practicable,'' it is also consistent with Title VI of the Civil Rights Act of 1964 (Title VI), as amended, and its implementing regulations. Under Title VI, recipients of Federal financial assistance have a responsibility to ensure meaningful access to their programs and activities by persons with limited English proficiency. It is also consistent with Department policy under Title VI and Executive Order 13166 (Improving Access to Services for Persons with Limited English Proficiency).

We decline to further define the term ''to the extent practicable'' under these regulations, but remind States and LEAs of their Title VI obligation to take reasonable steps to communicate the information required by the ESEA, as amended by the ESSA, to parents with limited English proficiency in a meaningful way.[5] We also remind States and LEAs of their concurrent obligations under Section 504 and title II of the ADA, which require covered entities to provide persons with disabilities with effective communication and reasonable accommodations necessary to avoid discrimination unless it would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. Nothing in ESSA or these regulations modifies those independent and separate obligations. Compliance with the ESEA, as amended by the ESSA, does not ensure compliance with Title VI, Section 504, or title II of the ADA.

Changes: None.

Other Comments Related to State Responsibilities for Assessment

Comments: One commenter wrote in general support of the requirement to assess all students under § 200.2(b)(1), noting that this provision is particularly critical for historically underserved populations of students like children with disabilities.

Discussion: We appreciate the commenter's support for the proposed regulations, which were intended to ensure equity and educational opportunities for all students, including children with disabilities.

Changes: None.

Comments: One commenter suggested the regulations replace the slash (/) in reading/language arts with ''or'' to make the language consistent with the statutory requirements to assess students in reading or language arts.

Discussion: We recognize the commenter's point that the ESEA uses ''reading or language arts'' to describe the academic content standards in these subjects, but note that the prior authorizations of the ESEA, the NCLB and the Improving America's Schools Act of 1994, also used the term ''reading or language arts'' to describe standards in these subjects, while the corresponding regulations used the term ''reading/language arts.'' As this is consistent with policy and practice for over two decades and we are unaware of significant confusion in this area, we believe it is unnecessary to change ''reading/language arts'' in § 200.2 and other sections of the final regulations.

Changes: None.

Comments: One commenter suggested adding a requirement to § 200.2 highlighting improved test security measures as a potential use of formula funds provided for State assessments under section 1201 of the ESEA, noting instances of testing irregularities that could be prevented with additional resources to support enhanced security measures.

Discussion: In general, effective test security practices are needed in order for a State to demonstrate strong technical quality, validity, and reliability, which the statute and regulations already require. We believe that specific expectations related to test security are best reflected in non-regulatory guidance. Existing non-regulatory assessment peer review guidance (available at *http://www2.ed.gov/admins/lead/account/peerreview/assesspeerrevst102615.doc*) for State assessments details the types of evidence States might submit to demonstrate strong test security procedures and practices. We therefore believe additional emphasis on test security in § 200.2 is unnecessary. Further, comments on funding for State assessment systems under section 1201 of the ESEA are outside the scope of these regulations. However, we note that using funds under 1201 to improve test security would be permissible.

Changes: None.

Comments: One commenter expressed concern about the risk of technical failure on a computer-based test and about the computing skills needed for a student to demonstrate knowledge and skills on such a test. Another commenter articulated similar concerns specifically with regard to English learners.

Discussion: The Department shares the commenters' concern about the risk of technical failure and encourages States to prepare thoroughly for technology-based assessments, including through building in needed back-up systems to ensure continuity of operations. As students grow up in an increasingly technology-based world, many are digital natives. However, we agree with the commenters' concerns about opportunity to access technology, and continue to support schools and districts in creating innovative means of providing equitable access to technology for all students, including English learners. Nothing in these regulations either requires or restricts the use of technology-based assessments, provided such assessments are accessible to all students, including students with disabilities, and we believe these topics are better suited to non-regulatory guidance and should be subject to a State's discretion.

Changes: None.

Comments: Several commenters suggested adding requirements that States must engage educators in developing (1) guidance on creating a positive testing environment in schools leading toward data-driven decisions; (2) tools for using tests to measure student growth and progress over time; and (3) ongoing professional development for teachers in using assessment data.

Discussion: While the Department appreciates the intent of these commenters to improve the assessment experience for educators, we decline to require these activities. We believe these efforts are most likely to be successful and meaningful if they are undertaken in response to community demand and buy-in from classroom teachers, school leaders, and local administrators—not in response to a Federal requirement. The Department anticipates updating non-regulatory guidance related to using Federal funds to support assessment literacy and implementing President Obama's Testing Action Plan.

Changes: None.

Comments: Multiple commenters recommended that the final regulations specifically allow States to adopt

[5] For more information on agencies' civil rights obligations to Limited English Proficient parents, see the Joint Dear Colleague Letter of Jan. 7, 2015, at Section J. (*http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf*).

innovative assessments statewide or in a subset of LEAs without seeking approval or any flexibility from the Department, so long as the State or LEA continues to administer its annual statewide assessments as described in § 200.2 and related regulations.

Discussion: We agree with the commenters that nothing in these regulations precludes an LEA or State from adopting and implementing innovative assessments in addition to the statewide assessments it uses to meet the requirements of section 1111(b)(2) of the ESEA. A State also does not need special flexibility if it uses an innovative approach statewide to meet the requirements of section 1111(b)(2) of the ESEA and these regulations. A State only requires special flexibility from the Department if it is seeking to use an innovative assessment in a subset of LEAs *and* permit these LEAs to forego administration of the statewide assessment while it scales the innovative assessments to operate statewide. In those cases, a State requires Innovative Assessment Demonstration Authority under section 1204 of the ESEA. Because the Department intends to issue separate regulations on this new authority, we believe additional clarification in these final regulations on assessments under part A of title I is unnecessary.

Changes: None.

Section 200.3 Locally Selected, Nationally Recognized High School Academic Assessments

Definition of ''Nationally Recognized High School Academic Assessment''

Comments: Some commenters supported the proposed definition of a ''nationally recognized high school academic assessment.'' Other commenters opposed it for various reasons, including the desire to include an individualized State higher education entrance or placement examination (*i.e.,* one that may be in use in a given State's system of higher education, but not across multiple States), a request for a particular assessment to meet the definition, and a concern that the proposed definition would preclude assessments used by career and technical education programs.

Discussion: The negotiated rulemaking committee discussed the definition of ''nationally recognized high school academic assessment'' at length and came to consensus on the proposed definition. Specifically, the committee agreed that, in order to be nationally recognized, an assessment must be in use in multiple States and recognized by institutions of higher education in those or other States for the purposes of entry or placement in those institutions. Since the statute specifically limits this exception to nationally recognized assessments, we do not think it is consistent with the statute to allow for assessments used only in a single State to meet the definition. The definition does not identify any specific academic assessment as allowable; neither does it preclude the use of any specific assessment that meets the definition. Any assessment given by a State or an LEA to meet the requirements of this subpart must be aligned with the challenging State academic standards, in keeping with §§ 200.2(b)(3) and 200.3(b)(1)(i)–(ii). Finally, since a State's high school assessment must assess the high school standards broadly, and since those standards are required by section 1111(b)(1)(D) to be aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards, we believe the definition is sufficiently broad to include assessments recognized by both postsecondary education and career training programs. We, therefore, disagree with commenters who worry that the use of this definition will adversely affect career and technical training programs. An LEA could request to use an assessment honored by career and technical training programs provided it fully meets the definition, including alignment with challenging State academic standards and use for entrance or placement in postsecondary education programs in multiple States.

Changes: None.

State Authority Over Locally Selected, Nationally Recognized High School Academic Assessments

Comments: Some commenters supported the clarification that a State has authority over whether to allow LEAs to request to use a locally selected, nationally recognized high school academic assessment. Others asked for more details regarding this authority, such as whether States would need to provide justification for choosing not to allow LEAs to request such an assessment and whether a State could, in subsequent years, revoke its approval of an individual LEA's use of a locally selected, nationally recognized high school academic assessment.

Discussion: Section 1111(b)(2)(H) of the ESEA affirms a State's authority to decide whether to allow LEAs in the State to request to use a locally selected, nationally recognized high school academic assessment in place of the statewide test. If a State decides to implement this authority, it must establish technical criteria to determine whether an assessment an LEA proposes meets those criteria and warrants approval, or disapproval if it does not meet the criteria. Because a State may decide not to offer LEAs this flexibility initially, the State has inherent authority to revoke, for good cause, the authority after it has been granted. Good cause might include, for example, concern about an LEA's implementation, such as when a substantial portion of students are not assessed in the LEA or when students are not receiving appropriate accommodations. Additionally, a State might revoke approval in general as a result of changes in State statute, regulation, or policy. We encourage a State to establish the criteria for doing so to ensure transparency in the system for LEAs and other stakeholders and to ensure there is sufficient time and a process in place for any such LEAs to revert to administration of the statewide assessment in all high schools.

Changes: We have revised § 200.3(b)(3) to specify that a State may approve or disapprove a request from an LEA based on whether the request meets the requirements of this section. We have also added § 200.3(b)(3)(iii) to specify that a State may, for good cause, revoke approval once granted.

Parental Consultation and Notification

Comments: Some commenters supported the requirements for an LEA to notify parents and offer them an opportunity to provide meaningful input into the LEA's application to the SEA regarding the use of a locally selected, nationally recognized high school academic assessment. One commenter opposed this requirement and suggested that notification of, and consultation with, parents be permitted but not required. Another commenter requested that the Department further strengthen consultation requirements regarding locally selected, nationally recognized high school academic assessments.

Discussion: We affirm the importance of parental notification and meaningful input from families regarding LEA use of a locally selected, nationally recognized high school academic assessment. The negotiated rulemaking committee strongly supported such parental engagement and notification. Since administration of a locally selected, nationally recognized high school academic assessment might impact the local instructional program,

parents and families should have the opportunity to engage in such a decision in order to ensure that it meets the needs of the whole district. Further, we are revising the final regulations to require that an LEA notify parents of how students, as appropriate, can be involved in providing input, recognizing that high school students are also significantly affected by the LEA's choice to use a locally selected, nationally recognized high school academic assessment, especially as these assessments may support their efforts to enroll in, or receive academic credit, in postsecondary institutions. At the same time, we believe that requiring notification and input prior to an LEA application to use such an assessment, along with notification upon approval of such application and in each subsequent year of use, is adequate to facilitate ongoing and meaningful parental involvement in decision making on this topic.

Changes: We have revised § 200.3(c)(1)(i)(B) to require an LEAs to afford students, as appropriate, an opportunity to provide meaningful input regarding the LEA's intent to use a locally selected, nationally recognized high school academic assessment.

Charter School Consultation

Comments: Several commenters specifically supported § 200.3(c)(1)(ii) and (c)(2)(ii) concerning charter school and charter school authorizer consultation when LEAs, including charter school LEAs, plan to propose using a locally selected, nationally recognized high school academic assessment in place of the statewide test.

Discussion: We agree with the commenters that the provisions requiring explicit consultation with charter schools and charter school authorizers are important and appreciate the commenters' support.

Changes: None.

LEA-Wide Assessment

Comments: A number of commenters supported the proposed regulations as written, including by affirming the importance of a single consistent assessment across a district. One commenter further requested that the Department require that any LEA in a State using a locally selected, nationally recognized high school academic assessment in place of the statewide test use the same such assessment as all other LEAs in that State not using the statewide high school test.

Other commenters opposed the requirement that an LEA use the same locally selected, nationally recognized high school academic assessment for all high school students in the LEA and requested that the Department revise the language in § 200.3(a)(2) to permit an LEA to administer multiple locally selected, nationally recognized high school assessments, arguing that decisions should be made at either the school or student level. Of these, certain commenters were particularly concerned that requiring a single assessment across an entire LEA makes it harder for larger LEAs to take advantage of this flexibility. Some commenters argued that the Department exceeded its authority, including one commenter who asserted that the Department violated prohibitions in section 1111(e) of the ESEA, in requiring a single locally selected, nationally recognized assessment in a district, and others expressed concern that requiring a single assessment would limit career and technical education pathways. Another commenter argued that the limit of one assessment per district should be unnecessary if any locally selected, nationally recognized high school academic assessment must be as rigorous as or more rigorous than the statewide test.

Discussion: Requiring a single assessment across an entire LEA intentionally promotes fairness and access by continuing to require a consistent measure of student achievement for all students in a district, except for students with the most significant cognitive disabilities whose performance under this subpart may be assessed with an AA–AAAS. We acknowledge that the complexity involved in implementing any assessment is greater in a large school district than it is in a small school district. Broadly speaking, large and small school districts face different challenges and approach them with disparate resources. The alternative—allowing multiple high school academic assessments within the same district—opens the door to the problematic situation whereby expectations may decrease over time for some students if higher-achieving students consistently take a different test. In addition to being required by the ESEA, the same high expectations for all students are needed to ensure that all students have the opportunity to graduate college and career ready. It is for this reason more than any other that the Department affirms the importance of an LEA offering a single LEA-wide assessment. Particularly given that the statute allows for an assessment that is more rigorous than the statewide test, it is important to ensure that implementing this new flexibility in the law does not lead to ''tracking'' students at a young age, creating lower expectations for some students than the ones that exist for their peers.

Given that locally selected, nationally recognized high school academic assessments would be used in the Academic Achievement indicator for purposes of the statewide accountability system under section 1111(c) of the ESEA, including the requirements that a State must meet regarding annual meaningful differentiation and identification of schools having the greatest success and those in need of additional support, meaningful school-to-school comparisons of student achievement are needed. During negotiated rulemaking, the negotiators reached consensus on the value of preserving within-district direct comparability of results, particularly for reporting on LEA report cards, transparency, and school accountability determinations.

Furthermore, the statutory language in this case is singular, articulating what a State does if it chooses to allow an LEA to request ''a'' locally selected, nationally recognized assessment. For all of these reasons, we believe that the application of the single assessment per LEA is consistent with the statute. However, we believe section 1111(b)(2)(H)(iii) of the ESEA is clear that LEAs could each select a distinct nationally recognized high school academic assessment so long as such assessment is supported with evidence that it meets the State's technical criteria and the Department's assessment peer review.

In response to questions about the Department's authority, the regulations are well within the Department's rulemaking authority. As provided in section 1601(a) of the ESEA, the Secretary may ''issue, in accordance with subsections (b) through (d) and subject to section 1111(e), such regulations as are necessary to reasonably ensure that there is compliance with this title.'' As discussed above, we believe requiring an LEA to administer the same nationally recognized high school academic assessment to all high school students in the LEA is necessary to ensure, as required by section 1111(b)(1) and (b)(2)(B)(i) of the ESEA, that an LEA applies the same high expectations to all students so that all students have the opportunity to graduate college and career ready. The alternative opens the door to an LEA's decreasing expectations over time for some students if higher-achieving students consistently take a different test. The

Department followed the requirements in section 1601(b) of the ESEA by subjecting the proposed regulations to negotiated rulemaking and the negotiating committee agreed with the proposed regulations by consensus. Moreover, the final regulations do not violate section 1111(e) of the ESEA, which prohibits the Secretary from promulgating any regulations that are inconsistent with or outside the scope of title I, part A. Rather, these regulation are consistent and specifically intended to ensure compliance with section 1111(b)(1) and (b)(2)(B) of the ESEA. The Department also has rulemaking authority under section 410 of the General Education Provisions Act (GEPA), 20 U.S.C. 1221e–3, and section 414 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3474.

Changes: None.

Comments: Certain commenters proposed allowing LEAs to phase in a locally selected, nationally recognized high school academic assessment over a number of years, such as over the course of two years.

Discussion: While an LEA may elect any number of transition strategies, it must annually assess all students in the district using the same assessment. Long-standing practice holds that entire States—including both large and small districts within them—transition in a single year from one assessment to another. An LEA, whether large or small, could rely on lessons learned and strong practices from such prior transitions in making a change for all schools in the district. For example, an LEA could pilot a locally selected, nationally recognized assessment with a subset of students in one year, so long as those students also take the statewide assessment. In some cases, students might already be taking such assessments for other purposes, which would limit the burden of such a transition since it would allow an LEA to implement the assessment without requiring students to take additional tests beyond those the students already plan to take. While best practice would encourage substantial training and preparation in advance of the new assessment, the transition itself must occur in a single year.

Changes: None.

Technical Requirements of a Locally Selected, Nationally Recognized High School Academic Assessment

Comments: Some commenters expressed concern that some locally selected, nationally recognized high school academic assessments may not fairly evaluate the performance of all students or all subgroups of students, particularly low-performing students. Commenters included citations to recent research regarding specific assessments. These commenters proposed revising the regulations to provide that a State may only approve a locally selected, nationally recognized assessment that measures the full range of student academic performance against the challenging State academic standards. On the contrary, other commenters expressed concern that the regulations as proposed would preclude the use of one or more assessments they are particularly interested in using under this flexibility.

Discussion: The Department agrees with the commenters' focus on the importance of an assessment providing meaningful information across the full performance spectrum. The Department believes that the technical requirements for assessment, articulated in § 200.2 and applied to locally selected, nationally recognized high school academic assessments through the provision in § 200.3(b)(1)(iv), are adequate to address this concern. In addition, if a State determines that an assessment an LEA requests to use meets the State's technical criteria, the State must also submit that assessment to the Department for assessment peer review. Issues of technical quality, such as this one, would be addressed through that peer review.

Regarding commenters' concerns that the regulations would preclude use of a particular assessment, the regulations are intended to ensure that assessments approved by a State through this flexibility meet all requirements for statewide assessments in general. This flexibility is only appropriate in such cases. The regulations do not either preclude, or proactively include, any particular assessments. However, if an assessment does not meet all general assessment requirements and statutory and regulatory requirements specific to this flexibility, including the definition of a ''nationally recognized high school academic assessment,'' it would not be eligible for use under this flexibility.

Changes: None.

Requests for Clarification Regarding Implementing a Locally Selected, Nationally Recognized High School Academic Assessment

Comments: One commenter asked whether a State may approve a particular assessment for an LEA within the State but deny another LEA's request to use the same assessment. Another commenter asked for guidance for States on developing technical criteria to review assessment requests from LEAs.

Discussion: Section 1111(b)(2)(H)(iii)(III) of the ESEA explains that, once a State approves a particular assessment within the State, other LEAs within the same State may use that assessment without again completing the full technical review process. However, a State would expect an LEA requesting to use a locally selected, nationally recognized high school academic assessment to complete an application for that authority, including required consultation and parent notification. A State would consider all available evidence relative to that application before granting flexibility under this section, and would have the authority to deny or request modification to an application if it felt that consultation and parental notification of an LEA had not been adequate.

Regarding requests for specific guidance, we encourage States to work with support organizations, such as Regional Education Laboratories, Comprehensive Centers, and State program officers at the Department, to gain technical assistance for implementation, including on establishing technical criteria for reviewing locally selected, nationally recognized academic assessments.

Changes: None.

Appropriate Accommodations for Students With Disabilities and English Learners on Locally Selected, Nationally Recognized High School Academic Assessments

Comments: Numerous commenters wrote in support of § 200.3(b)(2)(i) that requires a State to ensure that accommodations under § 200.6(b) and (f) used on a locally selected, nationally recognized high school assessment do not deny a student with a disability or an English learner either the opportunity to participate in the assessment or any of the benefits from participation in the assessment that are afforded to students without disabilities or who are not English learners. Other commenters requested clarification that accommodations need only be offered if they can be administered in a way that maintains the validity and reliability of the test items based on the specific construct the items are intended to measure. One commenter requested that the Department address specific assessment vendors, and not States, regarding this issue. Finally, a commenter asked for guidance regarding how States should address accommodations requests, particularly in the context of requests for

accommodations that would normally be allowed under State guidelines but that a particular assessment vendor for a locally selected, nationally recognized high school academic assessment does not permit.

Discussion: As described in detail in § 200.2(b)(4)(i) and section 1111(b)(2)(B)(iii) of the ESEA, State assessments must be valid and reliable for their intended purposes. Assessments must also provide for the participation of all students, as required in § 200.2(b)(2)(i) and section 1111(b)(2)(B)(vii) of the ESEA. At the same time, each State has discretion over which assessments it uses to meet these requirements, including any nationally recognized assessment the State approves an LEA to select and administer in high schools. In general, with respect to students with disabilities, if a State typically allows a particular accommodation on a State assessment in accordance with the State accommodations guidelines required under section 612(a)(16)(B) of the IDEA, which indicates that such an accommodation does not invalidate the assessment's results, it is the additional responsibility of the State to ensure that a student who requires and uses such an accommodation is not denied any benefit afforded to a student who does not need such an accommodation. Similarly, if an English learner needs appropriate accommodations to demonstrate what the student knows and can do in academic content areas, those accommodations must be available on a locally selected, nationally recognized academic assessment. A State is responsible under the ESEA and under the Federal civil rights laws (including Title VI, section 504, and title II of the ADA) for ensuring that the assessments it provides, or approves its LEAs to provide, are fully consistent with these requirements. If a given assessment would offer some students a benefit, such as a college-reportable score, that would not be available to another student taking the same assessment using an accommodation allowed on the State test, the State may not offer or approve such an assessment under the exception for locally selected, nationally recognized high school academic assessments. A State, rather than an assessment vendor, is the recipient of a title I, part A grant. As a result, the responsibility lies with the State to approve only a nationally recognized assessment that meets all applicable requirements, which may include working with affected vendors to ensure all appropriate accommodations are available.

Changes: None.

Implications for Students Taking an AA–AAAS

Comments: One commenter expressed concern that, if students in an LEA who take a general assessment shift to a locally selected, nationally recognized high school academic assessment for which there is no AA–AAAS, conclusions drawn across subgroups of students could be impacted, since students taking the AA–AAAS would be taking an alternate version of the statewide assessment, not the locally selected assessment.

Discussion: The Department acknowledges this concern, and is committed to supporting States in ensuring the validity of interpretations across subgroups. Because a State must develop an AA–AAAS against the same challenging State academic content standards that both the statewide general assessment and any locally selected, nationally recognized academic assessment also measure, conclusions drawn across the locally selected, nationally recognized assessment and an AA–AAAS should be valid if all tests are well designed and implemented. A State must demonstrate through assessment peer review that this is the case.

Changes: None.

Comparability

Comments: One commenter requested that the Department clarify that ''comparability'' across two assessments does not necessarily mean that the specific raw scores on the two assessments have the same meaning. Another commenter asked that the Department emphasize the importance of any locally selected, nationally recognized assessment providing comparable data between and among student subgroups, schools, and districts, including for low-performing students. One commenter expressed support for the statutory language, also reflected in the proposed regulations, requiring that locally selected, nationally recognized high school academic assessments be equivalent to or more rigorous than statewide assessments.

Discussion: The Department agrees that comparability does not imply that two assessments produce identical scale scores for students performing at the same level. Rather, comparability in this context means that students who perform similarly should be likely to meet the same academic achievement level on both assessments. Since the State will separately examine and confirm, through the approval process, that each locally selected, nationally recognized high school academic assessment measures the challenging State academic content standards, the State should have strong evidence that any approved assessment appropriately measures the challenging State academic standards in a manner comparable to the statewide assessment. Specifically, any assessment a State or LEA uses to meet the requirements of title I, part A must, among other requirements, cover the breadth and depth of the challenging State academic standards and be valid and reliable for all students, including high- and low-performing students. To be fully comparable at the level of student academic achievement determinations, the locally selected, nationally recognized high school academic assessment must provide results relative to each of the academic achievement levels in a similar manner to that provided by the statewide assessment. We believe these requirements are adequately enumerated in § 200.2, and we note that § 200.3(b)(1)(iv) requires locally selected, nationally recognized academic assessments to meet all requirements of § 200.2 except the requirement in § 200.2(b)(1) that all students in the State take the same assessment.

The Department agrees that additional specificity is needed in § 200.3(b)(1)(v) to clarify that the comparability expected is at each level of the State's academic achievement standards, not scale scores. We also note that, in addition to producing comparable data as described in § 200.3(b)(1)(v), section 1111(b)(2)(H)(v)(I) of the ESEA and § 200.3(b)(1)(iii) require that a locally selected, nationally recognized high school academic assessment must be equivalent to or more rigorous than the statewide assessments regarding academic content coverage, difficulty, overall quality, and any other aspect of assessments that a State may choose to identify in its technical criteria.

Changes: We have revised § 200.3(b)(1)(v) to clarify that comparability between a locally selected, nationally recognized high school academic assessment and the statewide assessment is expected at each level of a State's challenging academic achievement standards.

Highly Mobile Students

Comments: A commenter expressed concern for highly mobile students who could face increasingly disparate educational environments across districts within a State as a result of the

districts administering locally selected high school assessments.

Discussion: We share the commenter's concern for supporting the unique needs of highly mobile students, including migratory students, students in foster care, homeless students, and military-connected youth. We have recently released non-regulatory guidance regarding ESSA provisions related to homeless students and youth (please see *http://www2.ed.gov/policy/elsec/leg/essa/160240ehcyguidance072716.pdf*) and students in foster care (please see *http://www2.ed.gov/policy/elsec/leg/essa/edhhsfostercarenonregulatorguide.pdf*).

A locally selected, nationally recognized high school academic assessment approved by a State must measure the same challenging State academic standards and produce valid, reliable, and comparable results to the statewide high school assessment. These requirements should serve to ensure reasonable continuity across LEAs for mobile students.

Changes: None.

Locally Selected Academic Assessments in Grades Other Than High School

Comments: One commenter recommended that the Department change the regulations to allow for locally selected, nationally recognized academic assessments in grades three through eight, particularly since the commenter was from a State that passed a law allowing for such flexibility.

Discussion: Section 1111(b)(2)(H) only authorizes locally selected high school academic assessments; it does not permit locally selected assessments in grades lower than high school. The regulations are consistent with the statute in limiting locally selected, nationally recognized academic assessments to high school.

Changes: None.

Processes for Local Selection and State Technical Review

Comments: One commenter requested details of the processes by which an LEA would select a nationally recognized high school academic assessment, including whether there would be an election to determine who can make such a decision and what the needed qualifications for such a person would be.

Discussion: Section 1111(b)(2)(H)(iii)(I) of the ESEA, requires a State to create a review process and examine the technical quality of locally selected, nationally recognized high school academic assessments. However, neither the statute nor the regulations prescribe the specific process a State must undertake. Since a locally selected, nationally recognized high school academic assessment must meet all requirements of § 200.2 (except the requirement that all students in the State take the same assessment), a State could reasonably use the technical expectations articulated in that section as a basis for its review. As described above, we encourage States to work with support organizations, such as Regional Education Laboratories, Comprehensive Centers, and State program officers at the Department, for technical assistance with implementation.

Since a State will determine the specific process for review and approval, it will also have discretion over the individuals involved in such a decision, including whether any election would be held. We expect that State education officials, who may be elected, appointed, or otherwise selected, would lead the process; however, States have discretion in this area.

Changes: None.

Departmental Assessment Peer Review

Comments: One commenter objected to the requirement in § 200.3(b)(2)(ii) that a State submit locally selected, nationally recognized high school academic assessments to the Department for assessment peer review, including by contending that this requirement is contrary to the spirit of the ESSA. Another commenter requested that peer review not create preferential treatment for any particular assessments, especially assessments developed by consortia of States. An additional commenter asked that the Department expand the assessment peer review process in the context of a locally selected, nationally recognized high school academic assessment in order to require that a State submit a plan for how it will ensure that all assessments administered across the State are comparable and how they ensure stakeholders had the opportunity for meaningful consultation. Other commenters asked that the Department make public the results of ongoing assessment peer review as soon as possible, particularly in cases where a State has submitted a nationally recognized high school academic assessment as its statewide test.

Discussion: Section 1111(b)(2)(H)(iii)(II) of the ESEA, requires each State to submit evidence to the Department for assessment peer review following the State's own technical review that a locally selected, nationally recognized high school academic assessment meets the requirements of §§ 200.2 and 200.3. Generally, assessment peer review is intended to serve as an opportunity for technical experts to provide objective feedback regarding an assessment system and to ensure that any assessments administered meet the requirements of title I of the ESEA. The Department anticipates that it will be necessary to update the assessment peer review non-regulatory guidance to include consideration of locally selected, nationally recognized high school academic assessments, which would outline examples of relevant evidence. We think considerations related to such examples are best suited for such non-regulatory guidance. While members of an assessment consortium may be able to submit some evidence in common, the process is intended to provide balanced feedback regarding any assessment system to ensure that States and districts meet the requirements of the law and that there is no preferential treatment for particular assessments or consortia. The Department will release results of 2016 assessment peer review as soon as possible, and has provided general information regarding the process moving forward through a Dear Colleague Letter on October 6, 2016 (see *http://www2.ed.gov/admins/lead/account/saa/dcletterassepeerreview1072016ltr.pdf*).

Regarding opportunities for consultation, § 200.3(c)(1) requires an LEA to notify all parents of high school students it serves that the LEA intends to request to use a locally selected, nationally recognized high school academic assessment in place of the statewide academic assessment and inform parents of how they may provide meaningful input regarding the LEA's request as well as of any effect such request may have on the instructional program in the LEA. It also requires meaningful consultation with all public charter schools whose students would be included in such assessment. In addition, § 200.3(c)(2) requires an LEA to update its LEA plan under section 1112 or section 8305 of the ESEA, including by describing how the request was developed consistent with all requirements for consultation under the respective sections of the ESEA. While the Department appreciates the commenter's suggestion that review of this requirement become a requirement of assessment peer review, the Department declines to specify the mechanism for monitoring this requirement at this time, but notes that monitoring of this and all other

provisions will be established as implementation moves forward.

Changes: None.

Section 200.5 Assessment Administration

Grades and Subjects Assessed

Comments: Some commenters appreciated the need for high-quality annual assessments that provide useful data for educators, parents, and the public. Others, however, suggested that annual reading/language arts and mathematics assessments in grades 3 through 8 should not be required in all grades, recommending less frequent assessment (*e.g.,* only administer the assessments once in each of grades 3 through 5 and 6 through 8; only administer assessments in particular grades, such as high school) or assessing only a sample of students annually.

Discussion: Section 1111(b)(2)(B)(i) and (v)(I) of the ESEA requires that a State administer an assessment in reading/language arts and mathematics to all students annually in each of grades 3 through 8 and at least once in grades 9 through 12. In addition to being required by the statute, annually assessing all students provides important information about the progress students are making toward achieving the State's challenging academic standards. It also provides valuable information to parents, families, stakeholders, and the public about the performance of schools and LEAs.

Changes: None.

Comments: Two commenters requested that the grades for which a State must administer an assessment in high school should be consistent between reading/language arts, mathematics, and science.

Discussion: The proposed and final regulations in § 200.5(a)(1) are consistent with the statute; section 1111(b)(2)(B)(v)(I)(bb) of the ESEA requires that each State administer a reading/language arts and mathematics assessment in high school at least once in grades 9 through 12, and section 1111(b)(2)(B)(v)(II)(cc) requires the State to administer a science assessment in high school at least once in grades 10 through 12.

Changes: None.

Comments: One commenter expressed concern about any reading/language arts assessments that do not include writing, speaking, and listening. This commenter urged increased involvement of educators in assessment development.

Discussion: The Department agrees with the commenter about the importance of educator involvement in assessment development. Regarding the specific components of a reading/language arts assessment, a State must adopt challenging State academic standards and develop assessments that are fully aligned with the domains represented in those standards. The Department does not prescribe content to be covered in a State's academic standards. If a State includes specific content in its standards, it will need to demonstrate through assessment peer review that the corresponding assessment is fully aligned to those challenging State academic standards, including their depth and breadth as described in § 200.2(b)(3). Accordingly, we decline to make further changes to the regulations.

Changes: None.

Comments: One commenter requested that we clarify the grades in which the State must administer an ELP assessment, specifically whether the annual ELP assessment is required in preschool programs.

Discussion: Section 1111(b)(2)(G) of the ESEA requires a State to annually administer its ELP test to all students who are identified as English learners in schools served by the State. We are clarifying this in the final regulations, as a State's ELP assessments are an important piece, alongside assessments of academic content in reading/language arts, mathematics, and science, in the statewide assessment system. Further, we are revising the final regulations to clarify that this requirement applies to all students in the State's public education system, kindergarten through grade 12, who are identified as English learners.

Changes: We have revised § 200.5(a)(2) to clarify that a State must administer its ELP assessment, described in § 200.6(h) (proposed § 200.6(f)(3)), annually to all English learners in schools served by the State, kindergarten through grade 12, and made conforming edits in § 200.6(h)(1)(ii).

Comments: One commenter requested that we require a State to administer an assessment in social studies.

Discussion: The subjects in which a State must administer an assessment are specified in section 1111(b)(2)(B)(v)(I)–(II) of the ESEA, and do not include social studies. Since the statute does not require social studies assessments, we cannot require it in the regulations. However, a State, at its discretion, may always elect to assess students in additional grade levels or subject areas as authorized in section 1111(b)(2)(A) and (b)(2)(B)(v)(III) of the ESEA.

Changes: None.

Middle School Mathematics Exception

Comments: While some commenters appreciated the flexibility afforded States for students taking advanced mathematics in middle school, one commenter asked that the flexibility not be permitted as it leads to not all students being assessed against the same challenging academic standards and creates confusion as to the implications for the State's accountability system and transparent data reporting.

Discussion: Section 1111(b)(2)(C) of the ESEA clearly permits a State flexibility to exempt eighth graders taking advanced courses and related end-of-course assessments in mathematics from the statewide eighth grade mathematics assessment and to use the results of those advanced mathematics assessments in the Academic Achievement indicator for purposes of the State's accountability system, provided the State meets certain statutory requirements. The regulations reinforce this flexibility.

Changes: None.

Comments: One commenter expressed concern about the requirements for the assessment a student would take in high school if that student took advantage of the flexibility under § 200.5(b) in eighth grade. This commenter appeared to understand the regulatory language to mean that such subsequent assessment must be administered statewide to all students.

Discussion: The requirement in § 200.5(b)(3)(i) is that a subsequent assessment be State-administered, not that it be statewide. A more advanced high school assessment is, in fact, unlikely to be administered statewide to all students. However, as the results of such assessment will inform high school accountability determinations in the State and be part of the overall State assessment system, such assessment must be administered by the State, rather than developed locally.

Changes: None.

Comments: A few commenters objected to § 200.5(b)(4), which requires an SEA taking advantage of the flexibility to describe, in the State plan, its strategies to provide all students in the State the opportunity to be prepared for and to take advanced mathematics coursework in middle school consistent with section 1111(b)(2)(C) of the ESEA. The commenters interpreted this portion of the regulations as requiring advanced mathematics for all students, and some commenters voiced concerns that pushing students into coursework for which they were unprepared could have negative consequences. One commenter felt this would create a

burden for LEAs that do not have sufficient resources.

Discussion: Section 200.5(b)(4), based on the consensus language from negotiated rulemaking, only requires an SEA to describe its strategies to provide all students in the State the opportunity to be prepared for and to take advanced mathematics coursework in middle school *if* the State administers end-of-course mathematics assessments to high school students to meet the requirements under section 1111(b)(2)(B)(v)(I)(bb) of the ESEA, and uses the exception for students in eighth grade to take such assessments under section 1111(b)(2)(C) of the ESEA. An SEA wishing to take advantage of this new statutory flexibility must describe these strategies in its State plan—not every SEA must do so.

Further, this requirement does not create the expectation that all students must take advanced mathematics coursework in middle school, even in the limited number of SEAs covered by this section. Rather, the SEA must provide the opportunity to all students to become prepared and, if prepared, to take such advanced courses in middle school in order to ensure that this flexibility benefits students across the State, not only those in certain communities or from certain backgrounds. This is consistent with the statutory purpose of title I to ''provide all children significant opportunity to receive a fair, equitable, and high-quality education.'' In seeking waivers under ESEA flexibility between 2012 and 2015, States demonstrated their efforts to make such opportunity widely available, including through support for distance and virtual learning, flexibility regarding course-taking across campuses, and other appropriate methods.

Changes: None.

Comments: Several commenters requested that the flexibility in § 200.5(b) for middle school mathematics be expanded beyond eighth graders taking advanced mathematics courses. Some of these commenters wanted the flexibility to be expanded to other grades in mathematics; others wanted it expanded to assessments in reading/language arts or science. Other commenters expressed interest in this flexibility being expanded to States that do not administer an end-of-course mathematics assessment in high school to meet the requirements in § 200.5(a)(1)(i)(B) or by permitting the use of an end-of-course assessment that is not used statewide. One commenter requested that the regulations clarify that the Department can grant waivers in this area.

Discussion: Section 1111(b)(2)(C) of the ESEA clearly limits to eighth-grade mathematics the exception for a student in middle school taking advanced coursework to be exempt from the State's grade-level test and instead take the State's high school end-of-course assessment used to meet the requirement in section 1111(b)(2)(B)(v)(I)(bb) of the ESEA. While we know that some students take advanced coursework in mathematics in earlier grades, and in subjects other than mathematics, the negotiating committee came to consensus that the regulations not expand the flexibility beyond what was expressly permitted in the statute.

The ESEA limits the middle school advanced mathematics exception to States that administer a high school end-of-course assessment to meet the requirements of section 1111(b)(2)(B)(v)(I)(bb) of the ESEA. The statute indicates that only States using an end-of-course mathematics assessment as the State's high school assessment may take advantage of the middle school mathematics exception and only for students who are taking that end-of-course assessment in eighth grade (*i.e.,* the State may not administer a different end-of-course assessment, other than the assessment used by the State to meet the requirements in section 1111(b)(2)(B)(v)(I)(bb) of the ESEA, in place of the State's eighth grade assessment).

A State may request a waiver to extend this flexibility to other grades or subjects if the State meets the requirements in section 8401 of the ESEA. We do not believe it is necessary or appropriate, however, to highlight in the final regulations this one example of a provision subject to a waiver.

Changes: None.

Comments: Two commenters recommended that States taking advantage of this flexibility be permitted to meet the requirement to administer a more advanced assessment in high school by administering a test other than an end-of-course test in high school, such as the ACT, SAT, or a test that leads to college credit, such as an Advanced Placement test or an assessment other than a nationally recognized test.

Discussion: For States taking advantage of this flexibility, we think it is important to have safeguards in the State's assessment system for the higher-level mathematics assessment that is administered to these students in high school once they have taken the State's high school mathematics assessment in eighth grade, particularly since the assessments will be used for accountability and reporting purposes under title I. In addition to a higher-level mathematics end-of-course assessment given by the State, the regulations would permit a State to administer a higher-level mathematics assessment to these students that meets the definition of a ''nationally recognized high school academic assessment,'' which may include the SAT or ACT, depending on whether it meets the requirements in § 200.3. A test, such as an Advanced Placement test, that leads to college credit, would also meet the definition in § 200.3(d), and the State could consider permitting LEAs to select that assessment and administer it in high school to students who have already taken the State's high school assessment in eighth grade, provided it meets the other requirements for nationally recognized high school academic assessments in § 200.3.

With respect to options other than an end-of-course test or a nationally recognized test, since a State taking advantage of this flexibility is using an end-of-course assessment as its high school assessment to meet the requirements in § 200.5(a)(1)(i)(B), the State will likely not have a non-end-of-course, State-administered assessment in high school unless the State is taking advantage of the ability to permit LEAs to administer a nationally recognized assessment in place of the State test.

Changes: None.

Comments: One commenter requested that the regulations require a State to provide disaggregated performance data of eighth graders taking the advanced mathematics assessment separately from the other eighth graders taking the eighth grade assessment and separately from the high school students taking the high school assessment.

Discussion: The statute does not require this level of disaggregation and therefore we decline to require it through the regulations. However, a State has flexibility to disaggregate the data if it believes such disaggregation would provide beneficial information to parents, educators, and the public.

Changes: None.

Section 200.6 Inclusion of All Students

Comments: Some commenters expressed general support for provisions in § 200.6 related to assessment of students with disabilities, including students with the most significant cognitive disabilities who may participate in an assessment aligned with alternate academic achievement standards. They found the proposed regulations helpful to ensure that all

students receive the supports they need to fully participate in the public education system, including in general education settings with their peers.

Discussion: We appreciate the commenters' support of the requirements related to assessment of students with disabilities, including students with the most significant cognitive disabilities whose performance may be assessed with an AA–AAAS if the State has adopted alternate academic achievement standards.

Changes: None.

Comments: A few commenters asserted that it was inappropriate to assess students with the most significant cognitive disabilities, even using an AA–AAAS and appropriate accommodations, believing these assessments are outside such students' range of ability. Other commenters advocated for allowing some students with disabilities to take modified assessments or to take assessments aligned with content standards other than those for the grade in which the student is enrolled.

Discussion: We strongly disagree with the commenters' contention that it is always inappropriate to assess students with the most significant cognitive disabilities. Section 1111(b)(2) of the ESEA requires each State to annually administer a set of high-quality student academic assessments in, at a minimum, reading/language arts, mathematics, and science to all public elementary and secondary school students in the State, including students with disabilities. The requirement to include all public elementary and secondary school students is a requirement to include 100 percent of students in a State in either the general assessment or an AA–AAAS for students with the most significant cognitive disabilities. An AA–AAAS, however, must be reserved for no more than 1.0 percent of students who are assessed in a State in a subject area—*i.e.,* those with the most significant cognitive disabilities, as defined by the State. Congress made clear in section 1111(b)(1)(E)(ii) of the ESSA that an AA–AAAS for students with the most significant cognitive disabilities aligned with a State's challenging academic content standards and alternate academic achievement standards is the only AA–AAAS permitted for such students; a State is prohibited from developing or implementing any other alternate academic achievement standards for students with disabilities and assessing performance under this subpart.

We are heartened by progress in the field of assessments generally, and in the development of alternate assessments and accessibility features. These advances expand opportunities for all students to demonstrate their knowledge and skills, including students with disabilities. Further, research shows positive impacts of instructing and assessing students, including students with the most significant cognitive disabilities, to high academic standards.[6] Involving such students in assessments of grade-level content using an AA–AAAS is one important way to ensure that such students receive a rigorous education like their peers.

Changes: None.

Comments: One commenter expressed concern that the proposed regulations would replace or contradict 34 CFR 300.160 and suggested incorporating the text from that regulation into this rule.

Discussion: These regulations address assessment requirements under title I, part A of the ESEA, while 34 CFR 300.160 implements the requirement in the IDEA regarding participation in assessments (see 20 U.S.C. 1412(a)(16)). Consistent with this statutory provision, 34 CFR 300.160 also requires the participation of children with disabilities in assessments described in section 1111 of the ESEA. Therefore, title I and IDEA assessment provisions for children with disabilities must be read and implemented together. While the regulations in this document cannot alter the IDEA regulations, we note that the ESEA also amended the IDEA's participation in assessment requirements, and the Department anticipates updating the IDEA regulations in 34 CFR 300.160 to reflect those amendments.

Changes: None.

Comments: One commenter suggested that private schools and private, non-approved, non-licensed, or other entities providing educational services as part of a child with a disability's individualized education program (IEP) should be subject to the proposed regulations, and that any IEP should include evidence-based goals.

Discussion: Under section 612(a)(16) of the IDEA, States must ensure that all children with disabilities are included in all general State and districtwide assessment programs, including assessments required under this subpart, with appropriate accommodations and alternate assessments where necessary as indicated in their respective IEPs. While section 614(d)(1)(A)(i)(II) requires that annual IEP goals must be measurable, it does not specifically require that IEP goals be evidence-based. Therefore, no further clarification is necessary.

The applicability of the requirements in this section to students with disabilities in private schools depends upon whether the student has been enrolled in the private school by the LEA in order to meet the student's special education and related services needs under the IDEA, as opposed to a student attending a private school at the discretion of the parents. For students with disabilities who have been placed in a private school by an LEA, the requirements in this subpart apply.

Changes: None.

Comments: Multiple commenters suggested that the Department issue non-regulatory guidance on assessments for students with disabilities, noting a particular need for further guidance on topics such as providing appropriate accommodations, related professional development, and processing requests for accommodations; flagging the scores of students taking assessments with accommodations for colleges; developing an AA–AAAS; providing accessible information to parents; measuring student growth for students with disabilities; ensuring the technical quality of assessments that are partially in the form of portfolios, projects, or extended performance tasks; and suggested examples and additional considerations for States as they define students with the most significant cognitive disabilities.

Discussion: We appreciate the commenters' suggestions for areas where non-regulatory guidance related to assessment of students with disabilities is particularly needed, and we will take these suggestions into consideration as future non-regulatory guidance—including non-regulatory assessment peer review guidance—is developed and updated.

Changes: None.

Students With Disabilities in General

Comments: A number of commenters wrote in support of the requirement in § 200.6(a)(2)(i) requiring students with disabilities (except those with the most significant cognitive disabilities) to be assessed against the challenging State academic standards for the grade level in which the student is enrolled, noting that this provision is a critical safeguard against students with disabilities being

[6] For a discussion of research regarding these benefits, see previously cited research noted in footnote 2, including in U.S. Department of Education (2015). Improving the Academic Achievement of the Disadvantaged; Assistance to States for the Education of Children with Disabilities. 80 FR 50774–50775 and 50777. Available at *https://www.federalregister.gov/documents/2015/08/21/2015-20736/improving-the-academic-achievement-of-the-disadvantaged-assistance-to-states-for-the-education-of.*

tested based on below-grade level content and would help support implementation of the Department's November 16, 2015, Dear Colleague Letter on Free and Appropriate Public Education (FAPE).[7] Some of these commenters also supported § 200.6(a)(2)(ii), noting that it provides needed clarity that students with the most significant cognitive disabilities must either be assessed using the general assessment for the grade-level in which the student is enrolled (aligned to the State's challenging academic standards), or using an AA–AAAS that is aligned with the State's academic content standards for the grade in which the student is enrolled. In particular, commenters appreciated the clear distinction made in the regulations between grade-level academic content standards that apply to all children with disabilities, and academic achievement standards.

Discussion: We agree with commenters that these distinctions between content standards and achievement standards are essential to emphasize that each child with a disability, including students with the most significant cognitive disabilities, must be assessed with assessments aligned with the challenging State academic content standards for the grade in which the student is enrolled. Further, under section 1111(b)(1)(E)(i)(V) and § 200.2(b)(3)(ii)(B)(*2*), alternate academic achievement standards must now be aligned to ensure that a student who meets those standards is on track to pursue postsecondary education or competitive integrated employment, consistent with the Rehabilitation Act of 1973, as amended by WIOA.

Changes: None.

Comments: One commenter argued that the provision requiring students with the most significant cognitive disabilities to be assessed either using the general assessment for the grade in which a student is enrolled (aligned to the State's challenging academic standards), or using an alternate assessment aligned with the State's academic content standards for the grade in which a student is enrolled and the State's alternate academic achievement standards, is beyond the scope of the ESEA, as the regulations further specify how these standards are aligned with the grade in which a student is enrolled. The commenter believed that sections 1111(b)(2)(B) and (D) of the ESEA provide a State significant discretion with regard to its challenging State academic standards, and that section 1111(b)(2)(J) allows a State using computer-adaptive assessments to be exempted from assessing students with the most significant cognitive disabilities based on grade-level standards. The commenter recommended modifying the proposed regulations to no longer require that an AA–AAAS be related to a specific grade level.

Similarly, two commenters recommended greater flexibility, given the 1.0 percent cap statewide, on student participation in the AA–AAAS. These commenters suggested that States be permitted to administer an assessment that is not aligned to grade-level academic content standards to a subset of students with severe cognitive disabilities, which one of these commenters believed would be consistent with section 1111(b)(2)(B)(vii)(II) of the ESEA.

Discussion: We disagree that it is either inappropriate, or inconsistent with the statute, to expect students with the most significant cognitive disabilities to be assessed with an assessment aligned with the challenging State academic content standards for the grade in which they are enrolled. Under section 1111(b)(1)(E)(i)(I) of the ESEA, a State may adopt alternate academic achievement standards for assessing the performance under this part of students with the most significant cognitive disabilities provided those standards are aligned with the challenging State academic content standards that the State has adopted for all students for the grade in which they are enrolled. Further, section 1111(b)(2)(B)(ii) of the ESEA links alignment of assessments with the State's challenging academic standards to providing timely information about whether students are performing at their grade level. Therefore, the statute is clear in requiring that a State must, at a minimum, assess all students in a valid and reliable manner against grade-level academic content standards consistent with the Federal assessment requirements under title I, part A. Section 1111(b)(1)(E)(ii) of the ESEA additionally prohibits a State from developing or implementing for any use under title I, part A, any other alternate academic achievement standards for children with disabilities that are not alternate academic achievement standards for students with the most significant cognitive disabilities that meet the statutory requirements.

As previously discussed, a State has the right also to assess a student against academic content standards above and below the grade in which the student is enrolled, including by using a computer-adaptive assessment, provided the State meets all applicable requirements. Those requirements include: Producing a summative score that measures a student's academic achievement against the State's academic achievement standards; reporting that score and the corresponding achievement level to parents and educators and, in the aggregate and disaggregated by subgroups, reporting student academic achievement information on State and LEA report cards; and using that score in the Academic Achievement indicator and long-term goals in the State's accountability determinations. The State does not need specific authority to offer a student assessment items, in addition to items that produce the student's annual summative score measuring achievement of the challenging State academic content standards for the grade in which the student is enrolled, regardless of whether the student takes a general assessment or an AA–AAAS.

Changes: None.

Comments: One commenter indicated that the general assessment is most appropriate for students with minor cognitive disabilities rather than an AA–AAAS, and that, if a student cannot pass the end-of-year assessment, then the student should likely be retained until it is determined the student is ready to advance to the next grade.

Discussion: The commenter is correct that, consistent with section 1111(b)(2)(D) of the ESEA, an AA–AAAS is reserved for students with the most significant cognitive disabilities, subject to the limitation that in each subject assessed, the total number of students assessed with an AA–AAAS does not exceed 1.0 percent of the total number of students who are assessed in the State in that subject. An IEP team is responsible for determining which assessment a particular child with a disability takes, in keeping with the State guidelines under § 200.6(d). While we appreciate the commenter's concern about students mastering the full scope of the State's academic content standards for their grade, the Department is prohibited by section 1111(l) of the ESEA from prescribing the use of the academic assessments required under the ESEA for student promotion or graduation purposes. This concern is more appropriately addressed at the State and local levels.

Changes: None.

Comments: Several commenters wrote regarding clarifications in proposed § 200.6(a) that specify these regulations pertain to both children with disabilities

[7] Available at: *https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf.*

that receive services provided under the IDEA, as well as children that receive services under other acts including section 504 and title II of the ADA. Many of these commenters expressed support for the clarity in the regulations regarding students covered under laws besides the IDEA to ensure all students with disabilities receive the accommodations they need. However, one commenter recommended narrowing the inclusion of students who receive services under other laws besides the IDEA to requirements related to assessment accommodations only, believing the limitation would be more consistent with the statute.

Discussion: Section 1111(b)(2)(B)(vii)(II) of the ESEA provides that appropriate accommodations for students with disabilities must extend to children with disabilities covered under the IDEA and students with a disability who are provided accommodations under laws besides the IDEA. The topic of accommodations was addressed in detail at negotiated rulemaking, where the negotiators reached consensus that it would be appropriate to include references to students who receive accommodations under section 504 and title II of the ADA in the proposed regulations. We agree with the consensus reached at negotiated rulemaking that it is important to recognize that there are students with disabilities who receive accommodations under laws other than the IDEA and to clarify that these laws include section 504 and title II of the ADA. Further, we disagree with the commenter that the regulations expand these requirements beyond assessment accommodations. As written, the provisions of the regulations that apply to students who receive accommodations under laws other than the IDEA relate to identifying students in need of assessment accommodations and do not address any other rights or responsibilities not derived from those laws. Therefore, we decline to make any changes to this section.

Changes: None.

Appropriate Accommodations and Assistive Technology

Comments: A number of commenters expressed concern that § 200.6(b)(1) suggested that States should, but did not require States to, implement assessments with accommodations that include interoperability with, and ability to use, assistive technology devices that meet nationally recognized accessibility standards, such as Web Content Accessibility Guidelines (WCAG) 2.0 and the National Instructional Materials Accessibility Standard (NIMAS). These commenters were concerned that, without changes, the regulations would not adequately support students with disabilities using assistive technology in accessing and benefitting from assessments under the ESEA. They further noted that the proposed regulations, as drafted, imply assistive technology devices would need to meet these nationally recognized accessibility standards when, they contend, it is the assessment that should meet the accessibility standards. Accordingly, such commenters suggested rewording the provision to require that State assessments be developed consistent with nationally recognized accessibility standards.

Separately, one commenter interpreted § 200.6(b)(1) in the opposite manner—that it required any accommodation selected by an IEP team to be subject to the accessibility standards—and opposed the purported requirement as unduly limiting IEP teams. Another commenter requested that the Department strike any reference to ''nationally recognized accessibility standards'' on the basis that the Department should not cede control of a regulatory provision to third parties. However, an additional commenter generally supported the provision as proposed, finding it sufficient to promote appropriate accommodations for all students with disabilities.

Discussion: We appreciate the support of commenters for the proposed regulations to ensure State assessments are accessible to all students. Section 1111(b)(2)(B)(vii) of the ESEA and these final regulations clearly require that States provide for the participation of all students in required assessments and develop assessments that are accessible to all students and that provide appropriate accommodations for English learners and students with disabilities. Section 1111(b)(2)(B)(vii)(II) of the ESEA also provides an example of one aspect of making assessments accessible by referencing interoperability with, and ability to use, assistive technology. During negotiated rulemaking, a negotiator suggested the language proposed for the negotiations regarding nationally recognized accessibility standards, and the committee came to consensus on adding such language.

Optimal use of nationally recognized accessibility standards applies equally to assessment development and to assistive technology devices. When a State identifies the technical and data standards with which its assessment system is compatible, this creates the conditions for successful, continuous integration with assistive technology devices if such devices are also consistent with the nationally recognized accessibility standards a State uses. Since both assessment development and assistive technology device development are continuous processes, clarity and common understanding are keys to integration. Data standards are a useful method of communication between States or assessment developers and assistive technology device-makers (and those who use such devices). The change most commenters requested would apply the expectation for interoperability in a manner distinct from the statute, where it is an example and not a requirement, and would place full responsibility for consistency with nationally recognized standards on States in developing the assessment system, without recognizing the importance of also expecting that assistive technology devices be compatible with common data standards. Accordingly, the Department disagrees with those commenters that such a change is needed or is appropriate.

Regarding the concern that the provision as written would limit IEP teams, the Department disagrees with the commenter. Consistent with § 200.6(b)(1)(i), IEP teams may identify needed accommodations for any child with a disability on an individualized, case-by-case basis, and must follow the State guidelines for appropriate accommodations when making such decisions. In accordance with section 612(a)(16)(B) of the IDEA and 34 CFR 300.160(b), a State's guidelines for IEP teams must identify for each assessment only those accommodations that do not invalidate the score, and instruct teams to select for each assessment only those accommodations that do not invalidate the test score. Both the ESSA and these regulations use ''interoperability with assistive technology devices'' as an example of appropriate accommodations, but do not necessarily require their use. However, if an IEP team determines that it is necessary for a student with a disability to use an assistive technology device in order to participate in an assessment under this part, the team would need to ensure that the device selected for the student will not invalidate the student's test score. States and school districts will need to communicate this information to IEP teams to ensure that they can make informed decisions in this regard. The same expectations apply to the State with respect to making information about assistive technology devices available to the teams and individuals described in § 200.6(b)(1)(ii) and (iii).

The Department disagrees with the commenter who requested removal of all references to nationally recognized accessibility standards. First, as previously stated, interoperability with assistive technology devices is included in the statute and these regulations as an example of how to provide appropriate accommodations and ensure assessments are accessible to all students. Further, we do not believe that the Department would be ceding control over regulatory implementation to a third party. Generally, we enforce regulatory assessment expectations through assessment peer review, which is a process that the Department, with input from external experts, administers. The Department does not propose specifying any particular nationally recognized accessibility standards that should be used; however, the Department has previously worked with States and the broader field to develop the Common Education Data Standards (CEDS), which could serve as one option. Further, in the experience of the Department's Office for Civil Rights, where an SEA provides or collects information through electronic and information technology, such as on Web sites, it is difficult to ensure compliance with Federal civil rights accessibility requirements without adherence to modern standards such as the WCAG 2.0 Level AA standard. More broadly, we rely on nationally recognized professional and technical testing standards regarding assessment technical quality, which substantially inform assessment peer review. In certain cases, such as this one, collaboration with professionals in the field is essential to successful regulatory implementation.

Changes: None.

Comments: One commenter pointed out that some students, though identified as having a disability, do not need an accommodation. This commenter was concerned that § 200.6(b)(1) might inappropriately require every student identified as having a disability to receive an accommodation, even if such accommodation were not necessary.

Discussion: The regulation refers repeatedly to the use of ''appropriate'' accommodations. If no accommodations are needed or appropriate, a student would not be forced to receive an accommodation.

Changes: None.

Comments: One commenter recommended modifying § 200.6(b)(1)(iii) to specify that a team—not an individual—designated by an LEA must determine when accommodations are needed for a student with a disability that is covered under section 504 or title II of the ADA in order to support the inclusion of multiple professionals with the appropriate expertise, including specialized instructional support personnel, in making these decisions. Other commenters generally supported the provisions, as written, which they said clarified the role of the IEP or other placement team in determining the appropriate accommodations.

Discussion: Section 200.6(b)(1)(ii) does in fact provide that a team of individuals (the student's placement team) make this determination when a student is provided accommodations under section 504. However, when accommodations are provided under title II of the ADA, § 200.6(b)(1)(iii) provides that the determination is made by ''the individual or team designated by the LEA to make these decisions.'' As the title II regulations do not specify that such decisions must be made by a team, we decline to adopt the change proposed by this commenter. This interpretation is consistent with the Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools, jointly issued by the Department and the Department of Justice in November 2014.[8]

Changes: None.

Comments: One commenter supported § 200.6(b)(2)(i), noting that developing and disseminating information for parents and schools on the use of appropriate accommodations is critical for ensuring all students with disabilities can participate fully in the general curriculum and be held to high academic standards.

Discussion: We agree with the commenter that transparent information is a linchpin of ensuring students with disabilities receive instruction based on grade-level academic content standards and have access to the general education curriculum for the grade in which the student is enrolled. This information can empower parents to advocate on behalf of their children and equip educators with knowledge they need to provide high-quality instruction to all students, including students with disabilities. We are revising § 200.6(b)(2)(i) to include dissemination of information to LEAs, as school districts are also a critical stakeholder in ensuring students with disabilities receive appropriate accommodations, are likely to be the entities that support States in disseminating this information directly to schools and parents, and are included in similar provisions added to new § 200.7(a)(1)(i). We are also restructuring this provision to make clear that a State must (1) develop appropriate accommodations for students with disabilities; (2) disseminate information and resources on use of these accommodations to LEAs, schools, and parents; and (3) promote the use of those accommodations to ensure that all students with disabilities are able to participate in academic instruction and assessments.

Changes: We have revised § 200.6(b)(2)(i) to require States to disseminate information and resources on the use of appropriate accommodations to LEAs, in addition to schools and parents, and to clarify, separately, that States must also develop appropriate accommodations and promote their use.

Comments: Numerous commenters voiced support for § 200.6(b)(2)(ii), which requires States to ensure that general and special education teachers, paraprofessionals, specialized instructional support personnel, and other appropriate staff receive training and know how to administer assessments, including, as necessary, alternate assessments, and know how to make use of appropriate accommodations during testing for all students with disabilities. The commenters indicated that the requirement would help ensure that staff members receive sufficient training related to administering assessments to students with disabilities. In particular, this training would help staff learn to administer portfolio-based assessments, provide assistive technology, collaborate in professional learning communities, and provide accommodations to support students.

However, two commenters recommended not listing in the regulations the specific types of staff required to receive training (*i.e.,* general and special education teachers, paraprofessionals, and specialized instructional support personnel), thereby providing LEAs greater discretion to determine which staff members need to participate in this professional development. An additional commenter recommended clarifying that a State could work with high-quality external partners or intermediaries in developing this training to bolster the limited capacity of some LEAs in this area.

Discussion: We agree with the commenters who support maintaining the language in § 200.6(b)(2)(ii). These

[8] Available at: *http://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf.*

provisions emphasize the importance of training for school-based staff members who may administer assessments to ensure that such staff members know how to make use of appropriate accommodations during assessments for all students with disabilities, including students with the most significant cognitive disabilities who may take an AA–AAAS to assess their performance under this part, if the State has adopted such standards. We agree with the commenters that the determination as to which training is ''necessary'' is best made at the State, LEA, and school levels. In different places, distinct individuals require training to administer different types of assessments, and the level of training such individuals need in order to ensure appropriate use of accommodations may vary. We believe the language as drafted addresses the concerns of commenters by providing sufficient flexibility to tailor training to meet their needs, and therefore, decline to make any changes.

Changes: None.

Comments: A number of commenters wrote in support of § 200.6(b)(3), which requires a State to ensure that the use of appropriate accommodations on assessments does not deny a student with a disability the ability to participate in an assessment, or any benefit from participation in the assessment, that is afforded to students without disabilities. The commenters noted that this would help ensure that test accommodations do not prevent students with disabilities from receiving a college-reportable score on entrance examinations that a State administers to high school students as part of the State's assessment system. This commenter also indicated that it would help if accommodations on entrance examinations are available equitably to all students, citing: Overly burdensome requests for documentation of a disability that requires accommodations on the entrance examination; failure by test administrators to respond to requests promptly; and failure to provide needed accommodations for students with disabilities.

Some commenters also suggested that the Department clarify § 200.6(b)(3)(ii), which requires a State to ensure that the use of appropriate accommodations on assessments does not deny a student with a disability any benefit from participation in the assessment that is afforded to students without disabilities by defining appropriate accommodations within the scope of accommodations that may be provided without jeopardizing test validity and reliability. To illustrate, one commenter cited examples where the use of an accommodation would invalidate test scores for a particular student (such as measuring an English learner's reading comprehension by administering a test with a third-party ''read-aloud'' accommodation)—which the commenter believed would help ensure that all scores could be college-reportable.

Discussion: A State is responsible for ensuring that all students receive appropriate accommodations in keeping with the State's general responsibilities to provide assessments that are accessible to all students under section 1111(b)(2)(B)(vii) of the ESEA, and applicable requirements under the IDEA, as discussed above with regard to comments addressing § 200.6(a). This responsibility applies regardless of whether the assessment is a statewide assessment or a locally selected, nationally recognized high school academic assessment under § 200.3, which is why relevant language appears in §§ 200.2, 200.3, and 200.6. States are responsible for determining which accommodations are appropriate and for administering assessments such that a student who needs and receives such an accommodation is not denied any benefit afforded to students who do not need the accommodation. While it is true that a State is also responsible for ensuring that it administers assessments in a valid and reliable manner, these provisions must work together. The requirement that a State administer a valid and reliable assessment does not relieve the State of any responsibility related to appropriate accommodations. Rather, the State must ensure that any assessment it administers to meet the requirements of title I, part A meets all requirements of this subpart.

Changes: None.

Comments: One commenter recommended requiring in the final regulations that all assessments, including any AA–AAAS, meet a number of criteria. In particular, they must: (1) Be standardized assessments that meet the *Standards for Psychological and Educational Testing;* (2) be high quality, fair, and reliable; and (3) produce valid results and interpretations. This commenter also suggested promoting the use of principles of UDL and other best practices. The commenter noted that AA–AAAS in the past have often been overly individualized in an attempt to better comply with IDEA requirements. The commenter further said that, absent these criteria, comparability between general assessments and AA–AAAS may be lost, noting that both are used for accountability purposes under the ESEA. Finally, the commenter suggested that the regulations should require States and test developers to create a list of accommodations that have been determined as suitable for student use without jeopardizing the validity and reliability of scores for students with disabilities, which States could then share with IEP and other placement teams.

Discussion: The Department believes that the statute and regulations already require many of the actions the commenter requests. In particular, both section 1111(b)(2)(B)(iii) of the ESEA and § 200.2(b)(4)(ii) require consistency with relevant, nationally recognized professional and technical testing standards. The *Standards for Psychological and Educational Testing* are a strong example of such standards, and the Department's peer review of State assessment systems under title I, part A is based on these technical standards, which we believe helps mitigate one of the commenter's concerns. Section 1111(b)(2)(B)(iii) and (iv) and § 200.2(b)(4)(i) also address the importance of strong technical quality, including validity, reliability, and fairness. Finally, section 1111(b)(2)(B)(xiii) and 1111(b)(2)(D)(i)(IV) of the ESEA require that a State apply the principles of UDL, to the extent practicable, to both the general statewide assessments and the AA–AAAS, requirements that are reiterated in §§ 200.2(b)(2)(ii) and 200.6(d)(6).

The Department expects that assessment peer review will provide an opportunity to promote and enforce the use of high-quality assessments, which includes the AA–AAAS. While an AA–AAAS must be aligned with the challenging State academic content standards, the Department notes that, by definition, such an assessment will not be comparable to the general statewide assessments, since students taking an AA–AAAS are measured against alternate academic achievement standards. Similarly, each State is already required by section 1111(b)(2)(B)(vii) of the ESEA and section 612(a)(16)(A) of the IDEA to ensure that children with disabilities served under the IDEA are provided appropriate accommodations on title I, part A assessments, where necessary, as determined on an individualized case-by-case basis by their IEP team. To ensure that this occurs, section 612(a)(16)(B) of the IDEA requires a State to develop guidelines for the provision of appropriate accommodations. Under 34 CFR 300.160(b), these State guidelines must identify only those accommodations for each assessment that do not invalidate

the score and instruct IEP teams to select for each assessment only those accommodations that do not invalidate the score. These State guidelines apply to the provision of appropriate accommodations under the IDEA on regular and alternate assessments. Therefore, the Department does not believe changes are needed in this regard.

Changes: None.

AA–AAAS for Students With the Most Significant Cognitive Disabilities

Comments: Many commenters wrote either in broad support of, or broad opposition to, the criteria outlined in § 200.6(c)(4) that a State must follow in order to request from the Department a waiver of the requirement to assess no more than 1.0 percent of assessed students in each subject with an AA–AAAS. The commenters supporting the proposed regulations generally asserted that the elements included in the proposed regulation provide a comprehensive picture of the State's efforts to address and correct its assessment of more than 1.0 percent of assessed students on an AA–AAAS. The commenters opposing the proposed regulations generally favored additional local flexibility. Such commenters asserted that the waiver criteria as proposed are unduly burdensome and infringe on IEP team authority. A few commenters expressed concern that a burdensome process could discourage States from submitting a waiver.

Discussion: We appreciate the broad support for the proposed regulations and suggestions for revisions suggested by the commenters. We agree that strong waiver criteria are necessary to ensure that a waiver is only granted when appropriately justified and when a State demonstrates necessary progress towards assessing no more than 1.0 percent of assessed students in each subject with an AA–AAAS. Therefore, we generally maintain the criteria in the final regulations. However, we have considered the need for specific changes addressed by some commenters, particularly with regard to State and LEA burden, and discuss those in response to specific comments below.

Changes: None with respect to the overall need for waiver criteria. Changes with respect to specific criteria are discussed in response to specific comments below.

Comments: A few commenters contended that provisions in proposed § 200.6 infringe on an IEP team's authority to make an individual determination about the most appropriate assessment for an individual student, one noting that the proposed regulations could be amended to direct IEP teams to follow State participation guidelines when making decisions about which assessment a student should take.

Discussion: We agree with the commenters that, for a child with a disability who receives services under the IDEA, the decision about which type of assessment is most appropriate for the student rests with the IEP team. However, we do not think that any changes to the regulations are necessary to address this comment. With respect to the suggestion to amend the regulations to direct IEP teams to follow State participation guidelines, we emphasize that the State guidelines required under § 200.6(d) are intended to serve that very purpose—to provide clarity for IEP teams as to how to make appropriate assessment decisions. In particular, § 200.6(d)(1) provides that IEP teams are to apply the State guidelines on a case-by-case basis to determine whether an individual child is a student with the most significant cognitive disabilities who should be assessed with an AA–AAAS.

Changes: None.

Comments: One commenter contended that any waiver criteria are contrary to the intent of Congress, asserting that Congress intended that States should better support and more accurately assess students with the most significant cognitive disabilities rather than be required to conduct oversight in a way that may intrude on high-quality LEA programming. Another commenter broadly suggested that the waiver criteria are contrary to the Congressional intent in section 8401 of the ESEA, which the commenter asserts presumes the Department will grant waivers provided the request demonstrates the need for and assumed benefit of the waiver, without any additional requirements. Additionally, a commenter asserted that a number of the waiver requirements involve unrelated information requirements and external conditions, in direct violation of the respective prohibitions included in section 8401(b)(1)(E) and 8401(b)(4)(D) of the ESEA.

Discussion: We disagree. In section 1111(b)(2)(D)(i)(I) of the ESEA, Congress explicitly prescribed a cap of 1.0 percent on the number of students who may be assessed with an AA–AAAS, which Congress specified is only for students with the most significant cognitive disabilities. Although the statute prohibits a State from imposing a cap on an LEA's use of an AA–AAAS, section 1111(b)(2)(D)(ii)(II) requires an LEA that exceeds the State cap to submit information to the SEA justifying the need to exceed the cap. Moreover, section 1111(b)(2)(D)(ii)(III) requires a State to provide ''appropriate oversight, as determined by the State,'' of any such LEA.

Because a State must ensure that the total number of students assessed using the AA–AAAS in each subject does not exceed 1.0 percent of assessed students in that subject in the State, but cannot impose any similar cap on its LEAs, § 200.6(c)(3) helps ensure that States review and act upon information from LEAs, provide sufficient oversight, and take meaningful steps to ensure that, under State and LEA policies, only students with the most significant cognitive disabilities are assessed with an AA–AAAS, consistent with the statutory requirement limiting participation in the AA–AAAS. Section 200.6(c)(3), therefore, is well within the Department's rulemaking authority under section 1601(a) of the ESEA, which authorizes the Secretary to ''issue, in accordance with subsections (b) through (d) and subject to section 1111(e), such regulations as are necessary to reasonably ensure that there is compliance with this title.'' As discussed above, the regulations are necessary to support a State in meeting its statutory obligations. Moreover, § 200.6(c)(3) was submitted to negotiated rulemaking under section 1601(b) and the negotiating committee reached consensus on it. Finally, in light of the statutory requirements in section 1111(b)(2)(D)(i)(I) and (b)(2)(D)(ii)(I)–(III) of the ESEA, § 200.6(c)(3) certainly is not inconsistent with or outside the scope of title I, part A, and therefore does not violate section 1111(e)(1)(B)(i) of the ESEA. The Department also has rulemaking authority under section 410 of GEPA, 20 U.S.C. 1221e–3, and section 414 of the DEOA, 20 U.S.C. 3474.

Similarly, the waiver criteria outlined in § 200.6(c)(4) do not exceed the Department's authority. We are well aware that section 1111(e)(1)(B) of the ESEA prohibits the Department from requiring, as a condition of approval of a waiver request under section 8401, requirements that are inconsistent with or outside the scope of part A of title I. Clearly, the waiver criteria in § 200.6(c)(4) are not inconsistent with or outside the scope of section 1111(b)(2)(D) of the ESEA. Rather, they are consistent with ensuring that the statutory restriction on a State's use of an AA–AAAS is not vitiated through waivers. In order to evaluate whether a State has a legitimate justification for a waiver to assess more than 1.0 percent of assessed students in a given subject with an AA–AAAS, it is necessary for

the Department to evaluate certain data about which students are being assessed with an AA–AAAS and to receive assurances from a State that it is verifying certain information with any LEAs that the State anticipates will exceed the statewide 1.0 percent cap, including that such LEAs have followed the State guidelines for determining which students may be appropriately assessed with an AA–AAAS and addressing any disproportionality in the percentage of students in certain subgroups of students who are assessed with an AA–AAAS. Moreover, the requirements that a State must submit a plan and timeline to improve the implementation of its State guidelines, to support and provide oversight to LEAs, and to address any disproportionality in the percentage of students who take an AA–AAAS are all requirements directly related to evaluating whether the State, if it receives a waiver, has a sufficient plan for coming into compliance with the statutory 1.0 percent cap. The criteria to receive a waiver of the 1.0 percent cap in § 200.6(c)(4) also help to reinforce the other statutory requirements that a State seeking a waiver, in general, must meet (as described in section 8401(b)(1)(C), (D), and (F)), including that the waiving of the requested requirements will advance student academic achievement, that the SEA will monitor and regularly evaluate the effectiveness of its waiver plan, and in cases where a State is seeking to waive statutory requirements related to student assessment and data reporting under title I, part A, that the SEA and its LEAs will maintain or improve transparency in reporting to parents and the public on student achievement, including subgroups of students. For the same reasons § 200.6(c)(4) does not violate section 1111(e) of the ESEA, the Department would not violate section 8401(b)(4)(D) if it were to disapprove a State's waiver request to exceed the 1.0 percent cap if the State cannot demonstrate that it has met the criteria in § 200.6(c)(4), because the criteria in § 200.6(c)(4) do not impose conditions outside the scope of a waiver request. In sum, each of the elements described above is within the scope of a waiver request and title I, part A. Particular elements of the waiver criteria which commenters noted were outside the scope of a waiver request are discussed in greater detail below.

Changes: None.

Comments: One commenter contended that the waiver requirements present particular challenges for rural States and LEAs where the numbers of assessed students are so small that, even if one or two students are assessed with an AA–AAAS, the LEA would then exceed the statewide 1.0 percent cap. The commenter noted that increased monitoring of such LEAs would tax SEA resources and may inadvertently pressure rural LEAs to recommend general assessments for students who should more appropriately be taking an AA–AAAS. The commenter asserted that LEAs that partner to provide specialized programming for students with the most significant cognitive disabilities in rural States will necessarily assess more than 1.0 percent of assessed students, and that any heightened monitoring of such LEAs implies mistrust of the work in such schools and is counterproductive to the needs of the students in these schools.

Discussion: We appreciate the comment specific to the needs of rural States and LEAs and have taken these suggestions into consideration with regard to specific changes discussed in response to other comments, particularly with regard to SEA oversight requirements as described in § 200.6(c)(4). However, section 1111(b)(2)(D)(ii)(III) of the ESEA provides that a State will exercise oversight of an LEA that exceeds the statewide 1.0 percent cap, regardless of the number of students enrolled in the LEA. We note that it is the State's responsibility to develop State guidelines under § 200.6(d) that ensure that IEP teams within the State appropriately identify, on a case-by-case basis, only students with the most significant cognitive disabilities for an AA–AAAS. A rural State has discretion to develop its State guidelines in a way that best meets the State's unique needs, so long as the guidelines meet the requirements contained in the statute and regulations. Therefore, we decline to make any changes directly related to this comment but note that we are incorporating other changes to the waiver criteria that partially address rural concerns.

Changes: None.

Comments: One commenter contended that the regulations should take into account that some States have a low-incidence of children with disabilities, whereas others have a high-incidence, explaining that States with a high-incidence may assess the same number of students with the most significant cognitive disabilities with an AA–AAAS as a State with a low incidence, and only the State with the high-incidence of children with disabilities would exceed the 1.0 percent statewide cap.

Discussion: We appreciate the commenter's concern about variations in the numbers of children with disabilities nationwide. Section 1111(b)(1)(D)(i)(I) of the ESEA, however, establishes that all States must limit the number of students assessed in each subject with an AA–AAAS to no more than 1.0 percent of assessed students, with the only exception being a State that applies for and receives a waiver to exceed this prohibition. Therefore, we decline to make this suggested change.

Changes: None.

Comments: A few commenters suggested that proposed § 200.6 does not give States enough authority to act when an LEA has assessed more than 1.0 percent of assessed students in a given subject with an AA–AAAS and does not explain how the Secretary will decide whether to grant a waiver. One such commenter articulated that, in accordance with the proposed regulation, any rationale provided by an LEA would be sufficient and that the Department would grant every State request for a waiver. The commenter further noted that the Department should revise the regulation so that it explains the steps that a State should take to comply absent an approved waiver. Another commenter questioned whether there is also a statewide cap on the number of scores from an AA–AAAS that can count as proficient in school accountability determinations (similar to the regulation applied under the ESEA, as amended by NCLB), and if so, whether there would be a separate waiver process to request such a waiver. The commenter asked for greater detail about potential consequences for a State that assesses more than 1.0 percent of assessed students in a given subject with an AA–AAAS.

Discussion: While we appreciate the commenter's request for additional specificity, we do not agree that additional clarity is needed in the regulation. The waiver criteria outlined in § 200.6(c)(4) specify the elements a State must address in a request for a waiver. Further, should a State request a waiver for an additional year, under § 200.6(c)(4)(v) the Department expects to see substantial progress towards the State's plan and timeline for meeting the requirement to assess no more than 1.0 percent of students with an AA–AAAS. With regard to the request to address the steps a State should take absent an approved waiver, the Department notes that it maintains general enforcement authority, as it does with any ESEA violation.

With regard to the application of a 1.0 percent cap on the number of proficient scores that may be counted in accountability determinations, we do not believe such a cap is appropriate. Rather than codifying the regulations

under the ESEA, as amended by NCLB, that imposed such a cap, Congress chose in section 1111(b)(2)(D)(i)(I) of the ESEA to apply a cap on the number of students who may be assessed with an AA–AAAS. Thus, the scores of all students who take an AA–AAAS, no matter how many are proficient, must be reported on State and LEA report cards and included in school accountability determinations under section 1111(c) of the ESEA, including performance against long-term goals and in the Academic Achievement indicator.

Changes: None.

Comments: A few commenters expressed concern that the existence of waivers, generally, will dilute the importance of the requirement to assess no more than 1.0 percent of assessed students with an AA–AAAS.

Discussion: We agree with the commenters that the number of children with disabilities who take an AA–AAAS should be limited to no more than 1.0 percent of assessed students, as the vast majority of children with disabilities are most appropriately assessed with general assessments alongside their peers without disabilities. However, section 1111(b)(2)(D)(ii)(IV) of the ESEA specifies that the waiver authority under section 8401 of the ESEA allows a State to apply for a waiver of the 1.0 percent limitation. The negotiators thoroughly discussed the topic of waiver criteria during negotiated rulemaking, and we continue to agree that the majority of the criteria agreed to by the committee are appropriate. We believe those criteria will sufficiently protect the statutory limitation on the percentage of students with the most significant cognitive disabilities who may be assessed with an AA–AAAS. As these provisions are implemented, we will continue to evaluate the need for additional non-regulatory guidance.

Changes: None.

Comments: A number of commenters opposed the requirement in § 200.6(c)(4)(i) that a State's waiver request be submitted at least 90 days prior to the start of the State's first testing window. One commenter suggested that the timeline be abbreviated to 30 days before the start of the testing window due to the differences in timing of testing windows nationwide, and noted that the submission should occur before the ''main'' testing window rather than the ''first'' testing window. A few commenters indicated it will be difficult to predict 90 days in advance how many students will need to take an AA–AAAS, with some noting that this is a particular challenge for States with highly mobile populations, and in areas served by multiple LEAs, the Bureau of Indian Education (BIE), and tribal schools, or when parents decide that their children will not participate in assessments. The commenters requested that States be permitted to apply for waivers after the close of the State's testing windows. A few commenters indicated that when waiver requests are due before testing the State does not know the total number of students who will be assessed (the denominator for the participation rate calculation), so there is an increased administrative burden for some States who will request a waiver that they do not need, and other States that may need a waiver may not apply. A few commenters noted that since IEP teams meet year round, decisions about proper assessment placements may not have been made prior to the start of the first testing window, and suggested either that the submission timeline be after the assessment window or be removed altogether.

Discussion: While we appreciate the suggestions for changes with regard to the requirement to submit a waiver request 90 days prior to the first testing window, we believe these concerns are outweighed by the benefits of maintaining the requirement. As a request for a waiver is a request for permission to avoid non-compliance with the law, such a waiver should be requested before a State is non-compliant, rather than retroactively when a State will have already been non-compliant for a period of time. While we understand the contention that a more abbreviated timeline, such as 30 days prior to the start of the testing window, would be appropriate, we decline to adopt such a change, as the Department would not have sufficient time to address such requests; section 8401(b)(4) of the ESEA specifies that the Department has 120 days to respond to waiver requests, so the proposed 90-day period is already abbreviated from what is typically needed in order for the Department to approve waiver requests prior to a State becoming non-compliant. We acknowledge that IEP teams meet throughout the school year, but believe there is value in reinforcing the general principle that decisions about the assessment a student will take should be made in the beginning of the school year. Such advance planning allows the student, parents, teachers, and other instructional staff to have clear expectations and sufficient time to prepare for the assessment, which may include identifying appropriate accommodations. Given that some forms of an AA–AAAS are administered throughout a school year, it is furthermore appropriate that such decisions are made early to ensure that a student's performance is fully measured. We are, however, revising § 200.6(c)(4)(i) to clarify that a State's waiver must be submitted 90 days prior to the start of the testing window for the relevant subject, recognizing that a State may request a waiver for only one subject, and that the testing windows can, but need not necessarily, vary among assessments.

Commenters supporting the waiver criteria as drafted acknowledge that the data that will be submitted along with such waiver requests are necessary so that States are transparent about how many students are assessed with an AA–AAAS, and we likewise value the transparency that will be provided by requiring this information prior to receipt of a waiver. Furthermore, a State should be able to determine whether there will be a need to request a waiver in a particular school year based on the prior year's data, and we note that the data a State submits along with a waiver request, consistent with § 200.6(c)(4)(ii) may be State-level data from either the current or previous school year. Therefore, we maintain that it is necessary to receive waiver requests in advance of the State's testing window and decline to make these requested changes.

Changes: We have revised § 200.6(c)(4)(i) to clarify that a waiver must be submitted 90 days prior to the start of the testing window for the relevant subject.

Comments: Many commenters specifically opposed § 200.6(c)(4)(ii)(B) of the waiver criteria for a State that exceeds the 1.0 percent cap, which requires the State to submit State-level data from the current or previous school year to show that the State has measured the achievement of at least 95 percent of all students and 95 percent of students in the children with disabilities subgroup who are enrolled in assessed grades. A few commenters suggested that the Department has overstepped its authority by linking a requirement for 95 percent test participation to receipt of a waiver of the 1.0 percent State cap on participation in the AA–AAAS, since the ESEA requires 95 percent participation on assessments used for Federal accountability but allows each State to determine how low student participation will be factored in its accountability system. One commenter argued that this requirement exceeds the plain statutory language of the ESEA and is therefore outside the scope of the waiver requirements in section 8401 of

the ESEA, which the commenter asserted requires only information directly related to the waiver request. Various commenters appeared to view the 95 percent test participation requirement as a punitive requirement for States with high numbers of parents choosing to opt their students out of statewide assessments, and contended it may result in competing parent advocacy groups working against each other. Another commenter suggested this requirement contradicts the increased flexibility in the measurement of student achievement that the commenter associated with the ESEA.

Discussion: We disagree with the commenters who suggest that it is inappropriate to require that 95 percent of all students and 95 percent of students in the subgroup of children with disabilities be assessed in order to receive a waiver from the statutory prohibition on assessing more than 1.0 percent of assessed students with an AA–AAAS. Section 1111(b)(2)(B)(i)(II) of the ESEA requires a State to annually administer an assessment to *all* public school students in the State, not just 95 percent of them. Since the 1.0 percent statewide cap on participation in the AA–AAAS is a cap on the number of students assessed, a State's data on proper use of the AA–AAAS will only be transparent and accurate if it is based on the entire population of students that must be assessed in the State. We believe this must be achieved by requiring the State to provide State-level data to show that it is assessing at least 95 percent of all students and 95 percent of children with disabilities as part of its waiver request. This recognizes that a small number of students may not be able to participate in the assessments for various reasons, without losing an accurate and representative sample of the whole student population in determining whether a State requires a waiver. Further, without such a protection, there is no guarantee that an LEA will not encourage certain students to avoid testing all together, thereby keeping those students out of the denominator of students who count for purposes of calculating the 1.0 percent cap. We note that since a waiver request must be submitted to the Department 90 days prior to the State's first relevant testing window, a State will likely submit data from the previous school year to fulfill this requirement.

With regard to the commenters who believe this requirement inappropriately ties an accountability requirement to a waiver request, we disagree. We acknowledge that, under section 1111(e)(1)(B)(i) of the ESEA, the Department is prohibited from requiring a State to add any requirements for receipt of a waiver that are inconsistent with or outside the scope of title I, part A. The requirement to ensure that at least 95 percent of all students and 95 percent of students in the subgroup of children with disabilities participate in State assessments is not in conflict with such a prohibition, given that section 1111(b)(2)(B)(i)(II) of the ESEA requires *all* students to be administered an assessment, and that such an expectation is specifically needed in the context of granting a waiver of the 1.0 percent statewide cap on participation in an AA–AAAS, as the cap is on the number of students assessed. The full inclusion of children with disabilities in academic assessments, either the general assessment or an AA–AAAS, is essential to ensure that they are held to the same high expectations as their peers, and the 1.0 percent cap on participation in an AA–AAAS is only effective as a guardrail when full participation in assessments is ensured. Further, the waiver criteria for a *State* related to the 1.0 percent cap on participation in the AA–AAAS is separate and distinct from—and has no effect on—how the State meets the statutory requirement to hold *schools* accountable for 95 percent participation in assessments, which will be determined by the State consistent with section 1111(c)(4)(E) of the ESEA.

Finally, it is not necessary for the ESEA to specifically authorize the Secretary to include the 95 percent participation requirement as a waiver criterion in order for us to do so. Section 1601(a) of the ESEA allows the Secretary to ''issue, in accordance with subsections (b) through (d) and subject to section 1111(e), such regulations as are necessary to reasonably ensure that there is compliance'' with the statute. Section 200.6(c)(4)(ii)(B) is necessary to ensure that only those States that truly need to assess more than 1.0 percent of assessed students with an AA–AAAS are eligible for a waiver; otherwise, waivers would vitiate the statutory prohibition. Moreover, § 200.6(c)(4)(ii)(B) was submitted to negotiated rulemaking under section 1601(b) and the negotiating committee reached consensus on it. Finally, as noted above, § 200.6(c)(4)(ii)(B) is not inconsistent with or outside the scope of title I, part A, and therefore does not violate section 1111(e)(1)(B)(i) of the ESEA. The Department also has rulemaking authority under section 410 of GEPA, 20 U.S.C. 1221e–3, and section 414 of the DEOA, 20 U.S.C. 3474.

We also disagree with the contention that the requirement to ensure 95 percent test participation for all students and students in the subgroup of children with disabilities is in violation of section 8401(b)(4)(D) of the ESEA. Such a requirement is not an external condition outside the scope of a waiver request but, rather, is consistent with requirements for the administration of assessments to all students in section 1111(b)(2)(B)(i)(II) of the ESEA and necessary to ensure that the 1.0 percent cap on the number of assessed students who may participate in an AA–AAAS is applied in such a way that continues to expect full test participation for all students and all children with disabilities.

Changes: None.

Comments: While many commenters supported the waiver criteria as drafted, one commenter noted that instances of disproportionate identification for an AA–AAAS should be examined and addressed, but generally opposed the proposed waiver criterion. Another commenter asserted that requirements to address disproportionality in the number and percentage of students assessed with an AA–AAAS when a State applies for a waiver of the statewide 1.0 percent cap are outside the scope of the waiver requirements in section 8401 of the ESEA, since such waivers must include only information directly related to the request.

Discussion: We disagree with the assertion that the requirement in § 200.6(c)(4)(ii)(A) that a State provide data on the number and percentage of students in the subgroups of economically disadvantaged students, major racial and ethnic groups, and English learners who are assessed with an AA–AAAS, and the requirement in § 200.6(c)(4)(iii)(B) that a State must assure any LEA that the State anticipates will assess more than 1.0 percent of students using an AA–AAAS will address any disproportionality in the percentage of students from such subgroups who take an AA–AAAS, are outside the scope of the requirements for a waiver under section 8401 of the ESEA. The 1.0 percent limitation on the number of students in a State who may be assessed with an AA–AAAS is a critical protection to ensure that the vast majority of children with disabilities are included in the general assessment alongside their peers and that only the small number of students with the most significant cognitive disabilities are assessed with an AA–AAAS. However, such a protection is minimized if a disproportionate percentage of students from any one subgroup is assessed with an AA–AAAS, and such disproportionate identification indicates that the State should revisit its

guidelines for how IEP teams within the State identify which students are those with the most significant cognitive disabilities who may be assessed with an AA–AAAS. Thus, we believe that maintaining a focus on disproportionate use of the AA–AAAS is necessary within the criteria for a waiver of the 1.0 percent statewide cap on the number of students who may be assessed with an AA–AAAS. Further, it is not necessary for the ESEA to specifically authorize the Secretary to address disproportionality through waiver criteria. As noted in the discussion of the prior comment, section 1601(a) of the ESEA authorizes the Secretary to issue regulations as are necessary to reasonably ensure that there is compliance with title I, part A. For the reasons we express above, we believe a waiver of the 1.0 percent cap is only warranted if a State is not disproportionately including in the AA–AAAS students who are poor, English learners, or students from a major racial or ethnic group, thereby raising concerns that the State's guidelines for identifying students with the most significant cognitive disabilities are not being carried out responsibly. Like the other assessment-related regulations submitted to negotiated rulemaking, the committee reached consensus on § 200.6(c)(4)(ii)(A), (iii)(B), and (iv)(C), consistent with 1601(b) of the ESEA. In addition, the Department has rulemaking authority under section 410 of GEPA, 20 U.S.C. 1221e–3, and the DEOA, 20 U.S.C. 3474.

That said, we are revising § 200.6(c)(4)(iii)(B) and (iv)(C) to clarify that the assurances a State must provide and its plan and timeline related to disproportionality in the AA–AAAS must be focused on the ''percentage'' of students in each subgroup that are assessed using an AA–AAAS in a particular subject, and not the raw ''number'' of students in each subgroup. Using the ''number'' of students assessed using an AA–AAAS would be insufficient to identify disproportionalities given that raw numbers also reflect the size of the student population in the State. However, the data that must be included as part of the waiver request described in § 200.6(c)(4)(ii)(A) must still include the number and percentage of students in each subgroup assessed using an AA–AAAS in the relevant subject.

Changes: We have revised § 200.6(c)(4)(iii)(B) and (iv)(C) so that only the percentage of students in each subgroup assessed using an AA–AAAS is considered related to disproportionality in the assurances and plan included in a State's waiver request to exceed the 1.0 percent cap.

Comments: A few commenters contended that LEAs should not be required to assess less than 1.0 percent of assessed students with an AA–AAAS because some LEAs have legitimate reasons to assess more than 1.0 percent of students with an AA–AAAS based on student needs and city demographics (*e.g.,* medical facilities located within the city or other specialized programming located in certain LEAs). One such commenter acknowledged that LEAs need to submit justification to the State to assess more than 1.0 percent of assessed students with an AA–AAAS, but asserted that such justification should not be a complex annual process.

A few commenters more broadly objected to the requirement that SEAs verify information with LEAs through the assurances required under § 200.6(c)(4)(iii), with one commenter noting that in a State with a large number of LEAs this is a significant burden on SEA resources. A few other commenters opposed the same assurances, specifically objecting to the proposed language that allows a State discretion to verify certain information with LEAs that ''contribute to the State's exceeding'' the 1.0 percent cap. A few commenters contended that the proposed regulations would result in a de facto, or back-door, LEA-level cap on participation in the AA–AAAS in LEAs that have no record of assessing more than 1.0 percent of students with such an assessment. One commenter asserted that the proposed regulations regarding LEAs that ''contribute to the State's exceeding'' the 1.0 percent cap exceed the scope of the law since the ESEA provides that LEAs that assess more than 1.0 percent of students with an AA–AAAS shall submit information to the SEA justifying the need to exceed such cap, and permits the SEA to provide oversight of such LEAs, but it does not extend such oversight to LEAs that do not exceed the cap. Thus, the commenter argued that the ESEA prohibits these proposed regulations.

One commenter argued that the assurance in proposed § 200.6(c)(4)(iii)(B) is unattainable because an LEA will not be able to predict the extent to which it will assess less than 1.0 percent of students with an AA–AAAS since a decision as to which assessment a student will take is an individualized decision based on whether the student is a student with the most significant cognitive disabilities and eligible for the assessment.

Discussion: While we generally agree with the commenters who supported the waiver criteria, and place great value on the consensus reached during negotiated rulemaking, we have determined that there is reason to address a few of the specific concerns with regard to the criteria for assurances from the State included in § 200.6(c)(4)(iii).

With regard to the comment that § 200.6(c)(4)(iii) should be revised so that it extends only to LEAs that the State anticipates will assess more than 1.0 percent of the number of students assessed with an AA–AAAS and not to other LEAs that the State determines will significantly contribute to the State's exceeding the cap, we agree. Both LEAs that the State anticipates will assess more than 1.0 percent of students in the LEA with an AA–AAAS and LEAs that do not assess more than 1.0 percent of students with an AA–AAAS but that significantly contribute to a State's exceeding the 1.0 percent State cap were incorporated into the waiver criteria during negotiated rulemaking. Including both categories of LEAs was intended to provide a State with discretion to focus attention on those LEAs that assess less than 1.0 percent of students with an AA–AAAS but significantly contribute to the State exceeding its 1.0 percent cap, as well as those LEAs already assessing more than 1.0 percent. However, we acknowledge that this may, in some States, unfairly call attention to LEAs that will not assess more than 1.0 percent of assessed students with an AA–AAAS. While we strongly encourage States to look not only to LEAs that are assessing more than 1.0 percent of students with an AA–AAAS but also those significantly contributing to the State exceeding the cap of 1.0 percent, we are removing the language in § 200.6(c)(4)(iii) that extends the assurances that a State submits with a waiver to LEAs that ''significantly contribute'' to the State exceeding the 1.0 percent State cap.

With regard to the commenters asking for changes in proposed § 200.6(c)(4)(iii) to the specific assurances that a State has verified certain information with respect to LEAs that the State anticipates will assess more than 1.0 percent of their assessed students with an AA–AAAS, we maintain that the requirements in § 200.6(c)(4)(iii)(A), to follow each of the State's guidelines, and § 200.6(c)(4)(iii)(C), to address any disproportionality in the percentage of students in any subgroup assessed with an AA–AAAS, are critical to ensure that IEP teams within a State comply with the State's guidelines to determine that only students with the most significant

cognitive disabilities are most appropriately assessed with an AA–AAAS. We are, however, revising § 200.6(c)(4)(iii)(A) to remove duplicative language and improve clarity; specifically, the assurance States provide in their waiver requests must indicate that LEAs follow each of the State's guidelines under § 200.6(d), except § 200.6(d)(6), which only applies at a State level. All of the guidelines under § 200.6(d) are critically important for LEAs to follow, and we believe it is confusing and unnecessary to emphasize those in § 200.6(d)(1) over other pieces of the guidelines in this assurance.

In response to the specific commenter who suggested that proposed § 200.6(c)(4)(iii)(B) be removed, we agree. While LEAs should not significantly increase, from the prior year, the extent to which they assess more than 1.0 percent of all students assessed using an AA–AAAS without a demonstration of a higher prevalence rate of students with the most significant cognitive disabilities, we have determined that the practices this assurance are intended to address will also be addressed through the plan and timeline requirements in § 200.6(c)(4)(iv) and that some burden on the State and LEAs can be reduced by eliminating this assurance.

Given the changes that we are making to the waiver requirements contained in § 200.6(c)(4)(iii) to remove language referring to LEAs that significantly contributed to a State's exceeding the 1.0 percent cap, which commenters alleged was outside the Department's regulatory authority, the remaining assurances that are required in this section clearly do not exceed that authority. Based on the authority discussed above in response to comments regarding SEA oversight and disproportionality, the assurances a State is required to make related to an LEA that the State anticipates will exceed the State's 1.0 percent cap are necessary to evaluate whether a State is only assessing students with the most significant cognitive disabilities with an AA–AAAS and therefore warrants a waiver to exceed the 1.0 percent cap. Section 200.6(c)(4)(iii), as revised, is therefore well within the Department's regulatory authority under section 1601(a) of the ESEA as well as under section 410 of GEPA, 20 U.S.C. 1221e–3, and section 414 of the DEOA, 20 U.S.C. 3474.

Changes: We have revised § 200.6(c)(4)(iii) by removing the reference to LEAs that assess fewer than 1.0 percent of students using an AA–AAAS that the State determines will significantly contribute to the State's exceeding the cap. We have also removed § 200.6(c)(4)(iii)(B) and renumbered former § 200.6(c)(4)(iii)(C) as § 200.6(c)(4)(iii)(B). Finally, we have revised § 200.6(c)(4)(iii)(A) by removing ''including criteria in paragraph (d)(1)(i) through (iii)'' because it is included in the reference to guidelines under paragraph (d).

Comments: One commenter broadly objected to § 200.6(c)(4)(iv), which requires a State to submit a plan and timeline with its waiver request. A few commenters also objected more particularly to § 200.6(c)(4)(iv)(B), which requires a State to explain in the plan and timeline how it will support and provide appropriate oversight to an LEA that the State anticipates will assess more than 1.0 percent of its assessed students in a school year with an AA–AAAS, and any other LEA that the State determines will significantly contribute to the State's exceeding the cap. The commenters asserted that this creates intrusive State oversight of LEAs that are not exceeding the State cap by assessing less than 1.0 percent of their students with an AA–AAAS. One commenter contended that this interferes with IEP team authority and asserted that, since the IDEA provides a mechanism for monitoring compliance with IDEA requirements, this provision should be struck from the proposed regulations.

Discussion: We agree with the comment that § 200.6(c)(4)(iv) should be revised so that it applies only to LEAs that a State anticipates will assess more than 1.0 percent of the students assessed with an AA–AAAS and not to other LEAs that the State determines will significantly contribute to the State's exceeding the cap. The rationale for this change was discussed in the prior discussion. However, we also note that an effective plan and timeline, as required under § 200.6(c)(4)(iv), will likely need to consider both LEAs that have assessed more than 1.0 percent of their students with an AA–AAAS as well as LEAs that may approach but not exceed 1.0 percent. Nonetheless, we believe that a State will exercise proper discretion as to which LEAs must receive oversight from the State so that the State is able to meet the requirement to assess no more than 1.0 percent of assessed students with an AA–AAAS in future years. Given that a State must demonstrate substantial progress towards meeting each component of the State's plan and timeline to extend a waiver for additional years, we believe that a State will place great weight on how it exercises this discretion.

Changes: We have revised § 200.6(c)(4)(iv)(B) by removing the phrase referencing LEAs that the State determines will significantly contribute to the State's exceeding the cap, but do not themselves assess more than 1.0 percent of assessed students with an AA–AAAS.

Comments: One commenter asked the Department to allow States to monitor appropriate use of the AA–AAAS as a component of its existing accountability plan rather than as a new, separate process.

Discussion: We agree that there is benefit to streamlining processes at the State level and encourage States to consider how various aspects of their monitoring systems may be streamlined. These regulations merely articulate areas for technical assistance and oversight, as required under section 1111(b)(2)(D)(ii)(III) of the ESEA, rather than prescribe to States how to conduct such oversight. Therefore, we decline to make any changes.

Changes: None.

Comments: A few commenters opposed § 200.6(c)(4) that limits a State's waiver request to exceed the 1.0 percent cap to one year at a time. One commenter suggested that a State should be allowed to apply for a waiver for up to three years, but noted that a State could still be required to report annually against progress on meeting the requirement to assess no more than 1.0 percent of assessed students in each subject with an AA–AAAS.

Discussion: We do not anticipate a need to grant a State a multi-year waiver. The ESEA requires a State to assess no more than 1.0 percent of assessed students in a subject with an AA–AAAS each year, and it would be inconsistent with this requirement to provide a waiver to a State multiple years in advance, rather than expecting the State to take action to comply with the requirements of the law and only assess 1.0 percent of students in a subject using an AA–AAAS. On an annual basis, should a State apply for a waiver from the 1.0 percent cap, the State is expected to include a plan and timeline to improve implementation of its State guidelines, which guide IEP team decision making, so that the State is able to assess less than 1.0 percent of students in the State with an AA–AAAS in future years. While this may be a difficult transition for some States and may result in a State requesting a waiver from the requirement, we agree with the consensus reached during negotiated rulemaking that such waivers be limited to one year. We believe that an annual waiver submission will allow the Department to evaluate whether the

State is making necessary progress towards complying with the law. However, we do not intend to prohibit a State from applying for a waiver in subsequent years should the State determine there is a continued need for such a request, particularly if the State is making progress against its plan and timeline toward meeting the statutory requirement.

Therefore, we decline to make the suggested change.

Changes: None.

Comments: A few commenters opposed § 200.6(c)(4)(v) that any subsequent waiver request to the initial request must demonstrate ''substantial progress'' toward achieving each component of the plan and timeline that the State submitted with the waiver in the prior year. One such commenter asserted that this requires additional, burdensome evidence of intervention in LEAs that assess more than 1.0 percent of assessed students with an AA–AAAS. Another such commenter noted that ''substantial progress'' is an undefined term and open to subjective interpretation and would prefer that any measurable amount of progress towards achieving the plan and timeline be considered sufficient to receive a waiver in a future year. Another commenter noted there should be recognition that the numbers of students eligible for an AA–AAAS are based on factors that may be outside the State's or LEA's control, such as students entering and leaving a district and students who may choose not to participate in assessments.

Discussion: We disagree with the commenters and believe there is great value in ensuring that a State demonstrate substantial progress towards achieving the objectives outlined in the State's plan and timeline for assessing no more than 1.0 percent of assessed students with an AA–AAAS—because limiting the use of the AA–AAAS to 1.0 percent of the total number of students assessed in each subject is a statutory requirement. While there is a waiver authority, the expectation for States should be to meet that requirement, or work toward meeting it over time, rather than to perpetually receive a waiver of the requirement. While we agree with the commenter that the term ''substantial progress'' is undefined, the use of the word ''substantial'' is intentional and represents more than simply any measurable amount of progress towards achieving the plan and timeline. Nonetheless, we also acknowledge that a State is best positioned to describe in a subsequent waiver request how it has made substantial progress based on the State's context and unique needs, and note that, by maintaining the current language, a State is encouraged to make such a demonstration. Therefore, we decline to make the suggested change.

Changes: None.

Computer-Adaptive AA–AAAS

Comments: A few commenters strongly supported the provision in § 200.6(c)(7) that a computer-adaptive AA–AAAS must measure student performance against the academic content standards for the grade-level in which the student is enrolled, feeling it provides an important safeguard to ensure students with the most significant cognitive disabilities are held to high expectations and receive grade-level content even when taking adaptive assessments.

Discussion: We agree that it is essential for all children with disabilities to be held to the same high expectations as their peers without disabilities, including students with the most significant cognitive disabilities taking a computer-adaptive alternate assessment aligned with alternate academic achievement standards. Like a general computer-adaptive assessment, a computer-adaptive alternate assessment must be aligned with the challenging State academic content standards for the grade in which the student is enrolled, as required under section 1111(b)(2)(D)(i) of the ESEA.

Changes: None.

State Guidelines With Respect to Students With the Most Significant Cognitive Disabilities

Comments: Numerous commenters noted support for § 200.6(d)(1), which specifies that a State's guidelines for IEP teams must include a State definition of students with the most significant cognitive disabilities. Many commenters, in particular, believed these provisions were essential to protect the validity of assessments for children with disabilities, to prevent misidentification of students for an AA–AAAS, and to emphasize that students with the most significant cognitive disabilities are to be assessed against grade-level content standards, while recognizing that both cognitive functioning and adaptive behavior should be considered in determining student supports.

In addition, one commenter suggested adding specific examples to the regulations to provide States greater understanding of what might qualify as a ''significant cognitive disability,'' and provided several suggested examples such as students who require dependence on others for daily living activities. Two commenters supported adding that a student's intelligence quotient (IQ) score may not be a factor in determining whether a student should take an AA–AAAS. Finally, a commenter recommended modifying one of the parameters for States' definitions to emphasize the role of IEP teams and not equivocally state these students require extensive, direct individualized instruction and substantial supports to achieve measurable gains on the challenging State academic content standards for the grade in which the student is enrolled. Instead, the commenter proposed that IEP teams consider the provision of such instruction and supports.

Discussion: We appreciate the suggestions that the commenters provided and acknowledge that the negotiators engaged in robust discussion on the topic of how to define ''students with the most significant cognitive disabilities'' during negotiated rulemaking. We believe that the regulations reflect the consensus of the negotiators and appropriately balance the need for regulatory parameters to ensure that State guidelines incorporate key protections for students with the most significant cognitive disabilities while balancing the ability for States to construct such guidelines in consultation with local stakeholders to devise a State definition of ''students with the most significant cognitive disabilities'' that will ensure students within a given State are appropriately identified and assessed. We note that, should a State apply for a waiver to exceed the 1.0 percent cap on the number of students with the most significant cognitive disabilities who may be assessed with an AA–AAAS, under § 200.6(c)(4)(iv)(A) the State must include a plan and timeline in its waiver request to improve the implementation of those State guidelines, which may include revising its definition of ''students with the most significant cognitive disabilities'' if necessary so that the State can ensure it will assess no more than 1.0 percent of students with such an AA–AAAS. These revisions could include considering additional factors, such as those indicated by the commenters. However, in reviewing the proposed regulations, the Department believes it is necessary to update § 200.6(d) for consistency with regulations under the IDEA (34 CFR 300.306(b)(1)(iii)) and to clarify that status as an English learner may not be considered in determining whether a student is a student with the most significant cognitive disabilities, even in part. The only relevance of English learner status to that

determination is ensuring that the evaluation of the student's disability is conducted in an appropriate language.

With regard to the comments about IEP team discretion, we refer to the discussion above in which we note that, under both the ESEA and the IDEA, decisions of IEP teams must be informed by State guidelines. We agree with the consensus reached by the negotiated rulemaking committee that students with the most significant cognitive disabilities require extensive, direct individualized instruction and substantial supports to achieve measurable gain on the challenging State academic content standards for the grade in which the student is enrolled. However, we believe this is only one factor for a State to consider in the development of its State guidelines and strongly encourage States to work with local stakeholders to develop State definitions that best reflect local needs.

Changes: We have revised § 200.6(d)(1)(i) to clarify that a student's status as an English learner, similar to the identification of a student as having a particular disability under the IDEA, does not determine whether a student is a student with the most significant cognitive disabilities.

Comments: One commenter expressed general concern with requirements related to State guidelines for IEP teams under § 200.6(d), believing that the proposed regulations unduly limit the discretion of a student's IEP team with regard to determinations of which assessment is appropriate for a student, especially given that the State may only assess 1.0 percent of students assessed in a given subject with an AA–AAAS. Similarly, another commenter argued that § 200.6(d) violated section 1111(b)(2)(D)(ii)(I)–(II) of the ESEA because the requirements for State guidelines usurped the authority of the IEP team to determine which students with the most significant cognitive disabilities may take an AA–AAAS.

Discussion: We appreciate the commenters' concern and agree that under sections 1111(b)(1)(E) and 1111(b)(2)(D)(ii) of the ESEA IEP teams are responsible for determining whether a student has a significant cognitive disability and is most appropriately assessed against alternate academic achievement standards. However, IEP teams do not have unlimited discretion in this regard. Rather, under section 1111(b)(2)(D)(ii) of the ESEA and section 614(d)(1)(A)(i)(VI)(bb) of the IDEA, IEP teams must decide which children with the most significant cognitive disabilities will participate in an AA–AAAS, consistent with State guidelines under section 612(a)(16)(C) of the IDEA, as amended by the ESSA, governing the participation of children with disabilities in the AA–AAAS. Those State guidelines inform decisions of IEP teams as to which children with disabilities are those with the most significant cognitive disabilities who should participate in an AA–AAAS. As agreed in negotiated rulemaking, we continue to believe that it is appropriate, consistent with section 1111(b)(2)(D)(i)(II) and (D)(ii)(I) of the ESEA and section 612(a)(16)(C) of the IDEA, to establish the parameters included in § 200.6(d) and therefore decline to make any changes.

Changes: None.

Comments: One commenter argued that § 200.6(d)(1) violated section 1111(e)(2) of the ESEA by imposing on States a definition of ''students with the most significant cognitive disabilities'' in conflict with a prohibition on the Secretary's authority for defining terms that are inconsistent with or outside the scope of the law.

Discussion: We appreciate the commenter's concern, but note that we are not defining the term ''students with the most significant cognitive disabilities;'' rather, the regulations require States to define this term and establish criteria for States to adhere to in establishing their own definition. Further, given that an AA–AAAS, as described in section 1111(b)(2)(D) of the ESEA, is only for students with the most significant cognitive disabilities, and that States must now ensure that no more than 1.0 percent of assessed students in the State take such assessments, we believe requiring a State to define ''students with the most significant cognitive disabilities'' in accordance with factors related to cognitive functioning and adaptive behavior is both consistent with and within the scope of the ESEA. Therefore, we decline to adopt any changes in response to this comment.

Changes: None.

Comments: A few commenters supported § 200.6(d)(2), which requires the State guidelines to help explain differences between assessments based on grade-level academic achievement standards and alternate academic achievement standards to IEP teams, including any effects of State or local policies on students as a result of taking an AA–AAAS (*e.g.,* how participation in such assessments may delay or otherwise affect the student's ability to complete requirements for a regular high school diploma). They noted that this provision will help provide IEP teams with needed information as such teams make potentially high-stakes decisions regarding whether a student will take an AA–AAAS.

Additionally, a commenter wrote in support of § 200.6(d)(3), which requires a State to notify parents of students participating in an AA–AAAS that their child's achievement will be measured based on alternate academic achievement standards and provide information on how participation in such assessment may delay or affect their child's completion of the requirements for a regular high school diploma, noting that these provisions empower parents to effectively advocate for their child's inclusion in the general assessment and the course of study that will help them prepare for the general assessment.

Discussion: We appreciate the commenters' support and agree that these provisions will help ensure IEP teams, including parents, are equipped with the information they need to make decisions that are in the best interests of the students they serve. We further agree that § 200.6(d)(3) will help ensure parents have the necessary information to advocate on behalf of their children in order to support their educational needs.

Changes: None.

Comments: A few commenters wrote in support of § 200.6(d)(4)–(5), which clarifies that States may not prevent students taking an AA–AAAS from pursuing a regular high school diploma and must promote (consistent with the IDEA) students with the most significant cognitive disabilities' access to the general education curriculum.

Discussion: We strongly agree with the commenters that it is critical for students with the most significant cognitive disabilities taking an AA–AAAS to not be precluded from attempting to complete the requirements for a regular high school diploma and to ensure that the instruction they receive promotes their involvement and progress in the general education curriculum for the grade in which the student is enrolled. Section 200.6(d)(4)–(5) incorporates requirements in sections 1111(b)(2)(D)(i)(III) and 1111(b)(2)(D)(i)(VII) of the ESEA.

Changes: None.

Comments: Multiple commenters wrote in support of the emphasis on maintaining high expectations for all students, including students with the most significant cognitive disabilities. These commenters expressed support for assessing students with the most significant cognitive disabilities with an AA–AAAS, which is aligned with the State's academic content standards for the grade in which the student is enrolled.

Discussion: We strongly agree with the commenters on the importance of ensuring that all students, including those with the most significant cognitive disabilities are provided access to the State's academic content standards for the grade in which the student is enrolled. As § 200.6(a)(2)(ii)(B) provides that students with the most significant cognitive disabilities may take an AA–AAAS aligned with the challenging State academic content standards for the grade in which the student is enrolled, we believe it is likewise important to emphasize the importance of providing students with the most significant cognitive disabilities with access to grade-level content standards throughout the school year.

Changes: We have revised § 200.6(d)(5) to clarify that the reference to promoting the involvement and progress of students with the most significant cognitive disabilities in the ''general education curriculum'' refers to curriculum that is based on the State's academic content standards for the grade in which the student is enrolled.

Comments: Several commenters wrote in support of the emphasis on developing any AA–AAAS consistent with the principles of UDL, expressing that UDL will make an AA–AAAS more accessible to students with the most significant cognitive disabilities.

Discussion: We agree with commenters on the importance of incorporating UDL principles into developing an AA–AAAS, as required under section 1111(b)(1)(D)(i)(IV) of the ESEA. We believe the best way to incorporate this requirement is to make it an affirmative requirement, to the extent feasible, in § 200.6(d)(6) and add using UDL with respect to an AA–AAAS along with general assessments that the State administers consistent with § 200.2(b)(2)(ii). These changes will help support States' efforts to more thoughtfully and efficiently develop assessment systems that are fully accessible to all students.

Changes: We have revised § 200.6(d)(6) to remove a reference to the State plan and add a reference to the requirements related to UDL in § 200.2(b)(2)(ii).

Comments: One commenter suggested requiring that State guidelines for IEP teams be developed based on input from stakeholders, including local special education directors, citing a need for greater understanding of accommodation policies for assessing students with disabilities.

Discussion: While we appreciate the importance that this commenter is placing on the need for stakeholder engagement, we do not believe this suggested change is necessary. The State guidelines to be established in accordance with § 200.6(d) must be established consistent with section 612(a)(16)(C) of the IDEA. While States are in the best position to determine how to develop such guidelines, we encourage States to meaningfully consult with and incorporate feedback from relevant stakeholders, including teachers, parents of children with disabilities, children with disabilities, paraprofessionals, specialized instructional support personnel, school administrators, local special education directors, and the State advisory panel required under section 612(a)(21) of the IDEA.

Changes: None.

English Learners in General

Comments: None.

Discussion: In developing the final regulations, the Department determined that it would be helpful to devote separate paragraphs in § 200.6 to describe each of the requirements regarding the inclusion of English learners in State assessments required under title I, part A of the ESEA. To distinguish better among these provisions, we are revising § 200.6 to include paragraphs (f) on inclusion of English learners in general; (g) on assessing reading/language arts in English for English learners; (h) on assessing English language proficiency of English learners; and (i) on recently arrived English learners—rather than include all of these provisions in a single paragraph, as proposed. As a result, requirements pertaining to the inclusion of students enrolled in Native American language schools or programs have been moved to new § 200.6(j), and we have added a single paragraph that includes all related definitions in new § 200.6(k). By restructuring these requirements that were included in proposed § 200.6(f)–(h), we believe they are more clearly stated and emphasized in the final regulations. In addition, we are moving proposed § 200.6(i) on highly mobile student populations to § 200.2(b)(1)(ii)(A)–(D) in the final regulations, which we feel is a more logical location for these provisions, as it is in the same section as related requirements for administering assessments to all students in § 200.2(b)(1)(ii) and for disaggregating assessment data for these particular student groups in § 200.2(b)(11).

Changes: We have renumbered and reorganized proposed § 200.6(f) regarding inclusion of English learners so that these requirements appear in separate paragraphs in new § 200.6(f)–(i). In addition, we have moved proposed § 200.6(g) regarding students in Native American language schools or programs to new § 200.6(j) and proposed § 200.6(i) regarding highly mobile student populations to new § 200.2(b)(1)(ii)(A)–(D). We have also made conforming edits to cross-references throughout the final regulations.

English Learners With Disabilities

Comments: Some commenters expressed general support for proposed § 200.6(f)(1)(i)(A), which clarified that English learners who are also identified as students with disabilities under § 200.6(a) must be provided accommodations as necessary based on both their status as English learners and their status as students with disabilities. Some commenters recommended adding language to proposed § 200.6(f)(1)(i) to clarify that staff responsible for identifying the appropriate accommodations for English learners with disabilities receive necessary training to select and administer assessments, and the accommodations appropriate for each individual child, in order to yield accurate and reliable information. One commenter specifically recommended training that addresses cultural sensitivities.

Discussion: We appreciate the commenters' support of the requirements related to assessment of English learners and agree that appropriate accommodations on assessments are important to ensure that English learners are assessed in a valid and reliable manner so they can demonstrate what they know and can do, as described in section 1111(b)(2)(B)(vii)(III) of the ESEA. In addition to providing assessments to an English learner with disabilities in the student's native language, consistent with section 1111(b)(2)(B)(vii)(III) of the ESEA, providing appropriate accommodations may also include providing the accommodations for the student's disabilities in the student's native language. We agree that appropriate staff should receive necessary training to administer assessments in order for school staff to know how to make use of appropriate accommodations during assessment for all English learners with disabilities. While § 200.6(b)(2)(ii), as proposed, includes staff that work with all students with disabilities, including those who are English learners, we are revising the regulations to more clearly indicate that teachers of English learners must also receive any necessary training regarding administration of assessments,

including alternate assessments, and the use of assessment accommodations.

Changes: We have revised § 200.6(b)(2)(ii) to indicate that States must ensure that teachers of English learners receive necessary training to administer assessments, that they know how to administer assessments, including, as necessary, alternate assessments under § 200.6(c) and (h)(5), and that they know how to make use of appropriate accommodations during assessments for all students with disabilities, including English learners with disabilities.

Comments: One commenter requested flexibility from the regulatory requirements for ELP assessments in the event that an English learner has a disability that prevents the student from accessing a particular domain of the ELP test, even with accommodations.

Discussion: We appreciate the commenter's suggestion and agree that greater clarity is needed to ensure that States fulfill their responsibility to assess all English learners annually on the State's ELP assessment, consistent with section 1111(b)(2)(G)(i) of the ESEA. We acknowledge that there are English learners with a disability covered under the IDEA, section 504, or title II of the ADA who may have a disability that precludes assessment of the student in one or more domains of the State's ELP assessment such that there are no appropriate accommodations for the affected domain(s) (*e.g.,* a non-verbal English learner who because of that identified disability cannot take the speaking portion of the assessment, even with accommodations). We are revising the regulations accordingly to specify that, in these very rare circumstances, such an English learner must be assessed on all of the remaining domains of the State's ELP assessment. The exclusion of these students from the ELP assessment entirely would be not only contrary to the law, but could also lead to a lack of proper attention and services for such students.

Changes: We have added § 200.6(h)(4)(ii) to clarify that, for English learners who have a disability that precludes assessment of the student in one or more domains of the State's ELP assessment such that there are no appropriate accommodations for the affected domain(s), as determined on an individualized basis by the student's IEP team, 504 team, or individual or team designated by the LEA to make these decisions under title II of the ADA, as set forth in § 200.6(b)(1), a State must assess the student in the remaining domains on the ELP assessment.

Comments: One commenter asked that the Department provide clarity as to how the 1.0 percent cap on the number of students who may take an AA–AAAS is applicable to recently arrived students with the most significant cognitive disabilities who are exempted from one administration of the reading/language arts assessment.

Discussion: We appreciate this request for clarification. Consistent with applicable regulations, a recently arrived English learner may be counted as a participant in the State's reading/language arts assessment if the student takes either the State's ELP assessment or reading/language arts assessment regardless if the student takes the AA–AAAS or the alternate ELP assessment. Accordingly, when calculating the denominator to determine if the State will exceed the 1.0 percent cap on student participation in an AA–AAAS for reading/language arts (*i.e.,* the number of students who were assessed in reading/language arts), the denominator would include any such recently arrived English learner who participated in either the ELP or reading/language arts assessment. The numerator would only include those students who take the AA–AAAS. For calculating the 1.0 percent cap for student participation in a mathematics or science alternate assessment, all ELs are included in both the numerator and the denominator because there is no similar exemption for recently-arrived ELs from the mathematics assessment.

Changes: None.

Comments: The same commenter asked that the Department clarify if the 1.0 percent cap applies to the number of English learners who are students with the most significant cognitive disabilities taking an alternate assessment to the ELP assessment.

Discussion: The 1.0 percent statewide cap on the number of assessed students in a particular subject who may take an AA–AAAS is limited to the assessments that measure the achievement of students with the most significant cognitive disabilities against alternate academic achievement standards permitted under section 1111(b)(1)(E) of the ESEA, and applies only to assessments in mathematics, reading/language arts, and science. Thus, the 1.0 percent statewide cap on the number of students assessed in a particular subject who may take an AA–AAAS, required in section 1111(b)(2)(D) of the ESEA, does not apply to the number of English learners who are students with the most significant cognitive disabilities taking an alternate assessment to the ELP assessment. Section 200.6(h)(5) (proposed § 200.6(f)(3)(v)) requires that a State provide an alternate ELP assessment for each English learner covered under § 200.6(a)(1)(ii)—that is, those with the most significant cognitive disabilities—who cannot participate in the general ELP assessment even with appropriate accommodations. Although the ELP assessment is not subject to the 1.0 percent cap in section 1111(b)(2)(D) of the ESEA, we nevertheless expect that the vast majority of English learners with disabilities will be able to take the general ELP assessment with or without appropriate accommodations. The alternate ELP assessment is for only the very small fraction of English learners with the most significant cognitive disabilities, for whom the student's IEP team determines it to be necessary.

Changes: None.

Inclusion of English Learners in Academic Assessments

Comments: Some commenters expressed general support for provisions in proposed § 200.6(f) related to the appropriate inclusion of English learners in academic assessments required under § 200.2. Commenters found the proposed regulations helpful to ensure that all students receive the supports they need to fully participate in the public education system, including receiving appropriate accommodations with respect to a student's status as an English learner. Some commenters also expressed support for provisions in proposed § 200.6(f)(1)(ii)(A) that required States to ensure that the use of appropriate accommodations on assessments does not deny an English learner the ability to participate in an assessment, or any benefit from participation in the assessment, that is afforded to students who are not English learners.

Discussion: We appreciate the commenters' support of the requirements related to assessment of English learners and agree that appropriate accommodations on State assessments are important to ensure that English learners are fairly and accurately assessed so they can demonstrate what they know and can do. These requirements will also help ensure that receipt of assessment accommodations does not prevent English learners from receiving the same benefits from assessments that are afforded to non-English learners, such as college-reportable scores on entrance examinations that a State administers to all high school students in the State as part of the State's academic assessment system. We are maintaining these provisions in the regulations, but revising § 200.6(f)(2)(i) and (ii) (proposed § 200.6(f)(1)(ii)) for clarity.

Specifically, the information in § 200.6(f)(2)(ii) must be described in each State's plan, while the requirement in § 200.6(f)(2)(i)—for each State to ensure that the use of appropriate accommodations on assessments does not deny an English learner the ability to participate in an assessment, or any benefit from participation in the assessment, that is afforded to students who are not English learners—is a requirement without a related description in the State plan, consistent with similar provisions in §§ 200.3 and 200.6(b)(3) of these regulations.

Changes: We have moved the requirements from proposed § 200.6(f)(1)(ii)(A) to § 200.6(f)(2)(i) and have removed the requirement that State plans include a description related to this requirement. We have moved the requirements from proposed § 200.6(f)(1)(ii)(B)–(E) to § 200.6(f)(2)(ii).

Comments: One commenter stated that English learners should be excluded from all administrations of the reading/language arts and mathematics assessments until they demonstrate a sufficient level of English proficiency to produce valid results on these assessments.

Discussion: We disagree with the commenter that the regulations should exempt English learners from all administrations of the reading/language arts and mathematics assessments until they attain English proficiency. Section 1111(b)(2)(B)(vii)(III) of the ESEA requires States to provide for the inclusion of all English learners in all required content assessments, including by providing assessments in the language and form most likely to yield accurate data on what English learners know and can do in the content areas until such students attain English language proficiency. Additionally, § 200.6(f)(1)(i) and (2)(ii) (proposed § 200.6(f)(1)) require that each State take further steps to demonstrate that it is meeting its responsibility to provide assessments for English learners in the language that is most likely to assess an English learner's knowledge and skills accurately and fairly (*i.e.,* through providing assessments in the native language of English learner students). Given this responsibility, we strongly encourage States to provide native language assessments for English learners and firmly believe that utilizing this option will ensure that English learners are meaningfully included in a State's assessment and accountability system, rather than excluding such students altogether as the commenter suggested. In addition, we believe this will help ensure that schools, teachers, and parents can take advantage of the valuable information provided by student assessments to inform and improve instruction for English learners.

Changes: None.

Comments: One commenter recommended allowing States to use their aligned ELP assessments as a measure of students' proficiency in reading/language arts.

Discussion: It would be both inconsistent with the statute and inappropriate to permit a State to use an ELP assessment as a measure of students' proficiency in reading/language arts. A State's annual ELP assessment is designed specifically to measure an English learner's proficiency in the English language. Under section 1111(b)(1)(F) and 1111(b)(2)(G) of the ESEA, ELP assessments must be aligned to the ELP standards and measure English learners' proficiency levels annually in the four recognized domains of language: speaking, listening, reading, and writing. The State's required reading/language arts assessments, on the other hand, measure what students know and are able to do in the specific academic content area of reading/language arts, based on the challenging State academic standards in section 1111(b)(1) of the ESEA. States are required to provide for the participation of all English learners, as described in section 1111(b)(2)(B)(vii)(III) of the ESEA, in the annual reading/language arts assessments in the grades specified in section 1111(b)(2)(B)(v)(I) of the ESEA. We do note, however, that States may administer reading/language arts assessments in a student's native language for students who have been enrolled in schools in the United States for less than three consecutive years (or five consecutive years, in certain unique circumstances) for an English learner for whom such assessment would yield more accurate information on what the student knows and can do in the content area, as described in section 1111(b)(2)(B)(ix) of the ESEA. Further, section 1111(b)(3)(A)(i)(I) of the ESEA provides a limited exception for recently arrived English learners from one administration of the State's reading/language arts assessment only; otherwise, all English learners must take both the State's ELP assessment annually and the reading/language arts assessment in each of grades 3–8 and once in high school.

Changes: None.

Comments: A few commenters suggested the Department clarify that accommodations for English learners must result in valid, reliable, and predictable test scores.

Discussion: We agree that it is important to ensure that assessments are fair, valid, reliable, and high quality, resulting in meaningful scores. However, we believe no further clarification is needed as § 200.6(f)(1) (proposed § 200.6(f)(1)(i)) requires that States assess English learners in a valid and reliable manner that includes appropriate accommodations with respect to a student's status as an English learner. The regulations further require consistency with § 200.2, including § 200.2(b)(2) regarding accommodations for all students, including English learners, and § 200.2(b)(4) requiring assessments to be valid, reliable, and fair for the purposes for which they are used and consistent with relevant, nationally recognized professional and technical testing standards. Finally, we believe that the inclusion of a State's ELP assessments, in addition to its academic content assessments, in the assessment peer review process under § 200.2(d) will be critically important to ensure *all* assessments administered to English learners are fair, valid, reliable, and high-quality.

Changes: None.

Comments: A few commenters suggested the regulations require that each LEA offer accommodations to English learners needing linguistic support to access the State's content assessments and asserted that reporting the availability of accommodations alone is insufficient.

Discussion: Section 1111(b)(2)(B)(vii)(III) of the ESEA, and § 200.6(f)(1)(i) (require States to provide for the participation of all English learners, including needed accommodations. While this is a State responsibility under the statute, we agree with the commenters that States should proactively provide LEAs and schools with the necessary information and tools to ensure that English learners receive needed accommodations on required State assessments. Thus, we are revising the final regulations to require that States (1) develop appropriate accommodations; (2) disseminate information and resources to, at a minimum, LEAs, schools, and parents about these accommodations; and (3) promote the use of appropriate accommodations to ensure that all English learners are able to participate in academic instruction and assessments. This language is similar to that in section 1111(b)(2)(D)(i)(VI) of the ESEA regarding accommodations for students with the most significant cognitive disabilities and § 200.6(b)(2) with respect to other students with disabilities. We believe States should ensure information about available accommodations is transparent and

clear to LEAs and schools, as information on accommodations is critical for ensuring that all English learners are able to participate in academic instruction and assessments.

Changes: We have revised § 200.6(f)(1)(i) to require that a State (1) develop appropriate accommodations for English learners; (2) disseminate information and resources about such accommodations to, at a minimum, LEAs, schools, and parents; and (3) promote the use of those accommodations to ensure that all English learners are able to participate in academic instruction and assessments.

Assessing Reading/Language Arts in English

Comments: Several commenters asked for additional flexibility in proposed § 200.6(f)(2). Specifically, the commenters recommended extending the period that English learners can be assessed for reading/language arts in their native language beyond three years.

Discussion: We disagree with the commenters and believe additional flexibility is both inconsistent with the statute and unnecessary. Section 1111(b)(2)(B)(ix) of the ESEA and § 200.6(g)(1)–(2) (proposed § 200.6(f)(2)(i)–(ii)) permit a State to assess English learners' achievement in reading/language arts in the student's native language if they have been enrolled in schools in the United States for less than three consecutive years, with provisions permitting assessment in the native language for an additional two consecutive years if the LEA determines, on a case-by-case basis, that the student has not reached a sufficient level of English language proficiency to yield valid and reliable information on reading/language arts assessments written in English. Because the statute and final regulations already allow for LEAs to determine, on an individualized basis, whether it is necessary to assess an English learner in reading/language arts in his or her native language for an additional two years, we believe the flexibility these commenters seek is sufficiently addressed. We also note that, because the statute requires students to be assessed in reading/language arts in English if they have been enrolled in U.S. schools for three or more *consecutive* years, a highly mobile student who attends school in the United States for two years, exits the country, and then returns to a school in the United States in later years would still be able to be assessed in reading/language arts in his or her native language upon return to U.S. schools.

Changes: None.

Assessing English Language Proficiency

Comments: One commenter asked that we clarify the frequency or grade level in which an ELP test must be administered for accountability purposes.

Discussion: We appreciate the suggestion that we clarify the grade levels in which an annual statewide ELP assessment must be administered for accountability purposes, but note that requirements for school accountability are outside the scope of these regulations. Section 1111(c)(4)(B)(iii) of the ESEA describes the years in which an ELP assessment must be used for school accountability determinations. We note that § 200.5(a)(2) of these regulations specifies the requirement to administer an ELP assessment annually in any grade in which there are English learners, kindergarten through twelfth grade. The requirement for assessment administration, however, is distinct from the requirement for use of assessment results in accountability determinations, which, as explained above, is outside the scope of these regulations.

Changes: We have updated §§ 200.5(a)(2) and 200.6(h)(1)(ii) to clarify that the requirement is to administer the ELP assessment annually in any grade in which there are English learners, kindergarten through twelfth grade.

Comments: None.

Discussion: In preparing the final regulations, the Department believes it is helpful to clarify that the requirement for a State's ELP assessment to be aligned with its ELP standards, as described in section 1111(b)(1)(F) of the ESEA, is distinct from the requirement for a State to provide coherent and timely information to parents of English learners about their child's attainment of the State's ELP standards, and we are revising § 200.6(h)(2)(i) and (iii) (proposed § 200.6(f)(3)(ii)(A)) to list these requirements separately. In addition, we are revising § 200.6(h)(2)(iii) (proposed § 200.6(f)(3)(ii)(A)) to clarify that information given to parents must be consistent with the requirements of both § 200.2(e) and section 1112(e)(3) of the ESEA, which specifies that information related to language instruction (including student performance on the State's ELP assessment) that is provided to parents under the parents right-to-know requirements must be in a uniform and understandable format and, to the extent practicable, in a language parents can understand.

Changes: We have moved proposed § 200.6(f)(3)(ii) to § 200.6(h)(2) and have (1) listed separately the requirements for a State's ELP assessment to be aligned with its ELP standards (in § 200.6(h)(2)(i)) and for a State to provide coherent and timely information to parents of English learners about their child's attainment of the State's ELP standards (in § 200.6(h)(2)(iii)); and (2) clarified that information to parents must be consistent with both § 200.2(e) and section 1112(e)(3) of the ESEA (in § 200.6(h)(2)(iii)).

Recently Arrived English Learners

Comments: A few commenters expressed general support for the provisions in proposed § 200.6(f)(4), which clarified the statutory provision allowing States to exempt a recently arrived English learner from one administration of the State's reading/language arts assessment as described in section 1111(b)(3)(A)(i)(I) of the ESEA. Some commenters suggested the Department modify the regulations to allow States to also exempt a recently arrived English learner from one administration of the State's mathematics and science assessments. Particularly, one commenter expressed concern that many newly arrived students have not had enough language exposure to take these assessments.

Discussion: We appreciate the support for this provision and disagree with the commenters who argued that we should modify the regulations to exempt recently arrived English learners from required State assessments in mathematics and science, as this change would be inconsistent with the statute. Section 1111(b)(2)(B)(i) and (vii) of the ESEA requires a State's assessment system to be administered to all students and to provide for the participation of all students, including English learners. If a State chooses to use this flexibility, the one-year exemption for administering content assessments to recently arrived English learners in section 1111(b)(3)(A)(i)(I) of the ESEA applies only to the reading/language arts assessment, and not to mathematics or science. Annual assessments, as required by the ESEA, are valuable tools for schools, teachers, and parents to inform and improve student instruction; in order to reliably assess what English learners know and can do in the content area, we strongly encourage States to develop and use assessments in the native language of English learners, where needed.

Changes: None.

Comments: One commenter suggested the Department modify proposed § 200.6(f)(4) to allow States to exempt a recently arrived English learner for up to three years from the administration of the State's reading/language arts assessment. The commenter specifically voiced concern with any requirement that would not allow English learners who have been in the country for three years or less to be exempted from the administration of the State's reading/language arts assessment.

Discussion: We appreciate the commenter's concerns, but note that, while the ESEA provides additional flexibility for how recently arrived English learners may be included in school accountability determinations, as described in section 1111(b)(3)(A)(ii) of the ESEA), it does not change the requirements pertaining to the inclusion of recently arrived English learners in a State's academic content assessments. Section 1111(b)(3)(A)(i)(I) of the ESEA permits a State, at its discretion, to exempt recently arrived English learners from one, and only one, administration of the State's reading/language arts assessment during a student's first 12 months enrolled in schools in the United States (which may, consistent with past practice, be non-consecutive months). Section 200.6(i) (proposed § 200.6(f)(4)) is consistent with the statutory requirements.

Changes: None.

Assessments in Languages Other Than English

Comments: Some commenters expressed general support for the provisions in proposed § 200.6(f)(1)(ii) and (iv) that require a State to make every effort to develop, for English learners, annual academic assessments in languages other than English that are present to a significant extent in the participating student population, including a description in its State plan of how it will make every effort to develop assessments where such assessments are not available and are needed, and an explanation, if applicable, of why the State is unable to complete the development of those assessments despite making every effort. One commenter requested that the regulations clarify that results from assessments in native languages must be included in the accountability system, and that the regulations provide a timeline for such inclusion.

A few commenters, however, voiced concern with requiring States to develop native language assessments, citing concerns with: the number of assessments that must be peer reviewed; assessments that would measure different constructs, thus yielding data that are not comparable; and encouraging student assessment in languages in which they are not necessarily receiving academic instruction.

Discussion: We appreciate the commenters' support for the requirements related to assessments in languages other than English. While we recognize the concerns of some commenters, we note that section 1111(b)(2)(F) of the ESEA requires States to make every effort to develop assessments in languages other than English that are needed and, as part of that effort, States must identify languages present to a significant extent in the State's student population, and languages for which academic assessments are needed. The regulations do not require that States develop a specific number of assessments in languages other than English; they do require, in the process of identifying the languages present to a significant extent, that States identify at least the language other than English that is most commonly spoken in the State. The regulations also provide that, if a State has been unable to develop assessments in languages other than English that are present to a significant extent despite making every effort, it include a description in its State plan articulating its reasons.

We agree that results from State assessments in languages other than English that meet the requirements of these final regulations should be included in the State's accountability system; however, provisions related to school accountability are outside the scope of these regulations.

With regard to a timeline, § 200.6(f)(2)(ii)(D)(*1*) (proposed § 200.6(f)(1)(ii)(E)(*1*)) requires States to submit in their State plan a specific plan and timeline for developing assessments in languages other than English, and upon successfully implementing such assessments, States will include the results in their accountability system. In large part because these assessments will be used for accountability and reporting purposes under title I, part A, we believe it is critical that States submit evidence regarding how the assessments meet statutory requirements for assessment peer review under § 200.2(d)—as they do with all other assessments that are used for these purposes.

We further agree that it is important that any content assessments that States develop in languages other than English measure the same construct as the assessments administered in English, including alignment to the same challenging State academic standards, as required in section 1111(b)(2)(B)(ii) of the ESEA, but believe that the regulations, as proposed, help mitigate the concern that the assessments will be non-comparable to those in English. The Department's peer review of these assessments will help ensure that all content assessments in languages other than English are valid, reliable, fair, of high technical quality, and aligned to the challenging State academic content and achievement standards. Finally, with regard to the concerns that these provisions encourage students to be assessed in languages for which they are not receiving academic instruction, we note that an English learner is not required to be assessed using a reading/language arts or mathematics assessment in their native language, if a State develops one (*i.e.,* the student may always be assessed in English if that is the language most likely to yield accurate and reliable information on what such student knows and can do). We are also revising § 200.6(f)(2)(ii)(D)(*2*) to require States to gather meaningful input from students, as appropriate, on the need for assessments in languages other than English and include this in the State's description in its State plan of how it is making every effort to development assessments in languages other than English that are present to a significant extent in the State.

Changes: We have revised § 200.6(f)(2)(ii)(D)(*2*) so that States will describe their process to consult with students, as appropriate, as well as educators, parents and families of English learners, and other stakeholders on the need for assessments in languages other English.

Comments: One commenter suggested requiring States to develop assessments in languages other than English that may not be ''present to a significant extent,'' and specifically mentioned the Hawaiian language and the needs of tribal communities.

Discussion: While the Department appreciates the intent of this comment, we decline to make further changes to require States to develop assessments in languages other than English that may not be ''present to a significant extent.'' Section 1111(b)(2)(F) of the ESEA requires States to make every effort to develop assessments in languages other than English that are needed and, as part of that effort, States must identify languages ''present to a significant extent'' in the State's student population. A State may always develop and administer assessments in any languages needed regardless of their prevalence in the State, including

Native American languages, and tribal communities could certainly work together with States to create such assessments. We encourage States to engage stakeholders, including tribal communities when relevant, in the process. However, we believe efforts to support assessment in less prevalent languages are most likely to be successful and meaningful if they are undertaken in response to community demand and buy-in from classroom teachers, school leaders, and local administrators—not in response to a Federal requirement.

Changes: None.

Comments: Several commenters wrote in support of proposed § 200.6(f)(1)(iv), which requires a State, in defining ''languages other than English that are present to a significant extent in the participating student population,'' to ensure that its definition includes at least the most populous language other than English spoken by the participating student population, and to consider languages spoken by distinct populations and spoken in various LEAs, as well as across grade levels. A few commenters also suggested that States make the criteria they use to establish the definition of languages present to a significant extent publicly available (*e.g.,* on the State's Web site). In addition, one commenter recommended that States with a significant number of English learners or growing populations of English learners due to immigration or migration patterns identify, at minimum, five languages using the criteria noted in the proposed regulations. Finally, one commenter asked for clarity in situations in which a language is significant in one LEA but not statewide.

Other commenters, however, opposed the specific factors a State must consider regarding establishing a definition of languages present to a significant extent, particularly the requirement to identify the most populous language, arguing that the requirements are outside the scope of the law.

Discussion: We appreciate the commenters' support of proposed § 200.6(f)(1)(iv) and recommendations for ways to improve these provisions in the final regulations. We disagree with other commenters that these provisions are unnecessary. By statute, a State must create a definition of ''languages other than English that are present to a significant extent in the participating student population'' and the most commonly spoken language as required in § 200.6(f)(4)(i) (proposed § 200.6(f)(1)(iv)(A)) is logically appropriate to include in such a definition. We note that § 200.6(f)(4)(ii)–(iii) (proposed § 200.6(f)(1)(iv)(B)–(C)) provides guidance for States to consider in making every effort to develop native language assessments in required subjects for languages present to a significant extent in the State, rather than requirements, and that parameters regarding ''languages present to a significant extent'' were addressed in detail at negotiated rulemaking, where the negotiators reached consensus that it would be appropriate to include these considerations in the proposed regulations. ''Languages present to a significant extent'' is an ambiguous term, and we agree with the negotiating committee that the provisions in § 200.6(f)(4) (proposed § 200.6(f)(1)(iv)) are reasonably necessary to clarify for States how they may consider defining this term as they ''make every effort'' to develop native language assessments. Accordingly, § 200.6(f)(4) is fully consistent with the Secretary's authority under section 1601(a) of the ESEA to issue regulations that are necessary to reasonably ensure that there is compliance with title I, part A as well as his authority under section 410 of GEPA, 20 U.S.C. 1221e–3, and section 414 of the DEOA, 20 U.S.C. 3474. As required by section 1601(a), we submitted proposed § 200.6(f)(1)(iv)(B)–(C) to negotiated rulemaking and received consensus on the language from the negotiators. Further, as noted above, § 200.6(f)(4)(ii)–(iii) (proposed 200.6(f)(1)(iv)(B)–(C)) are considerations, not requirements, to help support a State in meeting the statutory requirement to identify the languages other than English that are present to a significant extent in the participating student population of the State and indicate the languages for which annual student academic assessments are not available and are needed. Clearly, then, the regulations are within the Secretary's authority under section 1601(a) and not inconsistent with or outside the scope of title I, part A under section 1111(e)(1)(B)(i). In sum, these provisions provide significant flexibility for States in identifying languages other than English that are present to a significant extent in the participating student population without being overly burdensome or prescriptive, and are therefore maintained in the final regulations.

In response to commenters requesting additional parameters for States to consider, we note that § 200.6(f)(2)(ii)(D) (proposed § 200.6(f)(1)(ii)(E)) requires a State to describe the process it used to gather meaningful input on the need for assessments in languages other than English; collect and respond to public comment; and consult with educators, parents and families of English learners, and other stakeholders. In order to meet these requirements, we believe a State will need to make the criteria used to establish its definition of ''languages present to a significant extent'' publicly available. Therefore, we believe no further clarification is needed. Additionally, as States have different populations, with different backgrounds and needs, we do not believe that it is appropriate to further specify the number of languages States must identify as present to a significant extent. With regard to a State in which one LEA has a particular language spoken to a significant extent, we leave to the State's discretion how to define ''languages present to a significant extent,'' and we believe such a situation is already sufficiently addressed in § 200.6(f)(4)(iii) (proposed § 200.6(f)(1)(iv)(C)).

Changes: None.

Students in Native American Language Schools or Programs

Comments: A small number of commenters wrote in support of the language in proposed § 200.6(g) which would allow a State to administer a reading/language arts assessment in the language of instruction to students who are enrolled in a school or program that provides instruction primarily in a Native American language, as long as certain guidelines are followed; and for the corresponding provision in proposed § 200.6(f)(2)(i). One commenter requested that we add language to proposed § 200.6(f)(2)(i) to include the expectation that students in these schools or programs will be provided instruction in English as well as in the Native American language (*i.e.,* that such schools or programs offer dual language instruction).

On the other hand, a number of commenters urged the Department to remove all restrictions pertaining to the use of assessments in Native American languages for a school or program that provides instruction primarily in a Native American language in the final regulations. These commenters indicated that various Federal statutes, including the Native American Languages Act (NALA) and portions of the ESEA (specifically sections 3124 and 3127 of title III), protect the right of Tribes to use Native American languages in education without restriction and that the limitations on their assessments in Native American languages in the proposed regulations

are inconsistent with these laws. Several of the commenters also reiterated the importance of the use of Native American languages and the positive impacts of education in these languages in terms of student learning and social, emotional, and cultural benefits.

Some of these commenters suggested changes to the proposed regulations that would make the use of this flexibility (*i.e.,* to use assessments in Native American language) an option that tribal communities could utilize directly, rather than requiring that the use of Native American language assessments be determined by the State. A number of commenters requested that we remove the requirement that such assessments be submitted for assessment peer review; one argued that the Department does not have the capacity or expertise to review assessments in these languages. Additionally, a number of commenters encouraged the Department to extend the flexibility to assess students in their Native American language of instruction to all content areas for which the ESEA requires statewide assessments. Commenters also proposed that, instead of maintaining the requirement that all English learners in Native American schools or programs take the annual ELP assessment, the Department require an annual language proficiency assessment in the particular Native American language of instruction for all students who have not yet attained proficiency in that language. These commenters cited Puerto Rico, which uses Spanish language proficiency assessments, as an example and requested the same treatment. Using the same reasoning, they also requested that we remove the requirement that students in Native American language schools or programs take reading/language arts assessments written in English by the end of eighth grade, arguing that no grade-level restriction should be placed on the option to use Native American language assessments. Some commenters claimed that the proposed regulations are discriminatory towards students enrolled in schools that use a Native American language, or violate the civil rights of such students. Finally, a portion of these commenters also encouraged the Department to allow Native American language assessments in the content areas to be aligned with a different set of standards than a State's challenging academic content standards with which all other State content assessments must be aligned.

Discussion: The Department agrees with commenters that the teaching and learning of Native American languages can have significant positive benefits for students, families, and communities as a whole, and that assessments in Native American languages are important to achieving that goal. We decline, however, to add a requirement to § 200.6(g)(1) (proposed § 200.6(f)(2)) regarding instruction in both English and the Native American language. While dual language instruction can provide valuable benefits to students, school districts are free to implement programs of their choosing, subject to State and local law; the Department cannot regulate the type of program or curriculum offered. We believe it is appropriate for the regulations in § 200.6(g)(1) and (j) (proposed § 200.6(f)(2) and (g)) to focus on requirements for assessments that are part of a State's assessment system under title I, part A.

We also agree that States should have more flexibility to administer Native American language assessments to students in Native American language schools or programs. Therefore, we have made changes to § 200.6(j) (proposed § 200.6(g)) to make it clear that a State may administer mathematics and science assessments in Native American languages to students enrolled in Native American language schools and programs, in addition to reading/language arts assessments.

We agree that the Department should extend the flexibility for students in Native American language schools or programs to take reading/language arts assessments written in English past eighth grade. However, we disagree with removing the requirement entirely. We believe requiring the use of a reading/language arts assessment in English is essential to support all students in meeting the State's challenging academic content standards under section 1111(b)(1) of the ESEA, which, consistent with section 1111(b)(1)(D) and § 200.2(b)(3), must be aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards. Therefore, we have revised § 200.6(j)(2) (proposed § 200.6(g)(2)) to require States to assess students in reading/language arts least once during grades 9 through 12 using an assessment written in English. This change is consistent with the statutory requirement in 1111(b)(2)(B)(v)(I) for reading/language arts to be assessed once during grades 9 through 12. Furthermore, assessing the achievement of students enrolled in a Native American language school or program in reading/language arts in English, during high school, at a minimum, is necessary to ensure that educators and schools provide supports to these students prior to their graduation. Regardless of whether students take reading/language arts assessments in elementary and middle school in a Native American language or in English, participating students should have the opportunity to become college and career ready in English.

In addition, the Department declines to make changes to shift the authority to utilize this flexibility from States to Tribes. We note that these regulations only apply to State-funded public schools and not to schools funded only by the BIE or by Tribes. For State-funded public schools, each State is responsible for the development and administration of the statewide assessment system, and the use of assessments in languages other than English is a core part of this responsibility. Nevertheless, collaboration with tribal communities will be essential in developing high-quality Native American language assessments. While we decline to make the requested change, we strongly encourage States to engage and to work closely with Tribes in developing and administering these assessments.

The Department also declines to remove the requirement that a State must ensure that it administers the annual English language proficiency assessments to all English learners enrolled in Native American schools or programs, and to add a required assessment of Native American language proficiency instead. First, we note that a State is free to develop and administer an assessment of Native American language proficiency, in addition to the assessments required under the ESEA; if it chooses so to do, we encourage the State to work collaboratively with Tribal communities to create such an assessment. However, there is no statutory authority for exempting English learners from the annual ELP assessment requirement. Puerto Rico provides a unique situation because all public school instruction is in Spanish in all schools and Spanish is the language of instruction at the public institutions of higher education; therefore, English language acquisition is not required to ensure college and career readiness. Puerto Rico provides services to limited Spanish proficient students in order for those students to access the general curriculum, and provides an assessment of limited Spanish proficiency to such students. We also note that the ESEA provisions cited by commenters (sections 3124 and 3127) are provisions of title III that apply only to the use of title III funds.

We disagree that § 200.6(j) (proposed § 200.6(g)) results in either discrimination or a civil rights violation for students in schools that use a Native American language. The section expressly permits students in such schools to be assessed in a Native American language, and it applies only to State-funded public schools, which are subject to State and local law. This Federal provision only provides flexibility to States with regard to assessments in such schools, rather than continuing to treat such schools the same as all schools as under prior regulations; it does not impose any new restrictions.

We also decline to remove the requirement that evidence regarding Native American language assessments be submitted for assessment peer review, as this is a critical means of ensuring that a State's assessments meet the statutory requirements. We note that the language of the proposed regulations led some commenters to believe that the assessments themselves would be submitted to the Department; we are clarifying in the final regulations that, consistent with § 200.2(d), States need submit for assessment peer review only evidence relating to compliance with applicable requirements, rather than the actual assessments, so that the Department can determine that the assessment meets all of the statutory and regulatory requirements. We are also clarifying that, in addition to submitting evidence for assessment peer review, the State must receive approval through the assessment peer review in order to use this flexibility.

Finally, the Department declines to change the regulations to allow Native American language assessments to be aligned with different standards than are used for a State's other assessments. There is no statutory authority for allowing separate academic content and achievement standards for students in Native American language schools or programs (see sections 1111(b)(1) and (b)(2)(B) of the ESEA).

Changes: We have revised § 200.6(j) (proposed § 200.6(g)) to specify that a State may administer Native American language assessments in any content area, including mathematics, science, and reading/language arts. We have also changed the requirement for assessing students in English in reading/language arts from requiring such assessment beginning in at least eighth grade to requiring such assessment only once in high school. Additionally, we have clarified that the State submits evidence for peer review regarding the assessments, rather than the assessments themselves, consistent with § 200.2(d), and must receive approval that the assessment meets all applicable requirements.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, OMB must determine whether this regulatory action is significant and, therefore, subject to the requirements of the Executive order and to review by the OMB. Section 3(f) of Executive Order 12866 defines ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an ''economically significant'' rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This final regulatory action is significant and is subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account, among other things and to the extent practicable, the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives such as user fees or marketable permits, to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing these final regulations only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these final regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities. Elsewhere in this section under *Paperwork Reduction Act of 1995,* we identify and explain burdens specifically associated with information collection requirements.

Discussion of Costs and Benefits

The Department believes that this regulatory action will generally not impose significant new costs on States or their LEAs. This action implements and clarifies the changes to the assessment provisions in part A of title I of the ESEA made by the ESSA, which as discussed elsewhere in this document are limited in scope. The costs to States and LEAs for complying with these changes will similarly be limited, and can be financed with Federal education funds, including funds available under Grants for State Assessments and Related Activities.

Moreover, the regulations implement statutory provisions that can ease assessment burden on States and LEAs. For example, § 200.5(b) implements the provision in section 1111(b)(2)(C) of the ESEA under which a State that administers an end-of-course mathematics assessment to meet the high school assessment requirement may exempt an eighth-grade student who takes the end-of-course assessment from also taking the mathematics assessment the State typically administers in eighth grade (provided that the student takes a more advanced mathematics assessment in high school), thus avoiding the double-testing of eighth-grade students who take advanced mathematics coursework.

In general, the Department believes that the costs associated with the regulations (which are discussed in more detail below for cost-bearing requirements not related to information collection requirements) are outweighed by their benefits, which include the administration of assessments that produce valid and reliable information on the achievement of all students, including students with disabilities and English learners, that can be used by States to effectively measure school performance and identify underperforming schools, by LEAs and schools to inform and improve classroom instruction and student supports, and by parents and other stakeholders to hold schools accountable for progress, ultimately leading to improved academic outcomes and the closing of achievement gaps, consistent with the purpose of title I of the ESEA.

Locally Selected, Nationally Recognized High School Academic Assessments

Section 200.3(b) implements the new provision in section 1111(b)(2)(H) of the ESEA under which a State may permit an LEA to administer a State-approved nationally recognized high school academic assessment in reading/language arts, mathematics, or science in lieu of the high school assessment the State typically administers in that subject. If a State seeks to approve a nationally recognized high school academic assessment for use by one or more of its LEAs, § 200.3(b)(1) requires, consistent with the statute, that the State establish technical criteria to determine whether the assessment meets specific requirements for technical quality and comparability. In establishing these criteria, we expect States to rely in large part on existing Department non-regulatory assessment peer review guidance and other assessment technical quality resources. Accordingly, we believe that the costs of complying with § 200.3(b)(1) will be minimal for the 20 States that we estimate will seek to approve a nationally recognized high school academic assessment for LEA use. Further, we believe the costs of this regulation are outweighed by its benefit to LEAs in those States, namely, the flexibility to administer for accountability purposes the assessments they believe most effectively measure the academic achievement of their high school students and can be used to identify and address their academic needs.

Native Language Assessments

Section 200.6(f) implements the new provision in section 1111(b)(2)(F) of the ESEA requiring a State to make every effort to develop, for English learners, annual academic assessments in languages other than English that are present to a significant extent in the participating student population. In doing so, § 200.6(f) requires a State, in its title I State plan, to define ''languages other than English that are present to a significant extent in the participating student population,'' ensure that its definition includes at least the most populous language other than English spoken by the participating student population, describe how it will make every effort to develop assessments consistent with its definition where such assessments are not available and are needed, and explain, if applicable, why it is unable to complete the development of those assessments despite making every effort. Although a State may incur costs in complying with the requirement to make every effort to develop these assessments consistent with its definition, we believe these costs are outweighed by the potential benefits to States and their LEAs, which include fairer and more accurate assessments of the achievement of English learners. In addition, and in response to several commenters expressing concern about the potential costliness of developing assessments in multiple languages other than English, we note that § 200.6(f) does not require a State to complete development of an assessment in a language other than English if it is unable to do so, including for reasons related to cost.

Regulatory Flexibility Act Certification

The Secretary certifies that these final requirements will not have a significant economic impact on a substantial number of small entities. Under the U.S. Small Business Administration's Size Standards, small entities include small governmental jurisdictions such as cities, towns, or school districts (LEAs) with a population of less than 50,000. Although the majority of LEAs that receive ESEA funds qualify as small entities under this definition, these regulations will not have a significant economic impact on these small LEAs because the costs of implementing these requirements will be borne largely by States and will be covered by funding received by States under Federal education programs including Grants for State Assessments and Related Activities. The Department believes the benefits provided under this final regulatory action outweigh any associated costs for these small LEAs. In particular, the final regulations will help ensure that assessments administered in these LEAs produce valid and reliable information on the achievement of all students, including students with disabilities and English learners, that can be used to inform and improve classroom instruction and student supports, ultimately leading to improved student academic outcomes.

Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 does not require you to respond to a collection of information unless it displays a valid OMB control number. We display the valid OMB control numbers assigned to the collections of information in these final regulations at the end of the affected sections of the regulations.

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps ensure that: The public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Sections 200.2, 200.3, 200.5, 200.6, and 200.8 contain information collection requirements. Under the PRA, the Department has submitted a copy of these sections to OMB for its review.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control

number. Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

The regulations affect currently approved information collections, 1810–0576 and 1810–0581. Under 1810–0576, the Department is approved to collect information from States, including assessment information. Under 1810–0581, the Department is approved to require States and LEAs to prepare and disseminate State and LEA report cards. On November 29, 2016, the Department published in the **Federal Register** a notice of final rulemaking titled Elementary and Secondary Education Act of 1965, As Amended By the Every Student Succeeds Act—Accountability and State Plans 81 FR 86076, which identified changes to information collections 1810–0576 and 1810–0581. These regulations result in additional changes to the existing information collection; these changes were described in the NPRM and subject to comments at that time.

One commenter stated that the reporting requirements were both understated and represented a significant burden on all SEAs. The commenter did not provide specific feedback explaining the commenter's estimation of the burden hours. In the absence of specific feedback or explanation, we continue to believe our estimates to be accurate, and make no changes.

To demonstrate the significant of the burden, the commenter noted that the expected burden for §§ 200.2(b), 200.2(d), and 200.3(b) totals an estimated 4,133 hours, and that this would result in a workload of approximately 15 hours per day. The calculation resulted from a lack of clarity in the description; we anticipate that collectively, all States will devote 4,133 hours to this work on an annual basis, rather than that each State will devote 4,133 hours to this work on an annual basis. We expect that each State will devote 80 hours to this task annually.

Section 200.2(d) requires States to submit evidence regarding their general assessments, AA–AAASs, and English language proficiency assessments for the Department's assessment peer review process, and § 200.2(b)(5)(ii) requires that States make evidence of technical quality publicly available. Section 200.3(b)(2)(ii) requires a State that allows an LEA to administer a locally selected, nationally recognized high school academic assessment in place of the State assessment to submit the selected assessment for the Department's assessment peer review process. We anticipate that 52 States will spend 200 hours preparing and submitting evidence regarding their general academic content assessments, AA–AAASs, and English language proficiency assessments for peer review, and that 20 States will spend an additional 100 hours preparing and submitting evidence relating to locally selected, nationally recognized high school academic assessments. Accordingly, we anticipate the total burden over the three-year information collection period, to be 12,400 hours for all respondents, resulting in an annual burden of 4,133 hours under 1810–0576.

Section 200.5(b)(4) requires a State that uses the middle school mathematics exception to describe in its title I State plan its strategies to provide all students in the State the opportunity to be prepared for and take advanced mathematics coursework in middle school. We anticipate that this will not increase burden, as information collection 1810–0576 already accounts for the burden associated with preparing the title I State plan.

Section 200.6(b)(2)(i) requires all States to develop appropriate accommodations for students with disabilities, disseminate information to LEAs, schools, and parents regarding such accommodations, and promote the use of such accommodations to ensure that all students with disabilities are able to participate in academic instruction and assessments. In response to comments, § 200.6(f)(1)(i) now requires States to develop appropriate accommodations for English learners, disseminate information and resources to LEAs, schools, and parents regarding such accommodations, and promote the use of such accommodations for English learners to ensure that all English learners are able to participate in academic instruction and assessments. Because of these additional dissemination requirements, we now anticipate that 52 States will spend 80 hours developing and disseminating this information annually, resulting in an annual burden increase of 4,160 hours under 1810–0576.

Section 200.6(c)(3)(iv) requires all States to make publicly available information submitted by an LEA justifying the need of the LEA to assess more than 1.0 percent of assessed students with an AA–AAAS for students with the most significant cognitive disabilities. We anticipate that 52 States will spend 20 hours annually making this information available, resulting in an annual burden increase of 1,040 hours under 1810–0576.

Section 200.6(c)(4) allows a State that anticipates that it will exceed the 1.0 percent cap for assessing students with the most significant cognitive disabilities with an AA–AAAS to request a waiver for the relevant subject for one year. We anticipate that 15 States will spend 40 hours annually preparing a waiver request, resulting in an annual burden increase of 600 hours under 1810–0576.

Section 200.6(c)(5) requires each State to report annually to the Secretary data relating to the assessment of children with disabilities. We anticipate that 52 States will spend 40 hours annually preparing a waiver request, resulting in an annual burden increase of 2,080 hours under 1810–0576.

Section 200.6(d)(3) establishes requirements for each State that adopts alternate academic achievement standards for students with the most significant cognitive disabilities. Such a State will be required to ensure that parents of students with the most significant cognitive disabilities assessed using an AA–AAAS are informed that their child's achievement will be measured based on alternate academic achievement standards, and informed how participation in such assessment may delay or otherwise affect the student from completing the requirements for a regular high school diploma. We anticipate that 52 States will spend 100 hours annually ensuring that relevant parents receive this information, resulting in an annual burden of 5,200 hours under 1810–0576.

Section 200.8(a)(2) requires a State to provide to parents, teachers, and principals individual student interpretive, descriptive, and diagnostic reports, including information regarding academic achievement on academic assessments. Section 200.8(b)(1) requires a State to produce and report to LEAs and schools itemized score analyses. Section 200.6(c)(2) specifies that if a State chooses to administer computer-adaptive assessments, such assessments must be included in the reports under section 200.8. We anticipate that 52 States will spend 1,500 hours annually providing this information, resulting in a total burden increase of 78,000 hours under 1810–0576.

Collection of Information from SEAs: Assessments and Notification

Regulatory section	Information collection	OMB Control Number and estimated burden
§ 200.2(b)(5)(ii), § 200.2(d), § 200.3(b)(2)(ii)	States will be required to submit evidence for the Department's assessment peer review process, and to make this evidence available to the public.	OMB 1810-0576. The annual burden is 4,133 hours.
§ 200.5(b)(4)	States will be required to describe in the title I State plan strategies to provide all students with the opportunity to take advanced mathematics coursework in middle school.	OMB 1810-0576. No additional burden, as this burden is already considered in the burden of preparing a title I State plan.
§§ 200.6(b)(2)(i);	States will be required to disseminate information regarding the	OMB 1810-0576. The annual burden

200.6(f)(1)(i)	use of appropriate accommodations for students with disabilities to LEAs, schools, and parents; States will be required to disseminate information regarding appropriate accommodations for English learners to LEAs, schools, and parents.	is 4,160 hours.
§ 200.6(c)(3)(iv)	Certain States will be required to make publicly available LEA-submitted information about the need to assess more than 1.0 percent of assessed students with an AA-AAAS for students with the most significant cognitive disabilities.	OMB 1810-0576. The annual burden is 1,040 hours.

§ 200.6(c)(4)	Certain States will request a waiver from the Secretary, to exceed the 1.0 percent cap for assessing students with the most significant cognitive disabilities with an AA-AAAS.	OMB 1810-0576. The annual burden is 600 hours.
§ 200.6(c)(5)	States will be required to report to the Secretary data relating to the assessment of children with disabilities.	OMB 1810-0576. The annual burden is 2,080 hours.
§ 200.6(d)(3)	States that adopt alternate achievement standards for students with the most significant cognitive disabilities will be required to ensure certain parents are provided with information.	OMB 1810-0576. The annual burden is 5,200 hours.

§§ 200.8(a)(2), 200.8(b)(1), 200.2(c)(2)	States will be required to provide student assessment reports to States, teachers, and principals, as well as itemized score analyses for LEAs and schools. If a State chooses to administer computer-adaptive assessments, the results must also be reported on all reports.	OMB 1810-0576. The annual burden is 78,000 hours.

Section 200.3(c)(1)(i) requires an LEA that intends to request approval from a State to use a locally selected, nationally recognized high school academic assessment in place of the statewide academic assessment to notify parents. Section 200.3(c)(3) requires any LEA that receives such approval to notify all parents of high school students it serves that the LEA received approval and will use these assessments. Finally, § 200.3(c)(4) requires the LEA to notify both parents and the State in any subsequent years in which the LEA elects to administer a locally selected, nationally recognized high school academic assessment. We anticipate that 850 LEAs will spend 30 hours preparing each notification and that, over the three-year information collection period, an LEA will be required to conduct these notifications four times.

Accordingly, we anticipate the total burden over the three-year information collection period to be 102,000 hours, resulting in an annual burden of 34,000 hours under 1810–0576.

COLLECTION OF INFORMATION FROM LEAS—PARENTAL NOTIFICATION

Regulatory section	Information collection	OMB Control No. and estimated burden
§ 200.3(c)(1)(i), § 200.3(c)(3), § 200.3(c)(4).	Certain LEAs will be required to notify parents of high school students about selected assessments.	OMB 1810–0576. The annual burden is 34,000 hours.

Finally, § 200.6(i)(1)(iii) establishes that a State and its LEAs must report on State and local report cards the number of recently arrived English learners who are not assessed on the State's reading/language arts assessment. Under 1810–0581, the Department is currently approved to require States to prepare and disseminate report cards. Although § 200.6(i)(1)(iii) requires the inclusion of this specific element, there is no change to the approved burden, as the current collection estimates the burden of preparing the report card, in full.

COLLECTION OF INFORMATION FROM SEAS AND LEAS—REPORT CARDS

Regulatory section	Information collection	OMB Control No. and estimated burden
§ 200.6(i)(1)(iii)	States and LEAs must report on State and local report cards the number of recently arrived English learners who are not assessed on the State's reading/language arts assessment.	OMB 1810–0581. No additional burden, as this burden is already considered in the burden of preparing report cards.

Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. ''Federalism implications'' means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

In the NPRM, while we did not believe that the proposed regulations had any federalism implications, we encouraged State and local elected officials to review and comment on the proposed regulations. In the *Public Comment* section of this preamble, we discuss any comments we received on this subject.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* Braille, large print, or electronic format) on request to the person listed under **FOR FURTHER INFORMATION CONTACT**.

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List of Subjects in 34 CFR Part 200

Elementary and secondary education, Grant programs—education, Indians—education, Infants and children, Juvenile delinquency, Migrant labor, Private schools, Reporting and recordkeeping requirements.

Dated: November 30, 2016.

John B. King, Jr.,

Secretary of Education.

For the reasons discussed in the preamble, the Department of Education amends part 200 of title 34 of the Code of Federal Regulations as follows:

PART 200—TITLE I—IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

■ 1. The authority citation for part 200 is revised to read as follows:

Authority: 20 U.S.C 6301–6576, unless otherwise noted.

■ 2. Section 200.2 is revised to read as follows:

§ 200.2 State responsibilities for assessment.

(a)(1) Each State, in consultation with its LEAs, must implement a system of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading/language arts, and science.

(2)(i) The State may also measure the achievement of students in other academic subjects in which the State has adopted challenging State academic standards.

(ii) If a State has developed assessments in other subjects for all students, the State must include students participating under this subpart in those assessments.

(b) The assessments required under this section must:

(1)(i) Except as provided in §§ 200.3, 200.5(b), and 200.6(c) and section 1204 of the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act (hereinafter ''the Act''), be the same assessments used to measure the achievement of all students; and

(ii) Be administered to all students consistent with § 200.5(a), including the following highly-mobile student populations as defined in paragraph (b)(11) of this section:

(A) Students with status as a migratory child.

(B) Students with status as a homeless child or youth.

(C) Students with status as a child in foster care.

(D) Students with status as a student with a parent who is a member of the armed forces on active duty or serves on full-time National Guard duty;

(2)(i) Be designed to be valid and accessible for use by all students, including students with disabilities and English learners; and

(ii) Be developed, to the extent practicable, using the principles of universal design for learning. For the purposes of this section, ''universal design for learning'' means a scientifically valid framework for guiding educational practice that—

(A) Provides flexibility in the ways information is presented, in the ways students respond or demonstrate knowledge and skills, and in the ways students are engaged; and

(B) Reduces barriers in instruction, provides appropriate accommodations, supports, and challenges, and maintains high achievement expectations for all students, including students with disabilities and English learners;

(3)(i)(A) Be aligned with challenging academic content standards and aligned academic achievement standards (hereinafter ''challenging State academic standards'') as defined in section 1111(b)(1)(A) of the Act; and

(B) Provide coherent and timely information about student attainment of those standards and whether a student is performing at the grade in which the student is enrolled; and

(ii)(A)(*1*) Be aligned with the challenging State academic content standards; and

(*2*) Address the depth and breadth of those standards; and

(B)(*1*) Measure student performance based on challenging State academic achievement standards that are aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards consistent with section 1111(b)(1)(D) of the Act; or

(*2*) With respect to alternate assessments for students with the most significant cognitive disabilities, measure student performance based on alternate academic achievement standards defined by the State consistent with section 1111(b)(1)(E) of the Act that reflect professional judgment as to the highest possible standards achievable by such students to ensure that a student who meets the alternate academic achievement standards is on track to pursue postsecondary education or competitive integrated employment, consistent with the purposes of the Rehabilitation Act of 1973, as amended by the Workforce Innovation and Opportunity Act, as in effect on July 22, 2014;

(4)(i) Be valid, reliable, and fair for the purposes for which the assessments are used; and

(ii) Be consistent with relevant, nationally recognized professional and technical testing standards;

(5) Be supported by evidence that—

(i) The assessments are of adequate technical quality—

(A) For each purpose required under the Act; and

(B) Consistent with the requirements of this section; and

(ii) For each assessment administered to meet the requirements of this subpart, is made available to the public, including on the State's Web site;

(6) Be administered in accordance with the frequency described in § 200.5(a);

(7) Involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills—such as critical thinking, reasoning, analysis, complex problem solving, effective communication, and understanding of challenging content—as defined by the State. These measures may—

(i) Include valid and reliable measures of student academic growth at all achievement levels to help ensure that the assessment results could be used to improve student instruction; and

(ii) Be partially delivered in the form of portfolios, projects, or extended performance tasks;

(8) Objectively measure academic achievement, knowledge, and skills without evaluating or assessing personal or family beliefs and attitudes, except that this provision does not preclude the use of—

(i) Constructed-response, short answer, or essay questions; or

(ii) Items that require a student to analyze a passage of text or to express opinions;

(9) Provide for participation in the assessments of all students in the grades assessed consistent with §§ 200.5(a) and 200.6;

(10) At the State's discretion, be administered through—

(i) A single summative assessment; or

(ii) Multiple statewide interim assessments during the course of the academic year that result in a single summative score that provides valid, reliable, and transparent information on student achievement and, at the State's discretion, student growth, consistent with paragraph (b)(4) of this section;

(11)(i) Consistent with sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the Act, enable results to be disaggregated within each State, LEA, and school by—

(A) Gender;

(B) Each major racial and ethnic group;

(C) Status as an English learner as defined in section 8101(20) of the Act;

(D) Status as a migratory child as defined in section 1309(3) of the Act;

(E) Children with disabilities as defined in section 602(3) of the Individuals with Disabilities Education Act (IDEA) as compared to all other students;

(F) Economically disadvantaged students as compared to students who are not economically disadvantaged;

(G) Status as a homeless child or youth as defined in section 725(2) of title VII, subtitle B of the McKinney-Vento Homeless Assistance Act, as amended;

(H) Status as a child in foster care. ''Foster care'' means 24-hour substitute care for children placed away from their parents and for whom the agency under title IV–E of the Social Security Act has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed and payments are made by the State, tribal, or local agency for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is Federal matching of any payments that are made; and

(I) Status as a student with a parent who is a member of the armed forces on active duty or serves on full-time National Guard duty, where ''armed forces,'' ''active duty,'' and ''full-time National Guard duty'' have the same meanings given them in 10 U.S.C. 101(a)(4), 101(d)(1), and 101(d)(5).

(ii) Disaggregation is not required in the case of a State, LEA, or school in which the number of students in a subgroup is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student.

(12) Produce individual student reports consistent with § 200.8(a); and

(13) Enable itemized score analyses to be produced and reported to LEAs and schools consistent with § 200.8(b).

(c)(1) At its discretion, a State may administer the assessments required under this section in the form of computer-adaptive assessments if such assessments meet the requirements of section 1111(b)(2)(J) of the Act and this section. A computer-adaptive assessment—

(i) Must, except as provided in § 200.6(c)(7)(iii), measure a student's academic proficiency based on the challenging State academic standards for the grade in which the student is enrolled and growth toward those standards; and

(ii) May measure a student's academic proficiency and growth using items above or below the student's grade level.

(2) If a State administers a computer-adaptive assessment, the determination under paragraph (b)(3)(i)(B) of this section of a student's academic proficiency for the grade in which the student is enrolled must be reported on all reports required by § 200.8 and section 1111(h) of the Act.

(d) A State must submit evidence for peer review under section 1111(a)(4) of the Act that its assessments under this section and §§ 200.3, 200.4, 200.5(b), 200.6(c), 200.6(f), 200.6(h), and 200.6(j) meet all applicable requirements.

(e) Information provided to parents under section 1111(b)(2) of the Act must—

(1) Be in an understandable and uniform format;

(2) Be, to the extent practicable, written in a language that parents can understand or, if it is not practicable to provide written translations to a parent with limited English proficiency, be orally translated for such parent; and

(3) Be, upon request by a parent who is an individual with a disability as defined by the Americans with Disabilities Act (ADA), as amended, provided in an alternative format accessible to that parent.

(Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 10 U.S.C. 101(a)(4), (d)(1), and (d)(5); 20 U.S.C. 1003(24), 1221e–3, 1401(3), 3474, 6311(a)(4), 6311(b)(1)–(2), 6311(h), 6399(3), 6571, and 7801(20); 29 U.S.C. 701 *et seq.;* 29 U.S.C. 794; 42 U.S.C. 2000d–1, 11434a(2), 12102(1), and 12131 *et seq.;* and 45 CFR 1355.20(a))

■ 3. Section 200.3 is revised to read as follows:

§ 200.3 Locally selected, nationally recognized high school academic assessments.

(a) *In general.* (1) A State, at the State's discretion, may permit an LEA to administer a nationally recognized high school academic assessment in each of reading/language arts, mathematics, or science, approved in accordance with paragraph (b) of this section, in lieu of the respective statewide assessment under § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C) if such assessment meets all requirements of this section.

(2) An LEA must administer the same locally selected, nationally recognized academic assessment to all high school students in the LEA consistent with the requirements in § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), except for students with the most significant cognitive disabilities who are assessed on an alternate assessment aligned with alternate

academic achievement standards, consistent with § 200.6(c).

(b) *State approval.* If a State chooses to allow an LEA to administer a nationally recognized high school academic assessment under paragraph (a) of this section, the State must:

(1) Establish and use technical criteria to determine if the assessment—

(i) Is aligned with the challenging State academic standards;

(ii) Addresses the depth and breadth of those standards;

(iii) Is equivalent to or more rigorous than the statewide assessments under § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), as applicable, with respect to—

(A) The coverage of academic content;

(B) The difficulty of the assessment;

(C) The overall quality of the assessment; and

(D) Any other aspects of the assessment that the State may establish in its technical criteria;

(iv) Meets all requirements under § 200.2(b), except for § 200.2(b)(1), and ensures that all high school students in the LEA are assessed consistent with §§ 200.5(a) and 200.6; and

(v) Produces valid and reliable data on student academic achievement with respect to all high school students and each subgroup of high school students in the LEA that—

(A) Are comparable to student academic achievement data for all high school students and each subgroup of high school students produced by the statewide assessment at each academic achievement level;

(B) Are expressed in terms consistent with the State's academic achievement standards under section 1111(b)(1)(A) of the Act; and

(C) Provide unbiased, rational, and consistent differentiation among schools within the State for the purpose of the State-determined accountability system under section 1111(c) of the Act, including calculating the Academic Achievement indicator under section 1111(c)(4)(B)(i) of the Act and annually meaningfully differentiating between schools under section 1111(c)(4)(C) of the Act;

(2) Before approving any nationally recognized high school academic assessment for use by an LEA in the State—

(i) Ensure that the use of appropriate accommodations under § 200.6(b) and (f) does not deny a student with a disability or an English learner—

(A) The opportunity to participate in the assessment; and

(B) Any of the benefits from participation in the assessment that are afforded to students without disabilities or students who are not English learners; and

(ii) Submit evidence to the Secretary in accordance with the requirements for peer review under section 1111(a)(4) of the Act demonstrating that any such assessment meets the requirements of this section; and

(3)(i) Approve an LEA's request to use a locally selected, nationally recognized high school academic assessment that meets the requirements of this section;

(ii) Disapprove an LEA's request if it does not meet the requirements of this section; or

(iii) Revoke approval for good cause.

(c) *LEA applications.* (1) Before an LEA requests approval from the State to use a locally selected, nationally recognized high school academic assessment, the LEA must—

(i) Notify all parents of high school students it serves—

(A) That the LEA intends to request approval from the State to use a locally selected, nationally recognized high school academic assessment in place of the statewide academic assessment under § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), as applicable;

(B) Of how parents and, as appropriate, students, may provide meaningful input regarding the LEA's request; and

(C) Of any effect of such request on the instructional program in the LEA; and

(ii) Provide an opportunity for meaningful consultation to all public charter schools whose students would be included in such assessments.

(2) As part of requesting approval to use a locally selected, nationally recognized high school academic assessment, an LEA must—

(i) Update its LEA plan under section 1112 or section 8305 of the Act, including to describe how the request was developed consistent with all requirements for consultation under sections 1112 and 8538 of the Act; and

(ii) If the LEA is a charter school under State law, provide an assurance that the use of the assessment is consistent with State charter school law and it has consulted with the authorized public chartering agency.

(3) Upon approval, the LEA must notify all parents of high school students it serves that the LEA received approval and will use such locally selected, nationally recognized high school academic assessment instead of the statewide academic assessment under § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), as applicable.

(4) In each subsequent year following approval in which the LEA elects to administer a locally selected, nationally recognized high school academic assessment, the LEA must notify—

(i) The State of its intention to continue administering such assessment; and

(ii) Parents of which assessment the LEA will administer to students to meet the requirements of § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), as applicable, at the beginning of the school year.

(5) The notices to parents under this paragraph (c) of this section must be consistent with § 200.2(e).

(d) *Definition.* ''Nationally recognized high school academic assessment'' means an assessment of high school students' knowledge and skills that is administered in multiple States and is recognized by institutions of higher education in those or other States for the purposes of entrance or placement into courses in postsecondary education or training programs.

(Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 20 U.S.C. 1221e–3, 3474, 6311(b)(2)(H), 6312(a), 6571, 7845, and 7918; 29 U.S.C. 794; 42 U.S.C. 2000d–1)

■ 4. Section 200.4 is amended:

■ a. In paragraph (b)(2)(ii)(B), by removing the term ''section 1111(b)(2)(C)(v)'' and adding in its place the term ''section 1111(c)(2)''.

■ b. In paragraph (b)(2)(ii)(C), by removing the words ''LEAs and''.

■ c. In paragraph (b)(3), by removing the words ''determine whether the State has made adequate yearly progress'' and adding in their place the words ''make accountability determinations under section 1111(c) of the Act''.

■ d. By revising the authority citation at the end of the section.

The revision reads as follows:

§ 200.4 State law exception.

* * * * *

(Authority: 20 U.S.C. 1221e–3, 3474, 6311(b)(2)(E), and 6571)

■ 5. Section 200.5 is revised to read as follows:

§ 200.5 Assessment administration.

(a) *Frequency.* (1) A State must administer the assessments required under § 200.2 annually as follows:

(i) With respect to both the reading/language arts and mathematics assessments—

(A) In each of grades 3 through 8; and

(B) At least once in grades 9 through 12.

(ii) With respect to science assessments, not less than one time during each of—

(A) Grades 3 through 5;

(B) Grades 6 through 9; and

(C) Grades 10 through 12.

(2) A State must administer the English language proficiency assessment

required under § 200.6(h) annually to all English learners in schools served by the State in all grades in which there are English learners, kindergarten through grade 12.

(3) With respect to any other subject chosen by a State, the State may administer the assessments at its discretion.

(b) *Middle school mathematics exception.* A State that administers an end-of-course mathematics assessment to meet the requirements under paragraph (a)(1)(i)(B) of this section may exempt an eighth-grade student from the mathematics assessment typically administered in eighth grade under paragraph (a)(1)(i)(A) of this section if—

(1) The student instead takes the end-of-course mathematics assessment the State administers to high school students under paragraph (a)(1)(i)(B) of this section;

(2) The student's performance on the high school assessment is used in the year in which the student takes the assessment for purposes of measuring academic achievement under section 1111(c)(4)(B)(i) of the Act and participation in assessments under section 1111(c)(4)(E) of the Act;

(3) In high school—

(i) The student takes a State-administered end-of-course assessment or nationally recognized high school academic assessment as defined in § 200.3(d) in mathematics that—

(A) Is more advanced than the assessment the State administers under paragraph (a)(1)(i)(B) of this section; and

(B) Provides for appropriate accommodations consistent with § 200.6(b) and (f); and

(ii) The student's performance on the more advanced mathematics assessment is used for purposes of measuring academic achievement under section 1111(c)(4)(B)(i) of the Act and participation in assessments under section 1111(c)(4)(E) of the Act; and

(4) The State describes in its State plan, with regard to this exception, its strategies to provide all students in the State the opportunity to be prepared for and to take advanced mathematics coursework in middle school.

(Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 20 U.S.C. 1221e–3, 3474, 6311(b)(2)(B)(v), (b)(2)(C), and (b)(2)(G), and 6571)

■ 6. Section 200.6 is revised to read as follows:

§ 200.6 Inclusion of all students.

(a) *Students with disabilities in general.* (1) A State must include students with disabilities in all assessments under section 1111(b)(2) of the Act, with appropriate accommodations consistent with paragraphs (b), (f)(1), and (h)(4) of this section. For purposes of this section, students with disabilities, collectively, are—

(i) All children with disabilities as defined under section 602(3) of the IDEA;

(ii) Students with the most significant cognitive disabilities who are identified from among the students in paragraph (a)(1)(i) of this section; and

(iii) Students with disabilities covered under other acts, including—

(A) Section 504 of the Rehabilitation Act of 1973, as amended; and

(B) Title II of the ADA, as amended.

(2)(i) Except as provided in paragraph (a)(2)(ii)(B) of this section, a student with a disability under paragraph (a)(1) of this section must be assessed with an assessment aligned with the challenging State academic standards for the grade in which the student is enrolled.

(ii) A student with the most significant cognitive disabilities under paragraph (a)(1)(ii) of this section may be assessed with—

(A) The general assessment under paragraph (a)(2)(i) of this section; or

(B) If a State has adopted alternate academic achievement standards permitted under section 1111(b)(1)(E) of the Act for students with the most significant cognitive disabilities, an alternate assessment under paragraph (c) of this section aligned with the challenging State academic content standards for the grade in which the student is enrolled and the State's alternate academic achievement standards.

(b) *Appropriate accommodations for students with disabilities.* (1) A State's academic assessment system must provide, for each student with a disability under paragraph (a) of this section, the appropriate accommodations, such as interoperability with, and ability to use, assistive technology devices consistent with nationally recognized accessibility standards, that are necessary to measure the academic achievement of the student consistent with paragraph (a)(2) of this section, as determined by—

(i) For each student under paragraph (a)(1)(i) and (ii) of this section, the student's IEP team;

(ii) For each student under paragraph (a)(1)(iii)(A) of this section, the student's placement team; or

(iii) For each student under paragraph (a)(1)(iii)(B) of this section, the individual or team designated by the LEA to make these decisions.

(2) A State must—

(i)(A) Develop appropriate accommodations for students with disabilities;

(B) Disseminate information and resources to, at a minimum, LEAs, schools, and parents; and

(C) Promote the use of such accommodations to ensure that all students with disabilities are able to participate in academic instruction and assessments consistent with paragraph (a)(2) of this section and with § 200.2(e); and

(ii) Ensure that general and special education teachers, paraprofessionals, teachers of English learners, specialized instructional support personnel, and other appropriate staff receive necessary training to administer assessments and know how to administer assessments, including, as necessary, alternate assessments under paragraphs (c) and (h)(5) of this section, and know how to make use of appropriate accommodations during assessment for all students with disabilities, consistent with section 1111(b)(2)(B)(vii)(III) of the Act.

(3) A State must ensure that the use of appropriate accommodations under this paragraph (b) of this section does not deny a student with a disability—

(i) The opportunity to participate in the assessment; and

(ii) Any of the benefits from participation in the assessment that are afforded to students without disabilities.

(c) *Alternate assessments aligned with alternate academic achievement standards for students with the most significant cognitive disabilities.* (1) If a State has adopted alternate academic achievement standards permitted under section 1111(b)(1)(E) of the Act for students with the most significant cognitive disabilities, the State must measure the achievement of those students with an alternate assessment that—

(i) Is aligned with the challenging State academic content standards under section 1111(b)(1) of the Act for the grade in which the student is enrolled;

(ii) Yields results relative to the alternate academic achievement standards; and

(iii) At the State's discretion, provides valid and reliable measures of student growth at all alternate academic achievement levels to help ensure that the assessment results can be used to improve student instruction.

(2) For each subject for which assessments are administered under § 200.2(a)(1), the total number of students assessed in that subject using an alternate assessment aligned with alternate academic achievement standards under paragraph (c)(1) of this

section may not exceed 1.0 percent of the total number of students in the State who are assessed in that subject.

(3) A State must—

(i) Not prohibit an LEA from assessing more than 1.0 percent of its assessed students in any subject for which assessments are administered under § 200.2(a)(1) with an alternate assessment aligned with alternate academic achievement standards;

(ii) Require that an LEA submit information justifying the need of the LEA to assess more than 1.0 percent of its assessed students in any such subject with such an alternate assessment;

(iii) Provide appropriate oversight, as determined by the State, of an LEA that is required to submit information to the State; and

(iv) Make the information submitted by an LEA under paragraph (c)(3)(ii) of this section publicly available, provided that such information does not reveal personally identifiable information about an individual student.

(4) If a State anticipates that it will exceed the cap under paragraph (c)(2) of this section with respect to any subject for which assessments are administered under § 200.2(a)(1) in any school year, the State may request that the Secretary waive the cap for the relevant subject, pursuant to section 8401 of the Act, for one year. Such request must—

(i) Be submitted at least 90 days prior to the start of the State's testing window for the relevant subject;

(ii) Provide State-level data, from the current or previous school year, to show—

(A) The number and percentage of students in each subgroup of students defined in section 1111(c)(2)(A), (B), and (D) of the Act who took the alternate assessment aligned with alternate academic achievement standards; and

(B) The State has measured the achievement of at least 95 percent of all students and 95 percent of students in the children with disabilities subgroup under section 1111(c)(2)(C) of the Act who are enrolled in grades for which the assessment is required under § 200.5(a);

(iii) Include assurances from the State that it has verified that each LEA that the State anticipates will assess more than 1.0 percent of its assessed students in any subject for which assessments are administered under § 200.2(a)(1) in that school year using an alternate assessment aligned with alternate academic achievement standards—

(A) Followed each of the State's guidelines under paragraph (d) of this section, except paragraph (d)(6); and

(B) Will address any disproportionality in the percentage of students in any subgroup under section 1111(c)(2)(A), (B), or (D) of the Act taking an alternate assessment aligned with alternate academic achievement standards;

(iv) Include a plan and timeline by which—

(A) The State will improve the implementation of its guidelines under paragraph (d) of this section, including by reviewing and, if necessary, revising its definition under paragraph (d)(1), so that the State meets the cap in paragraph (c)(2) of this section in each subject for which assessments are administered under § 200.2(a)(1) in future school years;

(B) The State will take additional steps to support and provide appropriate oversight to each LEA that the State anticipates will assess more than 1.0 percent of its assessed students in a given subject in a school year using an alternate assessment aligned with alternate academic achievement standards to ensure that only students with the most significant cognitive disabilities take an alternate assessment aligned with alternate academic achievement standards. The State must describe how it will monitor and regularly evaluate each such LEA to ensure that the LEA provides sufficient training such that school staff who participate as members of an IEP team or other placement team understand and implement the guidelines established by the State under paragraph (d) of this section so that all students are appropriately assessed; and

(C) The State will address any disproportionality in the percentage of students taking an alternate assessment aligned with alternate academic achievement standards as identified through the data provided in accordance with paragraph (c)(4)(ii)(A) of this section; and

(v) If the State is requesting to extend a waiver for an additional year, meet the requirements in paragraph (c)(4)(i) through (iv) of this section and demonstrate substantial progress towards achieving each component of the prior year's plan and timeline required under paragraph (c)(4)(iv) of this section.

(5) A State must report separately to the Secretary, under section 1111(h)(5) of the Act, the number and percentage of children with disabilities under paragraph (a)(1)(i) and (ii) of this section taking—

(i) General assessments described in § 200.2;

(ii) General assessments with accommodations; and

(iii) Alternate assessments aligned with alternate academic achievement standards under paragraph (c) of this section.

(6) A State may not develop, or implement for use under this part, any alternate or modified academic achievement standards that are not alternate academic achievement standards for students with the most significant cognitive disabilities that meet the requirements of section 1111(b)(1)(E) of the Act.

(7) For students with the most significant cognitive disabilities, a computer-adaptive alternate assessment aligned with alternate academic achievement standards must—

(i) Assess a student's academic achievement based on the challenging State academic content standards for the grade in which the student is enrolled;

(ii) Meet the requirements for alternate assessments aligned with alternate academic achievement standards under paragraph (c) of this section; and

(iii) Meet the requirements in § 200.2, except that the alternate assessment need not measure a student's academic proficiency based on the challenging State academic achievement standards for the grade in which the student is enrolled and growth toward those standards.

(d) *State guidelines for students with the most significant cognitive disabilities.* If a State adopts alternate academic achievement standards for students with the most significant cognitive disabilities and administers an alternate assessment aligned with those standards, the State must—

(1) Establish, consistent with section 612(a)(16)(C) of the IDEA, and monitor implementation of clear and appropriate guidelines for IEP teams to apply in determining, on a case-by-case basis, which students with the most significant cognitive disabilities will be assessed based on alternate academic achievement standards. Such guidelines must include a State definition of ''students with the most significant cognitive disabilities'' that addresses factors related to cognitive functioning and adaptive behavior, such that—

(i) The identification of a student as having a particular disability as defined in the IDEA or as an English learner does not determine whether a student is a student with the most significant cognitive disabilities;

(ii) A student with the most significant cognitive disabilities is not identified solely on the basis of the student's previous low academic achievement, or the student's previous need for accommodations to participate in general State or districtwide assessments; and

(iii) A student is identified as having the most significant cognitive disabilities because the student requires extensive, direct individualized instruction and substantial supports to achieve measurable gains on the challenging State academic content standards for the grade in which the student is enrolled;

(2) Provide to IEP teams a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on alternate academic achievement standards, including any effects of State and local policies on a student's education resulting from taking an alternate assessment aligned with alternate academic achievement standards, such as how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma;

(3) Ensure that parents of students selected to be assessed using an alternate assessment aligned with alternate academic achievement standards under the State's guidelines in paragraph (d) of this section are informed, consistent with § 200.2(e), that their child's achievement will be measured based on alternate academic achievement standards, and how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma;

(4) Not preclude a student with the most significant cognitive disabilities who takes an alternate assessment aligned with alternate academic achievement standards from attempting to complete the requirements for a regular high school diploma;

(5) Promote, consistent with requirements under the IDEA, the involvement and progress of students with the most significant cognitive disabilities in the general education curriculum that is based on the State's academic content standards for the grade in which the student is enrolled;

(6) Incorporate the principles of universal design for learning, to the extent feasible, in any alternate assessments aligned with alternate academic achievement standards that the State administers consistent with § 200.2(b)(2)(ii); and

(7) Develop, disseminate information on, and promote the use of appropriate accommodations consistent with paragraph (b) of this section to ensure that a student with significant cognitive disabilities who does not meet the criteria in paragraph (a)(1)(ii) of this section—

(i) Participates in academic instruction and assessments for the grade in which the student is enrolled; and

(ii) Is assessed based on challenging State academic standards for the grade in which the student is enrolled.

(e) *Definitions with respect to students with disabilities.* Consistent with 34 CFR 300.5, ''assistive technology device'' means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device.

(f) *English learners in general.* (1) Consistent with § 200.2 and paragraphs (g) and (i) of this section, a State must assess English learners in its academic assessments required under § 200.2 in a valid and reliable manner that includes—

(i) Appropriate accommodations with respect to a student's status as an English learner and, if applicable, the student's status under paragraph (a) of this section. A State must—

(A) Develop appropriate accommodations for English learners;

(B) Disseminate information and resources to, at a minimum, LEAs, schools, and parents; and

(C) Promote the use of such accommodations to ensure that all English learners are able to participate in academic instruction and assessments; and

(ii) To the extent practicable, assessments in the language and form most likely to yield accurate and reliable information on what those students know and can do to determine the students' mastery of skills in academic content areas until the students have achieved English language proficiency consistent with the standardized, statewide exit procedures in section 3113(b)(2) of the Act.

(2) To meet the requirements under paragraph (f)(1) of this section, the State must—

(i) Ensure that the use of appropriate accommodations under paragraph (f)(1)(i) of this section and, if applicable, under paragraph (b) of this section does not deny an English learner—

(A) The opportunity to participate in the assessment; and

(B) Any of the benefits from participation in the assessment that are afforded to students who are not English learners; and

(ii) In its State plan, consistent with section 1111(a) of the Act—

(A) Provide its definition for ''languages other than English that are present to a significant extent in the participating student population,'' consistent with paragraph (f)(4) of this section, and identify the specific languages that meet that definition;

(B) Identify any existing assessments in languages other than English, and specify for which grades and content areas those assessments are available;

(C) Indicate the languages identified under paragraph (f)(2)(ii)(A) of this section for which yearly student academic assessments are not available and are needed; and

(D) Describe how it will make every effort to develop assessments, at a minimum, in languages other than English that are present to a significant extent in the participating student population including by providing—

(*1*) The State's plan and timeline for developing such assessments, including a description of how it met the requirements of paragraph (f)(4) of this section;

(*2*) A description of the process the State used to gather meaningful input on the need for assessments in languages other than English, collect and respond to public comment, and consult with educators; parents and families of English learners; students, as appropriate; and other stakeholders; and

(*3*) As applicable, an explanation of the reasons the State has not been able to complete the development of such assessments despite making every effort.

(3) A State may request assistance from the Secretary in identifying linguistically accessible academic assessments that are needed.

(4) In determining which languages other than English are present to a significant extent in a State's participating student population, a State must, at a minimum—

(i) Ensure that its definition of ''languages other than English that are present to a significant extent in the participating student population'' encompasses at least the most populous language other than English spoken by the State's participating student population;

(ii) Consider languages other than English that are spoken by distinct populations of English learners, including English learners who are migratory, English learners who were not born in the United States, and English learners who are Native Americans; and

(iii) Consider languages other than English that are spoken by a significant portion of the participating student population in one or more of a State's LEAs as well as languages spoken by a

significant portion of the participating student population across grade levels.

(g) *Assessing reading/language arts in English for English learners.* (1) A State must assess, using assessments written in English, the achievement of an English learner in meeting the State's reading/language arts academic standards if the student has attended schools in the United States, excluding Puerto Rico and, if applicable, students in Native American language schools or programs consistent with paragraph (j) of this section, for three or more consecutive years.

(2) An LEA may continue, for no more than two additional consecutive years, to assess an English learner under paragraph (g)(1) of this section if the LEA determines, on a case-by-case individual basis, that the student has not reached a level of English language proficiency sufficient to yield valid and reliable information on what the student knows and can do on reading/language arts assessments written in English.

(3) The requirements in paragraph (g)(1)–(2) of this section do not permit a State or LEA to exempt English learners from participating in the State assessment system.

(h) *Assessing English language proficiency of English learners.* (1) Each State must—

(i) Develop a uniform, valid, and reliable statewide assessment of English language proficiency, including reading, writing, speaking, and listening skills; and

(ii) Require each LEA to use such assessment to assess annually the English language proficiency, including reading, writing, speaking, and listening skills, of all English learners in kindergarten through grade 12 in schools served by the LEA.

(2) The assessment under paragraph (h)(1) of this section must—

(i) Be aligned with the State's English language proficiency standards under section 1111(b)(1)(F) of the Act;

(ii) Be developed and used consistent with the requirements of § 200.2(b)(2), (4), and (5); and

(iii) Provide coherent and timely information about each student's attainment of the State's English language proficiency standards to parents consistent with § 200.2(e) and section 1112(e)(3) of the Act.

(3) If a State develops a computer-adaptive assessment to measure English language proficiency, the State must ensure that the computer-adaptive assessment—

(i) Assesses a student's language proficiency, which may include growth toward proficiency, in order to measure the student's acquisition of English; and

(ii) Meets the requirements for English language proficiency assessments in paragraph (h) of this section.

(4)(i) A State must provide appropriate accommodations that are necessary to measure a student's English language proficiency relative to the State's English language proficiency standards under section 1111(b)(1)(F) of the Act for each English learner covered under paragraph (a)(1)(i) or (iii) of this section.

(ii) If an English learner has a disability that precludes assessment of the student in one or more domains of the English language proficiency assessment required under section 1111(b)(2)(G) of the Act such that there are no appropriate accommodations for the affected domain(s) (*e.g.,* a non-verbal English learner who because of an identified disability cannot take the speaking portion of the assessment), as determined, on an individualized basis, by the student's IEP team, 504 team, or by the individual or team designated by the LEA to make these decisions under title II of the ADA, as specified in paragraph (b)(1) of this section, a State must assess the student's English language proficiency based on the remaining domains in which it is possible to assess the student.

(5) A State must provide for an alternate English language proficiency assessment for each English learner covered under paragraph (a)(1)(ii) of this section who cannot participate in the assessment under paragraph (h)(1) of this section even with appropriate accommodations.

(i) *Recently arrived English learners.* (1)(i) A State may exempt a recently arrived English learner, as defined in paragraph (k)(2) of this section, from one administration of the State's reading/language arts assessment under § 200.2 consistent with section 1111(b)(3)(A)(i)(I) of the Act.

(ii) If a State does not assess a recently arrived English learner on the State's reading/language arts assessment consistent with section 1111(b)(3)(A)(i)(I) of the Act, the State must count the year in which the assessment would have been administered as the first of the three years in which the student may take the State's reading/language arts assessment in a native language consistent with paragraph (g)(1) of this section.

(iii) A State and its LEAs must report on State and local report cards required under section 1111(h) of the Act the number of recently arrived English learners who are not assessed on the State's reading/language arts assessment.

(iv) Nothing in this section relieves an LEA from its responsibility under applicable law to provide recently arrived English learners with appropriate instruction to enable them to attain English language proficiency as well as grade-level content knowledge in reading/language arts, mathematics, and science.

(2) A State must assess the English language proficiency of a recently arrived English learner pursuant to paragraph (h) of this section.

(3) A State must assess the mathematics and science achievement of a recently arrived English learner pursuant to § 200.2 with the frequency described in § 200.5(a).

(j) *Students in Native American language schools or programs.* (1) Except as provided in paragraph (j)(2) of this section, a State is not required to assess, using an assessment written in English, student achievement in meeting the challenging State academic standards in reading/language arts, mathematics, or science for a student who is enrolled in a school or program that provides instruction primarily in a Native American language if—

(i) The State provides such an assessment in the Native American language to all students in the school or program, consistent with the requirements of § 200.2;

(ii) The State submits evidence regarding any such assessment in the Native American language for peer review as part of its State assessment system, consistent with § 200.2(d), and receives approval that the assessment meets all applicable requirements; and

(iii) For an English learner, as defined in section 8101(20)(C)(ii) of the Act, the State continues to assess the English language proficiency of such English learner, using the annual English language proficiency assessment required under paragraph (h) of this section, and provides appropriate services to enable him or her to attain proficiency in English.

(2) Notwithstanding paragraph (g) of this section, the State must assess under § 200.5(a)(1)(i)(B), using assessments written in English, the achievement of each student enrolled in such a school or program in meeting the challenging State academic standards in reading/language arts, at a minimum, at least once in grades 9 through 12.

(k) *Definitions with respect to English learners and students in Native American language schools or programs.* For the purpose of this section—

(1) ''Native American'' means ''Indian'' as defined in section 6151 of the Act, which includes Alaska Native

and members of Federally recognized or State-recognized tribes; Native Hawaiian; and Native American Pacific Islander.

(2) A ''recently arrived English learner'' is an English learner who has been enrolled in schools in the United States for less than twelve months.

(3) The phrase ''schools in the United States'' includes only schools in the 50 States and the District of Columbia.

(Approved by the Office of Management and Budget under control number 1810–0576 and 1810–0581)

(Authority: 20 U.S.C. 1221e-3, 1400 *et seq.,* 3474, 6311(b)(2), 6571, 7491(3), and 7801(20) and (34); 25 U.S.C. 2902; 29 U.S.C. 794; 42 U.S.C. 2000d–1), 12102(1), and 12131; 34 CFR 300.5)

■ 7. Section 200.8 is amended:

■ a. In paragraph (a)(2)(i), by adding the word ''and'' following the semicolon.

■ b. In paragraph (a)(2)(ii), by removing the words ''including an alternative format (*e.g.,* Braille or large print) upon request; and'' and adding in their place the words ''consistent with § 200.2(e).''

■ c. By removing paragraph (a)(2)(iii).

■ d. In paragraph (b)(1), by removing the term ''§ 200.2(b)(4)'' and adding in its place the term ''§ 200.2(b)(13)''.

■ e. By adding an OMB information collection approval parenthetical.

■ f. By revising the authority citation at the end of the section.

The addition and revision read as follows:

§ 200.8 Assessment reports.

* * * * *

(Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 20 U.S.C. 1221e–3, 3474, 6311(b)(2)(B)(x) and (xii), and 6571)

■ 8. Section 200.9 is revised to read as follows:

§ 200.9 Deferral of assessments.

(a) A State may defer the start or suspend the administration of the assessments required under § 200.2 for one year for each year for which the amount appropriated for State assessment grants under section 1002(b) of the Act is less than $369,100,000.

(b) A State may not cease the development of the assessments referred to in paragraph (a) of this section even if sufficient funds are not appropriated under section 1002(b) of the Act.

(Authority: 20 U.S.C. 1221e–3, 3474, 6302(b), 6311(b)(2)(I), 6363(a), and 6571)

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Part VII

Department of Education

34 CFR Part 200
Every Student Succeeds—Innovative Assessment Demonstration Authority; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 200

[Docket ID ED–2016–OESE–0047]

RIN 1810–AB31

Every Student Succeeds—Innovative Assessment Demonstration Authority

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary issues final regulations under title I, part B of the Elementary and Secondary Education Act of 1965 (ESEA) to implement changes made to the ESEA by the Every Student Succeeds Act (ESSA) enacted on December 10, 2015, including the ability of the Secretary to provide demonstration authority to a State educational agency (SEA) to pilot an innovative assessment and use it for accountability and reporting purposes under title I, part A of the ESEA before scaling such an assessment statewide.

DATES: These regulations are effective January 9, 2017.

FOR FURTHER INFORMATION CONTACT: Jessica McKinney, U.S. Department of Education, 400 Maryland Avenue SW., Room 3W107, Washington, DC 20202–2800.

Telephone: (202) 401–1960 or by email: *jessica.mckinney@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of This Regulatory Action: On December 10, 2015, President Barack Obama signed the ESSA into law. The ESSA reauthorizes the ESEA, which provides Federal funds to improve elementary and secondary education in the Nation's public schools. Through the reauthorization, the ESSA made significant changes to the ESEA for the first time since the ESEA was reauthorized through the No Child Left Behind Act of 2001 (NCLB), including significant changes to title I. In particular, the ESSA includes in title I, part B of the ESEA a new demonstration authority under which an SEA or consortium of SEAs that meets certain application requirements may establish, operate, and evaluate an innovative assessment system, including for use in the statewide accountability system, with the goal of using the innovative assessment system after the demonstration authority ends to meet the academic assessment and statewide accountability system requirements under title I, part A of the ESEA. Aligned with President Obama's Testing Action Plan, released in October 2015, the demonstration authority seeks to help States interested in fostering and scaling high-quality, innovative assessments.[1] An SEA would require this demonstration authority under title I, part B, if the SEA is proposing to develop an innovative assessment in any required grade or subject and administer the assessment, initially, to students in only a subset of its local educational agencies (LEAs) or schools without also continuing administration of its current statewide assessment in that grade or subject to all students in those LEAs or schools, including for school accountability and reporting purposes under title I, part A, as it scales the innovative assessment statewide. Unless otherwise noted, references in this document to the ESEA refer to the ESEA as amended by the ESSA.

On July 11, 2016, the Secretary published a notice of proposed rulemaking (NPRM) for the title I, part B regulations pertaining to the innovative assessment demonstration authority in the **Federal Register** (81 FR 44958). We issue these regulations to provide clarity to SEAs regarding the requirements for applying for and implementing innovative assessment demonstration authority. These regulations will also help to ensure that SEAs provided this authority can develop and administer high-quality, valid, and reliable assessments that measure student mastery of challenging State academic standards, improve the design and delivery of large-scale assessments, and better inform classroom instruction, ultimately leading to improved academic outcomes for all students.

Summary of the Major Provisions of This Regulatory Action: The following is a summary of the major substantive changes in these final regulations from the regulations proposed in the NPRM. (The rationale for each of these changes is discussed in the *Analysis of Comments and Changes* section elsewhere in this preamble.)

- The Department has renumbered the proposed regulatory sections, as follows, in the final regulations:
  - —New section 200.104 (proposed § 200.76) entitled ''Innovative assessment demonstration authority.''
  - —New section 200.105 (proposed § 200.77) entitled ''Demonstration authority application requirements.''
  - —New section 200.106 (proposed § 200.78) entitled ''Innovative assessment selection criteria.''
  - —New section 200.107 (proposed § 200.79) entitled ''Transition to statewide use.''
  - —New section 200.108 (proposed § 200.80) entitled ''Extensions, waivers, and withdrawal of authority.''
- The Department has made a number of changes to new § 200.104 (proposed § 200.76), which provides definitions and describes general requirements for SEAs and consortia of SEAs applying for and implementing the innovative assessment demonstration authority:
  - —Section 200.104(b)(1) has been added to define an ''affiliate member of a consortium'' to be an SEA that is formally associated with a consortium of SEAs that is implementing the innovative assessment demonstration authority, but is not yet a full member of the consortium because it is not proposing to use the consortium's innovative assessment system under the demonstration authority.
  - —Section 200.104(b)(3) has been revised to clarify the definition of ''innovative assessment system'' to indicate that an innovative assessment system:
- Produces an annual summative determination of each student's mastery of grade-level content standards aligned to the challenging State academic standards under section 1111(b)(1) of the ESEA.
- In the case of a student with the most significant cognitive disabilities assessed with an alternate assessment aligned with alternate academic achievement standards (AA–AAAS) under section 1111(b)(1)(E) of the ESEA and aligned with the State's academic content standards for the grade in which the student is enrolled, produces an annual summative determination relative to such alternate academic achievement standards for each such student;
- May include any combination of general assessments or AA–AAAS in reading/language arts, mathematics, or science; and
- May, in any required grade or subject, include one or more types of assessments listed in § 200.104(b)(3)(ii).
  - —Section 200.104(b)(4) has been added to define a ''participating LEA'' as an LEA in the State with at least one

[1] For more information regarding President Obama's Testing Action Plan, please see: *http://www2.ed.gov/admins/lead/account/saa.html;* see also: *www.ed.gov/news/press-releases/fact-sheet-testing-action-plan.*

school participating in the innovative demonstration authority.

—Section 200.104(b)(5) has been added to define ''participating school'' as a public school in the State in which the innovative assessment system is administered under the innovative assessment demonstration authority instead of the statewide assessment and where the results of the school's students on the innovative assessment system are used by its State and LEA for purposes of accountability and reporting.

• The Department made a number of changes to § 200.105 (proposed § 200.77), which sets forth the application requirements that an SEA or consortium of SEAs must meet in order to receive approval to implement demonstration authority:

—Section 200.105(a) has been revised to require collaboration with representatives of Indian tribes located in the State and to clarify that in consulting parents, States must consult parents of children with disabilities, English learners and other subgroups under section 1111(c)(2) of the ESEA.

—Section 200.105(b) has been revised to clarify that the innovative assessment system may be administered to a subset of LEAs or schools within an LEA, and must be administered to all students within the participating LEA or schools within the LEA, except that an LEA may continue to administer an AA–AAAS that is not part of the innovative assessment system to students with the most significant cognitive disabilities, consistent with section 1111(b)(1)(E) of the ESEA.

—Section 200.105(b)(2) has been revised to clarify that the innovative assessment must align with the challenging State academic content standards for the grade in which the student is enrolled. In addition, § 200.105(b)(2)(ii) clarifies that the innovative assessment may include items above or below a student's grade level so long as the State measures each student's academic proficiency based on the challenging State academic standards for the grade in which the student is enrolled.

—Section 200.105(b)(4) has been revised to clarify that determinations of the comparability between the innovative and statewide assessment system must be based on results, including annual summative determinations, as defined in § 200.105(b)(7), that are generated for all students and for each subgroup of students.

—Section 200.105(b)(4)(i)(C) has been revised to clarify that States may include, as a significant portion of the innovative assessment system in each required grade and subject in which both an innovative and statewide assessment is administered, items or performance tasks from the statewide assessment system that, at a minimum, have been previously pilot tested or field tested for use in the statewide assessment system.

—Section § 200.105(b)(4)(i)(D) has been added to clarify that States may include, as a significant portion of the statewide assessment system in each required grade and subject in which both an innovative and statewide assessment is administered, items or performance tasks from the innovative assessment system that, at a minimum, have been previously pilot tested or field tested for use in the innovative assessment system.

—Section § 200.105(b)(4)(ii) has been added to require that States' innovative assessment systems generate results, including annual summative determinations, that are valid, reliable, and comparable for all students and for each subgroup of students among participating schools and LEAs, which an SEA must annually determine as part of its evaluation plan described in § 200.106(e) (proposed § 200.78(e)).

—Section 200.105(b)(7) has been revised to require that the innovative assessment produce an annual summative determination of achievement for each student that describes—

- The student's mastery of the challenging State academic standards (*i.e.,* both the State's academic content and achievement standards) for the grade in which the student is enrolled; and
- In the case of a student with the most significant cognitive disabilities assessed with an AA–AAAS under section 1111(b)(1)(E) of the ESEA, the student's mastery of those alternate academic achievement standards.

—Section 200.105(d)(4) has been revised to require that each participating LEA inform parents of all students in participating schools about the innovative assessment and that information shared with parents include the grades and subjects in which the innovative assessment will be administered.

—Section 200.105(f)(2) has been added to clarify that a consortium must submit a revised application to the Secretary in order for an affiliate member to become a full member of the consortium and use the consortium's innovative assessment system under the demonstration authority.

• The Department made a number of changes to § 200.106 (proposed § 200.78), which describes the selection criteria the Secretary will use to evaluate an application for demonstration authority:

—Section 200.106(a)(3)(iii) has been revised to clarify that the baseline for setting annual benchmarks toward high-quality and consistent implementation across schools that are demographically similar to the State as a whole is the demographics of participating schools, not participating LEAs.

—Section 200.106(d) has been revised to clarify that each SEA or consortium's application must include a plan for delivering supports to educators that can be consistently provided at scale; will be evaluated on the extent to which training for LEA and school staff will develop teacher capacity to provide instruction that is informed by the innovative assessment system results; and should describe strategies and safeguards to support educators and staff in developing and scoring the innovative assessment, including how the strategies and safeguards are sufficient to ensure objective and unbiased scoring of innovative assessments. Section 200.106(d) has also been revised to provide for the SEA or consortium to include supports for parents, in addition to educators and students, and require States to describe their strategies to familiarize parents as well as students with the innovative assessment system.

• The Department has revised § 200.107 (proposed § 200.79) to clarify that the baseline year used for purposes of evaluating the innovative assessment to determine if a State may administer the assessment statewide is the first year the innovative assessment is administered by a participating LEA under the demonstration authority.

Costs and Benefits: The Department believes that the benefits of this regulatory action outweigh any associated costs to a participating SEA, which may be supported with Federal grant funds. These benefits include the administration of assessments that more effectively measure student mastery of challenging State academic standards and better inform classroom instruction and student supports, ultimately leading to improved academic outcomes for all students. Please refer to the *Regulatory Impact Analysis* section of this document for a more detailed

discussion of costs and benefits. Consistent with Executive Order 12866, the Office of Management and Budget (OMB) has determined that this action is significant and, thus, is subject to review by OMB under the Executive order.

Public Comment: In response to our invitation to comment in the NPRM, 89 parties submitted comments on the proposed regulations.

We discuss substantive issues under the sections of the proposed regulations to which they pertain, except for a number of cross-cutting issues, which are discussed together under the heading ''Cross-cutting issues.'' Generally, we do not address technical and other minor changes, or suggested changes the law does not authorize us to make under the applicable statutory authority. In addition, we do not address general comments that raised concerns not directly related to the proposed regulations or that were otherwise outside the scope of the regulations, including comments that raised concerns pertaining to instructional curriculum, particular sets of academic standards or assessments or the Department's authority to require a State to adopt a particular set of academic standards or assessments, as well as comments pertaining to the Department's regulations on statewide accountability systems, data reporting, and State plans.

Tribal Consultation: The Department held four tribal consultation sessions on April 24, April 28, May 12, and June 27, 2016, pursuant to Executive Order 13175 (''Consultation and Coordination with Indian Tribal Governments''). The purpose of these tribal consultation sessions was to solicit tribal input on the ESEA, including input on several changes that the ESSA made to the ESEA that directly affect Indian students and tribal communities. The Department specifically sought input on: The new grant program for Native language Immersion schools and projects; the report on Native American language medium education; and the report on responses to Indian student suicides. The Department announced the tribal consultation sessions via listserv emails and Web site postings on *http://www.edtribalconsultations.org/*. The Department considered the input provided during the consultation sessions in developing the proposed requirements.

Analysis of Comments and Changes: An analysis of the comments and of any changes in the regulations since publication of the NPRM follows.

Cross-Cutting Issues

Reorganization and Renumbering of the Proposed Regulations

Comments: None.

Discussion: The NPRM included proposed regulatory sections to implement the innovative assessment demonstration authority in §§ 200.75 through 200.80. However, some of these sections contain existing regulations that have not yet been removed and reserved. Accordingly, we are revising the final regulations by renumbering the proposed sections, as follows:

- New § 200.104 (proposed § 200.76) entitled ''Innovative assessment demonstration authority.''
- New § 200.105 (proposed § 200.77) entitled ''Demonstration authority application requirements.''
- New § 200.106 (proposed § 200.78) entitled ''Innovative assessment selection criteria.''
- New § 200.107 (proposed § 200.79) entitled ''Transition to statewide use.''
- New § 200.108 (proposed § 200.80) entitled ''Extensions, waivers, and withdrawal of authority.''

Changes: We have revised the final regulations by renumbering the regulatory sections, as proposed. As a result, we have added §§ 200.104 through 200.108 in the final regulations, which describe the demonstration authority, in general; application requirements; selection criteria; transition to statewide use; and extensions, waivers, and withdrawal of authority.

Overtesting

Comments: A few commenters raised concerns that the proposed requirements impose new testing requirements. Of these commenters, a few expressed concern that the assessments would serve to punish teachers who work with children who are struggling academically. Others were concerned that the assessments would be inappropriately used for high stakes decisions.

Discussion: Neither section 1204 of the ESEA nor the proposed regulations impose new assessment requirements beyond those required by title I, part A of the ESEA. Accurate and reliable measurement of student achievement based on annual State assessments in reading/language arts and mathematics remains a core component of State assessment and accountability systems under the ESSA. In support of these goals, section 1111(b)(2)(B)(v)(I) of the ESEA requires annual assessments in reading/language arts and mathematics to be administered to all students in each of grades 3 through 8, and at least once between grades 9 and 12. Section 1204 allows a State to pilot new innovative assessments under a demonstration authority, but requires that each State assess all students on the applicable assessments, using either the innovative assessment in participating LEAs and schools or the statewide assessment in non-participating LEAs and schools. No State is required to participate in the innovative assessment demonstration authority. Finally, while States are required to use the results of State assessments in statewide accountability systems, consistent with sections 1111(c) and 1111(d) of the ESEA, there are no further requirements for how assessment results are used, including for teacher evaluation or student advancement and promotion decisions. Decisions about the use of test results for those purposes remain a State and local decision.

Changes: None.

Comments: One commenter commended the Department for allowing States the option to pilot a new assessment in a subset of schools rather than the entire State, but stressed that true innovation is needed to reduce the unnecessary and high stakes associated with assessments in the United States. The commenter encouraged the Department to look for opportunities to reduce testing, particularly for high stakes purposes. Another commenter noted that districts are already required to track student growth through Response to Intervention in kindergarten through grade 5 (K–5), so having State assessments in grades 3–5 is duplicative testing.

Discussion: Section 1111(b)(2)(B)(v)(I) of the ESEA requires that each State administer reading/language arts and mathematics assessments in each of grades 3 through 8 and at least once in grades 9 through 12; while some schools may be required by their LEA or State to use Response to Intervention in grades K–5, there is no Federal requirement to do so. We believe that while the ESEA maintains this core requirement for annual assessment, it also presents States with opportunities to streamline low-quality or duplicative testing. Each State, in coordination with its LEAs, should continue to consider additional action it may take to reduce burdensome and unnecessary testing. We know that annual assessments, as required by the ESSA, are tools for learning and promoting equity when they are done well and thoughtfully. When assessments are done poorly, in excess, or without a clear purpose, they take time away from teaching and learning. The President's Testing Action Plan provides a set of principles and

actions that the Department put forward to help protect the vital role that good assessments play in guiding progress for students, advancing equity for all, and evaluating schools, while providing help in reducing practices that have burdened classroom time or not served students or educators well. We plan to issue further non-regulatory guidance to help States and LEAs use the provisions of the ESEA to take actions aligned with the Testing Action Plan to improve assessment quality and reduce the burden of unnecessary and duplicative testing.

Changes: None.

Parental Rights

Comments: One commenter noted the importance of parental involvement in issues pertaining to State assessments under the ESEA, including test design, reporting, and use of test results, and voiced support for parents' rights to make decisions around their child's participation in assessments. Another commenter was supportive of expecting students to take assessments, but concerned—given the decisions some parents make to opt their children out of taking assessments—about requiring that a 95 percent participation rate among students and subgroups of students be a factor for school accountability purposes. The commenter suggested that the final regulations make 95 percent participation a goal, rather than a requirement, and expect States to review participation rates in schools that fail to assess at least 95 percent of their students.

Discussion: We agree with commenters that it is important to seek and consider input from parents when designing and implementing State assessment systems and policies. Accurate and reliable measurement of student achievement based on annual State assessments in reading/language arts and mathematics remains a core component of State assessment and accountability systems under the ESEA. In support of these goals, section 1111(b)(2)(B)(i) and (v)(I) of the ESEA requires annual assessments in reading/language arts and mathematics to be administered to all students in each of grades 3 through 8, and at least once between grades 9 and 12. Section 1111(c)(4)(E) of the ESEA also requires that States hold schools accountable for assessing at least 95 percent of their students. The statute reiterates these critical requirements for holding participating schools in the innovative assessment demonstration authority accountable, as described in sections 1204(e)(2)(ix) and 1204(j)(1)(B)(v)(II), which both reference the requirements in section 1111(c) in the application requirements and requirements for transitioning to using the innovative assessment system statewide. All States, regardless of their participation in innovative assessment demonstration authority, are responsible for ensuring that all students participate in the State's annual assessments and that all schools meet the statutory and applicable regulatory requirements to hold schools accountable for the 95 percent participation rate requirement. The final regulations for the innovative assessment demonstration authority, like the proposed regulations, are designed to assist States in fulfilling this responsibility.

Changes: None.

Comments: A few commenters raised concerns that the proposed regulations will impose new data collection requirements that might lead to data mining. These commenters were particularly concerned about student privacy and the right of parents to protect their students' data from being collected.

Discussion: We agree with the commenters' concern that it is paramount to protect student privacy. New § 200.105(b)(8) (proposed § 200.77(b)(8)) requires that each State and LEA report student results on the innovative assessment, consistent with sections 1111(b)(2)(B) and 1111(h) of the ESEA, including section 1111(b)(2)(B)(xi), which provides that in reporting disaggregated results, the State, LEA, and school may not reveal personally identifiable information about an individual student. Further, new § 200.105(d)(3)(ii) (proposed § 200.77(d)(3)(ii)) requires that any data submitted to the Secretary regarding the State's implementation of the innovative assessment demonstration authority may not reveal any personally identifiable information. We disagree with the commenters that this regulation requires new student-level data to be publicly reported beyond those requirements in the statute; rather, it requires that any State choosing to participate in the innovative assessment demonstration authority continue to meet the reporting requirements of sections 1111(b)(2)(B) and 1111(h) of the ESEA.

Changes: None.

Stakeholder Engagement

Comments: Multiple commenters supported the proposed regulations for prioritizing meaningful consultation with stakeholders in various phases of the innovative assessment demonstration authority, such as in developing States' applications and plans for innovative assessment demonstration authority in proposed § 200.77(a)(2) and in requiring ongoing feedback from stakeholders on implementation in proposed § 200.77(d)(3)(iv). These commenters appreciated that the proposed regulations emphasized a meaningful role for assessment experts; parents and parent organizations; teachers, principals and other school leaders, and local teacher organizations (including labor organizations); local school boards; groups representing the interests of particular subgroups of students, including English learners, children with disabilities, and other subgroups included under section 1111(c)(2) of the ESEA; and community organizations and intermediaries.

Discussion: We appreciate the support for these provisions and agree that meaningful, timely, and ongoing consultation with a diverse group of stakeholders at all phases of the innovative assessment demonstration authority is essential to ensure effective implementation and development of a high-quality innovative assessment system. We strongly encourage States to engage in substantial outreach with stakeholders in developing and implementing an innovative assessment system under the ESSA.[2]

Changes: None.

Comments: Several commenters suggested that evidence of consultation with stakeholders at the time a State is seeking demonstration authority in proposed § 200.77(a) be submitted directly from stakeholders, rather than from the State.

Discussion: We believe the commenters' concern that evidence of meaningful consultation under new § 200.105(a) (proposed § 200.77(a)) is submitted from the State, rather than from required groups, is mitigated by the selection criterion under new § 200.106(b)(3) (proposed § 200.78(b)(3)), which requires a State to submit signatures directly from groups and individuals supporting the application, many of whom overlap with those who must be consulted under new § 200.105(a). As a result, we believe that adding to the provisions for consultation by requiring States to gather and submit further information from organizations and individuals directly would add burden to the application process without providing

[2] The Department has issued non-regulatory guidance on consultation under the ESEA, including suggestions and examples of best practices for meaningful stakeholder engagement. See: *http://www2.ed.gov/policy/elsec/guid/secletter/160622.html.*

substantially new information that would aid in the external peer review of a State's application.

Changes: None.

Comments: A few commenters requested that the Department add specific groups of stakeholders to the list of those with which the State must consult in developing its innovative assessment system and application under proposed § 200.77(a)(2). Commenters suggested adding groups such as specialized instructional support personnel, representatives of community-based organizations, and organizations and parents who advocate for the interests of particular subgroups of children or are experts in working with these subgroups. In addition, one commenter representing tribal organizations suggested that tribal leaders be included as a required group for consultation under proposed § 200.77(a)(2). Stakeholders supported including these groups under proposed § 200.77(a)(2) because States would then be required to regularly solicit ongoing feedback from these additional groups under proposed § 200.77(d)(3)(iv) and during the transition to statewide use of the innovative assessment system under proposed § 200.79(b)(3).

Discussion: The list of stakeholders that are part of required consultation under new § 200.105(a)(2) (proposed § 200.77(a)(2)) comes directly from section 1204(e)(2)(A)(v)(I) of the ESEA. The Department added students to the list of required stakeholders, given the substantial and direct impact of implementing a new innovative assessment on the teaching and instruction students will receive and to reinforce related statutory requirements for ensuring students are acclimated to the innovative assessments, as described in section 1204(e)(2)(B)(vi) of the ESEA. While we recognize that the additional groups suggested by commenters for inclusion in the regulations may also provide valuable input in developing the innovative assessment, we believe that the current list, as proposed, already includes broad categories to ensure diverse input, such as ''educators'' and those ''representing the interests of children with disabilities, English learners, and other subgroups.''

We note that a State may always consult with additional groups beyond those required in the regulations in developing its innovative assessment system, and we strongly encourage States to ensure meaningful and ongoing engagement with a diverse group of stakeholders. The Department has issued non-regulatory guidance, generally, on conducting effective outreach with stakeholders in implementing the ESSA, with suggestions and examples of best practices for meaningful stakeholder engagement.[3]

We agree that it would be helpful to emphasize that parents of particular subgroups of students, as well as organizations representing these students, must be consulted, and are revising the final regulations accordingly. The State must consider the appropriate services to ensure meaningful communication for parents with limited English proficiency and parents with disabilities.

In addition, we agree that it would be beneficial to add representatives of Indian tribes to the list of required stakeholders, as some LEAs have a high percentage of their student population who are American Indian or Alaska Native, and these LEAs will be expected to implement the innovative assessment by the time the State transitions to statewide use of the innovative assessment system. This requirement is consistent with the new requirement in title I, part A for States to consult with representatives of Tribes prior to submitting a State plan (section 1111(a)(1) of the ESEA), and the new requirement that certain LEAs consult with Tribes prior to submitting a plan or application for covered programs (section 8538 of the ESEA).

Changes: We have added new § 200.105(a)(2)(iv) to require State collaboration with representatives of Indian tribes and § 200.105(a)(2)(v) to specify that parents who are consulted must include parents of children in subgroups described in § 200.105(a)(2)(i) (proposed § 200.77(a)(2)(i)).

Comments: Several commenters suggested that particular groups or individuals be added to the list of entities for which a State submits signatures under the selection criterion demonstrating stakeholder support for innovative assessment demonstration authority in proposed § 200.78(b)(3)(iv). Commenters suggested that disability rights organizations, community-based organizations, and statewide organizations representing superintendents or school board members also be added. Some of these commenters felt that signatures from other stakeholders listed in proposed § 200.78(b)(3)(iv) should be required, believing these organizations' views were considered as less important than groups representing local leaders, administrators, and teachers. Another commenter recommended that we require teacher signatures where local teacher organizations do not exist to ensure that States have support from teachers in the development and implementation of the innovative assessment system.

Discussion: In proposed § 200.78(b)(3), the Department prioritized requiring signatures from those individuals and organizations that are most directly involved in the implementation of innovative assessments at the local level, such as superintendents, school boards, and teacher organizations, as these are the individuals who will be charged (depending on the State's innovative assessment system design) with developing, administering, or scoring the assessments; thus, their input and support are essential to the successful implementation of the innovative assessment system. We agree with commenters that signatures of support from other individuals, however, can be beneficial and note that while the selection criterion in new § 200.106(b)(3)(i)–(ii) (proposed § 200.78(b)(3)(i)–(ii)) specifically references signatures from superintendents and school boards in participating districts, this does not preclude a State from requesting and including signatures and letters of support from State organizations representing superintendents and school boards, as such groups may be included under ''other affected stakeholders'' as described in new § 200.106(b)(3)(iv) (proposed § 200.77(b)(3)(iv)). Signatures from disability and community-based organizations may also be included under new § 200.106(b)(3)(iv). Moreover, because these signatures are part of the selection criteria, if a State were to include signatures from a wide range of individuals—including those that are not required, but may be included, as described in new § 200.106(b)(3)(iv)—it would strengthen this component of the State's application. In this way, we believe the requirements, as proposed, provide a strong incentive for a State to seek input and support from a diverse group of stakeholders, and organizations representing those stakeholders in developing its application, without adding burden to the process for States by including additional required signatures from groups who may not be directly involved in implementation of the innovative assessment system. Similarly, while signatures from individual teachers in participating districts could be a powerful demonstration of support from

[3] For more information regarding stakeholder engagement, please see: *http://www2.ed.gov/policy/elsec/guid/secletter/160622.html.*

educators in participating districts, we believe such a requirement would add a significant burden for LEAs and SEAs. A State may choose to collect teacher signatures, but we also recognize it may be more efficient and feasible for SEAs and LEAs to collect signatures from organizations that represent teachers.

Changes: None.

Comments: One commenter recommended that the final regulations require ongoing collaboration with stakeholders, including parents and organizations that advocate on behalf of students, in addition to consultation on the development of the innovative assessment system at the time of the State's application as described in proposed § 200.77(a).

Discussion: New § 200.105(d)(3)(iv) (proposed § 200.77(d)(3)(iv)) requires each State to submit an assurance in its application that it will annually report to the Secretary on implementation of its innovative assessment system, including ongoing feedback from teachers, principals, other school leaders, students and parents, and other stakeholders consulted under new § 200.105(a)(2) (proposed § 200.77(a)(2)) from participating schools and LEAs. As States must collect and report on this stakeholder feedback each year, and the Department will use it to inform ongoing technical assistance and monitoring of participating States, we believe no further requirements related to ongoing consultation are necessary.

Changes: None.

Comments: One commenter supported the provisions for States to include the prior experience of external partners as part of the selection criterion in proposed § 200.78(b), but suggested that we revise the final regulations in proposed § 200.78(d) to include community-based organizations so as to emphasize the need for States to partner with external organizations to provide training to staff and to familiarize parents and students with the innovative assessment.

Discussion: SEAs and consortia of SEAs must submit evidence under new § 200.105(a)(1) (proposed § 200.77(a)(1)) of collaboration in developing the innovative assessment system, including experts in the planning, development, implementation, and evaluation of innovative assessment systems, many of whom could be part of external partnerships the SEA or consortium has established. We are revising the regulations in new § 200.105(a)(1) to more clearly describe that external partners may be included as collaborators. The commenter is correct that the selection criterion in new § 200.106(b) (proposed § 200.78(b)) provides for States to describe the prior experience of their external partners, if any. Further, we presume the role of external partners in executing a State's plan for demonstration authority will be fully described, if applicable, in each relevant selection criterion, and do not feel it is necessary to explicitly note that a State may work with external partners in each and every area, as we believe States are best positioned to determine the areas in which their work could benefit from external partnerships, based on their innovative assessment system design. A high-quality plan for supporting educators and students, for example, would include sufficient detail on any external partnerships and resources to accomplish this work, if the State has determined such partnerships are necessary.

Changes: We have added new § 200.105(a)(1) (proposed § 200.77(a)(1)) to clarify that experts in the planning, development, implementation, and evaluation of innovative assessment systems with whom SEAs collaborate to develop the innovative assessment system may include external partners.

Comments: One commenter encouraged the Department and States to engage local school boards in the process to identify participating districts and schools for the innovative assessment pilot.

Discussion: SEAs and consortia of SEAs must consult with school leaders during the application process under new § 200.105(a)(2)(ii) (proposed § 200.77(a)(2)(ii)). The selection criterion provides for SEAs to submit signatures from LEA superintendents and local school boards participating in the demonstration authority, consistent with new § 200.106(b)(3)(i)–(ii) (proposed § 200.78(b)(3)(i)–(ii)), as a showing of support for the innovative assessment demonstration authority. We believe that these requirements and selection criterion provide opportunities for SEAs to speak with local school leaders, including local school boards, about their plans for and support of innovative assessments. These conversations will also be the time for SEAs to discuss district or school participation with local leaders, including school boards. Given these provisions, we do not think further changes to the regulations are necessary.

Changes: None.

200.104 Innovative Assessment Demonstration Authority

General

Comments: Many of the commenters supported the innovative assessment demonstration authority as an opportunity to move toward more innovative and meaningful systems for assessing student learning, beyond traditional multiple choice exams. In particular, some commenters supported the inclusion of performance- and competency-based assessments. One commenter advocated for a regulation that encourages new ways to assess under an existing system (*e.g.,* embedding technology-enhanced items), different strategies to do what current assessments intend to do but fail to do (*e.g.,* assessing higher-order thinking skills), or new ways to assess student competencies beyond what current assessments can do (*e.g.,* assessing in individualized or real world settings).

One commenter appreciated the opportunity to use the advances in assessment to better measure student learning, but asked the Department to ensure that this focus on innovation does not jeopardize assessment rigor and comparability. Multiple commenters felt that the regulations provided appropriate flexibility with protections to ensure that assessments are high-quality, valid, and reliable measurements consistent with the provisions of ESEA.

Discussion: We appreciate commenters' support of the innovative assessment demonstration authority and believe that this authority can enhance State efforts to measure student mastery of challenging State academic standards and will lead to improved academic outcomes for all students. We also agree that it is essential, even as States are piloting more innovative assessments, that all students, including students with the most significant cognitive disabilities, be held to challenging content standards, and that all assessments be of high quality, producing valid, reliable, and comparable determinations of student achievement, except for alternate assessments for students with the most significant cognitive disabilities, as defined by a State under § 200.6(d)(1) and section 1111(b)(2)(D) of the ESEA, who may be assessed with alternate assessments aligned with alternate academic achievement standards consistent with section 1111(b)(1)(E) of the ESEA.

In developing these regulations, we worked carefully to balance the flexibility offered to States under this authority and the need to provide room for innovation with the responsibility to ensure that States continue to meet the requirements of title I of the ESEA. As long as States meet the requirements of title I of the ESEA, they may explore new ways to assess students beyond

what is possible with the current assessments.

Changes: None.

Comments: Several commenters expressed general disagreement with providing States innovative assessment demonstration authority, claiming that the authority would not support students or their learning. Other commenters expressed concern that the regulations, as proposed, require too many assurances and documentation, create too many prescriptive requirements, and impede States' ability to create truly innovative assessment systems.

Discussion: The innovative assessment demonstration authority provides flexibility to States to develop and administer a new system of assessments that may include different types of assessments, such as instructionally embedded assessments or performance-based tasks, that provide useful and timely information for educators to guide instruction and identify appropriate instructional supports. Under the demonstration authority, States may develop new innovative assessments that meet the needs of their teachers and that provide better measures for learning. However, section 1204(e)(2)(A)(vi) of the ESEA requires that assessments be developed so that they are accessible to all students, including English learners and students with disabilities; are fair, valid, and reliable; and hold all students to the same high standards.

We disagree that the requirements are unnecessarily burdensome or too prescriptive. Under section 1204 of the ESEA, the demonstration authority is for those States interested in piloting new innovative assessments and administering the innovative assessments in a subset of schools for the purposes of accountability and reporting instead of the statewide assessment, until a State fully scales use of the innovative assessment among all LEAs and schools. If a State wants to create an innovative assessment outside of the demonstration authority while continuing to use the statewide assessment in all schools and LEAs, the State may do so. Section 1204 of the ESEA further establishes the application requirements for States seeking innovative assessment demonstration authority. The regulations clarify and organize those statutory requirements in new §§ 200.105 and 200.106 (proposed §§ 200.77 and 200.78). Given that the demonstration authority is initially limited to seven States, we particularly believe the selection criteria outlined in new § 200.106 will provide the chance for peer reviewers to distinguish high-quality applications consistent with the requirements of the statute. Moreover, section 1601(a) of the ESEA provides that the Secretary ''may issue . . . such regulations as are necessary to reasonably ensure that there is compliance'' with the law. The Department also has rulemaking authority under section 410 of the General Education Provisions Act (GEPA), 20 U.S.C. 1221e–3, and section 414 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3474. These regulations are necessary and appropriate to assist States in developing new, innovative assessments while maintaining high expectations, validity, and rigor; further, they are consistent and specifically intended to ensure compliance with section 1204 of the ESEA.

Changes: None.

Comments: One commenter suggested the Department ask States to indicate their interest in the innovative assessment demonstration authority when they submit their consolidated State plan. The commenter noted that under this recommendation a State would share its vision for an innovative assessment without submitting a binding application, allowing the Department to provide targeted technical assistance to interested States.

Discussion: Title I, part B is not one of the programs included in the definition of ''covered program'' in section 8101(11) of the ESEA as it applies to the consolidated State plan. Accordingly, we do not believe it is necessary to include a requirement for States to indicate their interest in the demonstration authority in the consolidated State plan.

Changes: None.

Comments: None.

Discussion: In reviewing the proposed regulations, the Department believes it would be helpful to establish definitions of ''participating LEA'' and ''participating school.'' At some points during implementation, States may have both participating and non-participating LEAs and schools, and this change provides clarity about what it means for an LEA or school to be participating in the demonstration authority.

Changes: We have added § 200.104(b)(4) to define a ''participating LEA'' as an LEA in the State with at least one school participating in the innovative demonstration authority. We also have added § 200.104(b)(5) to define ''participating school'' as a public school in the State where the innovative assessment system is administered under the innovative assessment demonstration authority instead of the statewide assessment under section 1111(b)(2) of the ESEA and where the results of the school's students on the innovative assessment system are used by its State and LEA for purposes of accountability and reporting under section 1111(c) and 1111(h) of the ESEA. We have made conforming edits in new §§ 200.105 and 200.106.

Defining Innovative Assessment

Comments: Many commenters requested clarity concerning which parts of the innovative assessment system need to meet the requirements of section 1111(b)(2) of the ESEA. Specifically, commenters asked the Department to be clear that it is the innovative assessment system that must meet the requirements, not each individual innovative assessment. The commenters noted that a grade-level innovative assessment may be comprised of multiple parts, each of which may be a stand-alone assessment (*e.g.,* an interim assessment, a performance-based assessment, or a competency-based assessment), which sum to an annual, summative grade-level determination of how a student performed against the challenging State academic standards. Commenters suggested that individual assessments should not be required to meet the requirements of peer review or section 1111(b)(2) individually.

Discussion: The Department believes there may have been some confusion about the meaning of innovative assessments in the context of an innovative assessment ''system.'' The Department considers an assessment system to be inclusive of all required assessments under the ESEA, such as the general assessments in all grade levels in reading/language arts, mathematics, and science, and the AA–AAAS. A grade-level innovative assessment, on the other hand, refers to the full suite of items, performance tasks, or other parts that sum to the annual, summative determination.

The Department, through its peer review process, will review the innovative assessment system overall, including a review of documentation and evidence provided for the innovative assessment at each grade level that comprises the innovative assessment system. The provision in new § 200.107(b) (proposed § 200.79(b)), which requires an innovative assessment to meet all of the requirements of section 1111(b)(2) of the ESEA, does not mean that each part of a grade-level innovative assessment (*e.g.,* an interim assessment, a performance-based assessment, a competency-based assessment) must meet those requirements. Accordingly,

the Department will not review each part of the grade-level innovative assessment (*e.g.,* a single performance task that makes up part of the State's innovative 4th-grade mathematics test) to ensure that it meets the requirements in § 200.2(b) and, therefore, the peer review will not result in a determination that a single grade-level assessment does or does not meet the requirements of peer review. We do note, however, that, as a component of the peer review, a State must submit grade-specific documentation, such as alignment evidence, test blueprints, or documentation outlining the development of performance tasks or other components, and documentation about the validity of the inferences about the student.

To provide further clarity, we are revising the definition of ''innovative assessment system'' in new § 200.104(b)(3) (proposed § 200.76(b)(2)) to specify that an ''innovative assessment system'' produces an annual summative determination of each student's mastery of grade-level content standards aligned to the challenging State academic standards under section 1111(b)(1) of the ESEA, or, in the case of a student with the most significant cognitive disabilities assessed with an AA–AAAS under section 1111(b)(1)(E) of the ESEA and aligned with the State's academic content standards for the grade in which the student is enrolled, an annual summative determination relative to such alternate academic achievement standards for each such student. We also are revising the definition of ''innovative assessment system'' to specify that an innovative assessment may include, in any required grade or subject, one or more types of assessments, such as cumulative year-end assessments, competency-based assessments, instructionally embedded assessments, interim assessments, or performance-based assessments.

Changes: We have added a revised definition of ''innovative assessment system'' in new § 200.104(b)(3) (proposed § 200.76(b)(2)) to clarify the definition of ''innovative assessment system'' to indicate that an innovative assessment system:

- Produces an annual summative determination of each student's mastery of grade-level content standards aligned to the challenging State academic standards under section 1111(b)(1) of the ESEA, or, in the case of a student with the most significant cognitive disabilities assessed with an alternate assessment aligned with alternate academic achievement standards under section 1111(b)(1)(E) of the ESEA and aligned with the State's academic content standards for the grade in which the student is enrolled, an annual summative determination relative to such alternate academic achievement standards for each such student;
- May include any combination of general assessments or alternate assessments aligned to alternate academic achievement standards (AA–AAAS) in reading/language arts, mathematics, or science; and
- May, in any required grade or subject, include one or more types of assessments listed in new § 200.104(b)(3)(ii).

Comments: Two commenters asked the Department to be more explicit in the regulations that the innovative assessment could be an innovative general assessment, an innovative AA–AAAS, or both.

Discussion: As we stated in the preamble of the NPRM, an SEA or consortium of SEAs may propose an innovative general assessment in reading/language arts, mathematics, or science; an innovative AA–AAAS for students with the most significant cognitive disabilities, as defined by a State under section 1111(b)(2)(D) of the ESEA and § 200.6; or both. The definition of ''innovative assessment system'' in new § 200.104(b)(3) (proposed § 200.76(b)(2)) also specifies that a State's innovative assessment system may include assessments that produce an annual summative determination aligned with alternate academic achievement standards for students with the most significant cognitive disabilities. In such cases, a State's application would demonstrate that an innovative AA–AAAS has or will meet all requirements, including for technical quality, validity, and reliability, that are included under section 1111(b)(2)(B) of the ESEA. We are further revising new § 200.104(b)(3) to clarify that the innovative assessment system may include any combination of general assessments or AA–AAAS in any required grade or subject.

Changes: We have added new § 200.104(b)(3) (proposed § 200.76(b)(2)) to specify that the innovative assessment system may include any combination of general assessments or AA–AAAS in reading/language arts, mathematics, or science that are administered in at least one required grade under section 1111(b)(2)(B)(v) of the ESEA.

Defining Types of Innovative Assessments

Comments: Multiple commenters asserted that the terms used in proposed § 200.76(b)(2) to define an innovative assessment, such as competency-based assessments, instructionally embedded assessments, and performance-based assessments, are too open to interpretation and may, in fact, limit assessment options. Commenters recommended that proposed § 200.76(b)(2) provide more specific examples, such as essays, research papers, science experiments, and high-level mathematical problems.

Discussion: The definition of ''innovative assessment system'' in new § 200.104(b)(3) (proposed § 200.76(b)(2)) is consistent with the definition in section 1204(a)(1) of the ESEA. We note that essays, research papers, science experiments, and high-level mathematical problems may be examples of performance-based assessments, competency-based assessments, or instructionally embedded assessments. However, we do not believe it is necessary to provide that level of specificity in the regulations. We think that this kind of detailed clarification can be more effectively provided in non-regulatory guidance.

Changes: None.

Demonstration Authority Period

Comments: Multiple commenters agreed with the proposed regulation as written and believe that a requirement for immediate implementation of the innovative assessment system will ensure that States receiving authority commit time and resources to develop a successful innovative assessment system.

Discussion: We appreciate the support of commenters for innovative assessments and for the timeline for implementation. States only need demonstration authority when they are ready to use the innovative assessment, including for accountability and reporting purposes, in at least one school and at least one required grade or subject instead of the statewide assessment; prior to that, States have discretion to consider and test different innovative models to subsequently propose under this authority.

Changes: None.

Comments: Numerous commenters expressed concern about the requirement that States be ready, upon receiving demonstration authority, to immediately implement a new innovative assessment in at least one school. Commenters believe States may be unwilling or unable to commit time and resources to the development of an innovative assessment system without an assurance that the Department would consider their approach to an innovative assessment system. These commenters

suggested the Department consider a two-stage application process in which applicants may receive conditional approval that would allow time for planning prior to administration of the innovative assessment system in at least one school. One commenter noted that this would be an opportunity for States to work directly with the Department and receive feedback and technical assistance.

One commenter stated that, were the Department to consider a conditional approval process, it might risk exceeding the seven-State limitation during the initial demonstration authority period if the Department receives more than seven high-quality applications that meet all of the application requirements and selection criteria. The commenter proposes a contingency plan to rank the applications in the event that the number of applications exceeds the cap.

Several commenters suggested that this requirement means the Department drafted the proposed rule to accommodate specific States or may favor the participation of specific States. One of these commenters recommended the Department commit to granting demonstration authority so that States may pursue assessment innovation without the burden of sanctions or the threat of losing funds.

Discussion: We recognize that many States need time to develop and implement an innovative assessment system. However, a State does not need demonstration authority to plan for, develop, or pilot an innovative assessment system. The authority is only needed once the State is ready to administer an innovative assessment in at least one school and will administer the innovative assessment in place of the statewide assessment, including for purposes of accountability and reporting under title I, part A.

If the Department grants demonstration authority, even on a conditional basis, to seven States in the first year, there would be no additional opportunities for other States to pursue authority until the initial demonstration period ends. The Department is concerned that providing conditional approval to States that are not ready to implement an innovative assessment system in at least one school may, as a result, take an opportunity away from a State that is close to being ready but waits to submit an application to the Department, even though that second State may ultimately be ready to begin implementing its innovative assessment system sooner than the first State. In addition, because we know there is a tremendous amount of work involved in developing an innovative assessment system, we think that it is possible that a State with conditional approval may subsequently encounter unanticipated delays, challenges, or the need for substantial redesign. If this were to happen, it could negatively affect the Department's ability to evaluate the initial demonstration authority before determining to expand the innovative demonstration authority, as required by section 1204(c)(3) of the ESEA.

We encourage States to consider several options for how they may develop, implement, and scale an innovative assessment. If a State plans to pursue demonstration authority immediately, a State might choose to partner with an LEA or a school that already has an innovative assessment model in place at the local level. The State could choose to partner with that LEA or school using an innovative assessment model to begin piloting this model and using it for accountability and reporting purposes under the ESEA in that LEA or school, with the intention of moving statewide, once the State is granted innovative assessment demonstration authority. Alternatively, a State may choose to start small with a focus on a single grade and content area, like 8th-grade science. If the Department does not receive and grant demonstration authority to seven States in the first year, we anticipate that there will be additional opportunities for States to apply for demonstration authority until seven States have been approved.

Finally, the regulations are not designed to favor the participation of certain States. We will hold all applicants to the same high expectations, outlined in new §§ 200.105 and 200.106 (proposed §§ 200.77 and 200.78), based on external peer review of applications, before granting innovative assessment demonstration authority.

Changes: None.

Comments: Several commenters objected to proposed § 200.76(b)(1), which would require States to use the innovative assessment system for purposes of accountability during the demonstration authority period. These commenters cited section 1204(h) of the ESEA which provides that States may use the innovative assessment system for accountability during the demonstration authority. The commenters believe that requiring immediate use for accountability will limit innovation and may discourage States from applying until they are ready.

Discussion: Schools and LEAs in a State that are participating in an innovative assessment must continue to be included in the State's accountability system to ensure transparency to educators, parents, and the public about school performance. Section 1204(e)(2)(C)(iii) requires an SEA's plan for innovative assessment demonstration authority to include a description of how the SEA will hold all participating schools accountable for meeting the State's expectations for student achievement. The manner in which an SEA holds schools accountable for meeting the State's expectations for student achievement is through the statewide accountability system under section 1111(c) of the ESEA. A State may elect, pursuant to section 1204(e)(2)(B)(i) of the ESEA, to use the statewide academic assessments required under section 1111(b)(2) of the ESEA in the participating schools and participating LEAs for accountability purposes while piloting the innovative assessment system. In the alternative, the State may use its innovative assessments, instead of the statewide academic assessments, in reading/language arts, mathematics, or science for accountability purposes under the demonstration authority if the innovative assessment meets all of the statutory requirements.

If a State does not wish to use an innovative assessment for accountability and reporting purposes, it does not need demonstration authority to pilot its innovative assessments. Only those States that wish to use the innovative assessment in place of the statewide assessment, including for the purposes of accountability and reporting under title I, part A, in at least one school, require innovative assessment demonstration authority.

Changes: None.

Comments: Several commenters strongly supported the option in proposed § 200.77(b)(1) for SEAs to use the statewide academic assessments for accountability should they choose not to use the innovative assessments for such purposes.

Discussion: We appreciate the commenters' support.

Changes: None.

Community of Practice

Comments: Multiple commenters expressed support for a process that encourages States to undergo careful planning, gather technical expertise, and engage stakeholders before piloting an innovative assessment. One commenter supported the idea of having a community of practice to provide feedback and support to States in their planning for an innovative assessment system. However, the commenter noted

that the lack of funding for the community of practice does not indicate a high level of support for States in the development of an innovative assessment system.

Discussion: We appreciate the support of commenters for planning time and a community of practice that provides technical assistance in the planning and development of an innovative assessment system. We agree that a community of practice would provide an opportunity for States that are not yet ready to apply for demonstration authority an opportunity to work together and with the Department and experts in assessment and accountability, to share information on challenges faced, lessons learned, and promising and best practices to support continuous learning in ways to strengthen student assessments. The Department will strive to work collaboratively with States and other interested parties to provide technical assistance and support to all interested States.

Changes: None.

Peer Review of Applications

Comments: Commenters recommended that teachers be included in the list of peer reviewers on the basis that teachers have experience developing and implementing innovative item types and may be implementing the innovative assessment systems that will be under consideration in peer review. In addition, commenters suggested that principals and parents also be considered as peer reviewers.

Discussion: We agree with commenters that educators, including teachers and principals, should be considered as external peer reviewers. The experience of principals and teachers, especially of those already implementing innovative assessments in their schools and classrooms, is valuable in the peer review process to evaluate the strength of the application and its supporting evidence. In new § 200.104(c)(2) (proposed § 200.76(c)(2)), the Department specifies that peer review teams will consist of individuals with expertise in developing and implementing innovative assessments, such as psychometricians, researchers, State and local assessment directors, and educators—which includes teachers and principals. Therefore, this is already addressed in the regulations.

We do not agree that parents in general should be added to the list of peer reviewers in new § 200.104(c)(2). The very technical nature of these reviews requires that peer reviewers have the experience and expertise to evaluate an SEA's application, with an emphasis on knowledge of and experience with the development and implementation of innovative assessments and assessment technical requirements such as test design, comparability, and accessibility. Certainly, if a parent meets these requirements, including the level of expertise expected in the development and implementation of innovative assessments, that person would be considered to serve as a peer reviewer for the innovative assessment demonstration authority.

Changes: None.

Comments: One commenter recommended that tribal representatives be included in the list of peer reviewers of State applications for demonstration authority.

Discussion: As stated above, peer reviewers will be selected based on the individual's experience and expertise, with an emphasis on knowledge of and experience with the development and implementation of innovative assessments. Peer reviewers may also be individuals with past experience developing innovative assessment systems that support all students, including English learners, children with disabilities, and disadvantaged students (ESEA section 1204(f)(2)). Prior to selecting peer reviewers, the Department will publish a notice seeking peer reviewers and will reach out to a wide variety of stakeholders with such experience. We encourage tribal representatives with the experience and expertise in the development and implementation of innovative assessments to apply to be a peer reviewer.

Changes: None.

Granting Demonstration Authority

Comments: Commenters expressed concern that proposed § 200.76(d), which stated that the Secretary may award demonstration authority to ''at least one'' State, suggests that the Secretary might reject eligible applicants or limit the pilot to fewer States than the seven-State limit set forth in the statute during the initial demonstration period. Commenters asked that § 200.76(d), and other sections of the regulations, as appropriate, be changed to clarify that any State that meets the eligibility criteria will receive demonstration authority, not to exceed the seven-State limit.

Discussion: We intended new § 200.104(d) (proposed § 200.76(d)) to provide that the initial demonstration period is the three years beginning with the first year in which the Secretary awards at least one State or consortium demonstration authority under section 1204 of the ESEA. This is important to clarify because, during the initial demonstration authority period, the Secretary may not grant demonstration authority to more than seven States, including States participating in a consortium. We do not believe additional clarification is needed in the regulation as the Department references ''at least one State'' to indicate when the initial demonstration authority period begins (*i.e.,* it is when at least one State is granted the authority and begins implementing in at least one school; not when a full cadre of seven States have been granted the authority).

Each State that applies for the demonstration authority will undergo peer review, as identified in the statute and regulations. The peers will review the strength of the State's application and evidence against the application requirements and selection criteria before providing recommendations to the Secretary.

Changes: None.

Developing Innovative Assessments

Comments: One commenter recommended that the Department include a requirement that SEAs or consortia of SEAs use competitive bidding to identify and select developers for innovative assessments under the innovative assessment demonstration authority. The commenter asserted that such a requirement would ensure that SEAs or consortia of SEAs consider the expertise of a wide range of entities experienced in the design and development of assessments, including the types of assessments likely to be included as part of an innovative assessment system. Finally, the commenter noted that this requirement would not be burdensome as many State procurement laws specifically require this type of process.

Discussion: We believe it is important that each SEA or consortia of SEAs consider the expertise and experience of both LEAs within the State and any external entities that will be supporting the development and implementation of innovative assessments. As noted by the commenter, many State procurement laws already govern the process that States must use to identify and select external partners. We do not believe it is necessary or within the scope of these regulations for the Department to require specific procurement processes. Therefore, the Department declines to include additional requirements.

Changes: None.

Consortia

Comments: One commenter recommended that tribes be allowed to apply for innovative assessment demonstration authority, and that tribes be allowed to participate in a consortium of SEAs without counting against the four-State limitation on consortium membership. The commenter also requested that tribes be considered and included in State innovative assessment pilots.

Discussion: Under section 1204 of the ESEA, the Secretary may provide an SEA, or a consortium of SEAs, innovative assessment demonstration authority. An SEA is defined as ''the agency primarily responsible for the State supervision of public elementary schools and secondary schools'' (section 8101(49) of the ESEA), and ''State'' is defined for purposes of title I, part B as the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico (section 1203(c) of the ESEA). The law does not provide for separate eligibility for tribes so we are unable to make that change in these regulations. We note that these regulations only govern States and their school districts, and not schools funded by the Bureau of Indian Education (BIE) or by tribes. We also note, however, that title I, part B does provide a specific set-aside of funds for the BIE for assessments (section 1203(a)(1) of the ESEA), and nothing in the law prohibits those funds from being distributed to tribes for the development of assessments.

For the many State-funded public school districts serving substantial populations of American Indian/Alaska Native students, and for individual State-funded public schools operated by a tribe (as in the case of some charter schools), such public schools in a State granted the demonstration authority would be eligible to participate in the innovative assessment system. We agree that, in such States, collaboration with tribal communities is essential. Therefore, we strongly encourage interested States to work closely with any tribes located in their State when developing and administering innovative assessments. To prioritize this collaboration, and as previously described, we are requiring, in new § 200.105(a)(2) (proposed § 200.77(a)(2)), State collaboration with representatives of Indian tribes located in the State in the development of the innovative assessment.

Changes: None.

Comments: One commenter appreciated the allowance in proposed § 200.76(d)(2), which provides that an SEA that is affiliated with a consortium but not planning on using its innovative assessment under the demonstration authority would not count toward the four-State limit on consortium size. The commenter believed that this would create an opportunity for some States to receive technical assistance and additional time for planning prior to implementation of an innovative assessment system. The commenter suggested the final regulations include information about how affiliate members transition to become full, participating members in a consortium, including requiring these members to receive approval through the Department's peer review process before implementing innovative assessment systems for accountability purposes.

Discussion: An SEA may be affiliated with a consortium in order to participate in the planning and development of the innovative assessment, but is not considered a full member of the consortium unless the SEA is using the innovative assessment system in at least one LEA for the purposes of accountability and reporting under title I, part A of the ESEA instead of the statewide assessment. Affiliate members do not need to be included in the application for demonstration authority, nor do they count toward the four-State limitation on consortium size. The Department believes that it is the responsibility of the consortium of States and the affiliate State to determine when the affiliate State is ready to transition to full membership in the consortium and begin using the innovative assessment system, consistent with the innovative assessment demonstration authority requirements. At that point, the consortium, in partnership with the State seeking to transition from affiliated to full-member status, must apply for and receive authority from the Secretary to use the innovative assessment system for accountability and reporting purposes in place of the statewide assessment system in participating LEAs.

The Department believes it would be helpful to establish a definition of ''affiliate member of a consortium.'' A consortium of States may have both full members and affiliate members, and we believe it is necessary to clarify that a State is not a full member of a consortium unless it is proposing to use the consortium's innovative assessment system. In addition, we agree with commenters that it is necessary to provide detail on how an affiliate member of a consortium becomes a full member with authority to administer the consortium's innovative assessment system under demonstration authority.

Changes: We have added § 200.104(b)(1) to include a definition of ''affiliate member of a consortium'' to be an SEA that is formally associated with a consortium of SEAs that is implementing the innovative assessment demonstration authority, but is not yet a full member of the consortium because it is not proposing to use the consortium's innovative assessment system under the demonstration authority. We have made corresponding edits to new § 200.105(f)(1)(i) (proposed § 200.77(f)(1)(i)). We also have added § 200.105(f)(2) to clarify that the consortium must submit a revised application to the Secretary in order for an affiliate member to become a full member of the consortium and use the consortium's innovative assessment system under the demonstration authority.

200.105 Demonstration Authority Application Requirements

General

Comments: One commenter suggested that the innovative assessment system incorporate expanded learning time or other strategies that emphasize out-of-school time as part of a coordinated effort to provide students the opportunity to demonstrate mastery anytime, anywhere, including new requirements for SEAs and consortium of SEAs throughout proposed §§ 200.77(b) and 200.78(a) to incorporate after school and expanded learning time programs.

Discussion: This regulation is intended to support States as they apply for and implement innovative assessment demonstration authority under section 1204 of the ESEA, which includes the development and expansion of an innovative assessment system that can, at the conclusion of the demonstration authority period, meet requirements for statewide assessment and accountability systems under title I, part A. As there are no requirements regarding instructional programming or learning opportunities for students outside of the school day related to assessments and accountability systems under title I, part A, nor in section 1204 of the ESEA, we believe that decisions related to how extended learning time may support implementation of the innovative assessment system are best left to SEAs and LEAs.

Changes: None.

Comments: None.

Discussion: The Department believes it would be helpful for States interested in innovative assessment demonstration authority to reiterate in the regulations

the statutory requirement in section 1204(e) of the ESEA that an SEA or consortium's application for demonstration authority must be submitted to the Secretary ''at such time'' and ''in such manner'' as the Secretary reasonably requires. Given that the innovative assessment demonstration authority is a new flexibility permitted under the ESEA, and that commenters, as previously described, and stakeholders have asked questions and requested greater specificity on the application process, we believe this revision would better align the final regulations to the statute and provide further clarity for States, LEAs, and interested stakeholders.

Changes: We have added to the introductory paragraph of new § 200.105 (proposed § 200.77) to clarify that applications for innovative assessment demonstration authority must be submitted to the Secretary at such time and in such manner as the Secretary may reasonably require.

Comments: None.

Discussion: In reviewing the proposed regulations, the Department believes it will improve consistency with the application requirements in new § 200.105(b) (proposed § 200.77(b)), which requires that each application demonstrate how the innovative assessment system does or will meet certain requirements for alignment, validity, reliability, and quality, to add to new § 200.104(c)(2) (proposed § 200.76(c)(2)) to state that the external peer review process will evaluate how the SEA's application ''meets or will meet'' each of these requirements in new § 200.105.

Changes: We have added § 200.104(c)(2) (proposed § 200.76(c)(2)) to specify that the peer review of SEA applications will be used to determine if an application ''meets or will meet'' each of the requirements in § 200.105.

Comments: None.

Discussion: We further believe it is necessary to clarify certain application requirements pertaining to the assurances a State must include relating to annual reporting of information on the demonstration authority. First, we believe it would be helpful to clarify in new § 200.105(d)(3) (proposed § 200.77(d)(3)) that States must provide this information in a time and manner as reasonably required by the Secretary—which is consistent with the requirement in new § 200.104(c) for the submission of applications. Second, because new schools within participating LEAs and new LEAs may join the demonstration authority annually, we believe it would be helpful to clarify in new § 200.105(e)(2) (proposed § 200.77(e)(2)) that LEAs must annually assure they will follow all requirements in § 200.105 and add to new § 200.105(d)(3)(i)(B) (proposed § 200.77(d)(3)(i)(B)) that the State must include these updated assurances in its annual reporting to the Secretary. Finally, in order to ensure consistent reporting between participating and non-participating schools, we believe States should annually report data on student achievement on the innovative assessment system to the Secretary in a way that is consistent with requirements for State and LEA report cards required under section 1111(h) of the ESEA, which includes reporting on student achievement and progress toward meeting long-term goals. We are revising § 200.105(d)(3)(ii) accordingly.

Changes: We have added to new § 200.105(d)(3) (proposed § 200.77(d)(3)) to specify that annual reporting is required at such time and in such manner as the Secretary may reasonably require. We have further added to new §§ 200.105(d)(3)(i)(B) and 200.105(e)(2) (proposed § 200.77(e)(2)) to require States to include updated assurances from each participating LEA annually that the participating LEA will meet all requirements in new § 200.105. Finally, we have added to new § 200.105(d)(3)(ii) to specify that reporting on the performance of all students in participating schools must be consistent with reporting student achievement and participation data on State and LEA report cards under section 1111(h) of the ESEA.

Innovative Assessment Design and Alignment

Comments: One commenter expressed support for proposed § 200.77(b)(1), which would allow States flexibility in selecting specific grades or subject areas to administer innovative assessments, rather than assessments in all required grades or subject areas.

Discussion: We appreciate the support for providing flexibility for States to propose an innovative assessment system in any, or all, required grades and subjects under section 1111(b)(2)(B)(v) of the ESEA as it enables States to develop the innovative demonstration authority at a scope to meet their needs and priorities.

Changes: None.

Comments: A few commenters encouraged the Department to clarify in proposed § 200.77(b)(1) that the innovative assessment must be administered to all students and all student subgroups within participating schools, believing that it is critical to emphasize that all students in each school are expected to participate in the innovative assessment.

Discussion: We agree with commenters that it is important for all students, including all students within particular subgroups, to be administered the innovative assessment in each participating school, and the intent of proposed § 200.77(b)(1) was to require all students in each participating school to take the innovative assessment, if an innovative assessment was developed for a subject or grade in which they were enrolled under the demonstration authority. Given the concerns of the commenters, we are revising the regulations to more clearly state that all students in each participating school must take the innovative assessment in each grade and subject in which an innovative assessment is being piloted. However, we note that, taken together, final § 200.105(b)(1)(i) and (ii) (proposed § 200.77(b)(1)(i) and (ii)) do not require States to develop an innovative AA–AAAS for students with the most significant cognitive disabilities for each innovative general assessment; a State only developing an innovative general assessment would be required to continue administering its statewide AA–AAAS to students with the most significant cognitive disabilities, consistent with applicable statutory and regulatory requirements under title I, part A. All children with disabilities ineligible for the AA–AAAS in the participating school in the grade and subject for which the State has an innovative assessment should participate in the innovative assessment.

Changes: We have added to new § 200.105(b)(1)(i) (proposed § 200.77(b)(1)(i)) to clarify that the innovative assessment must be administered to all students in a subset of participating LEAs or a subset of participating schools within a participating LEA.

Comments: One commenter recommended that proposed § 200.77(b)(1)(i), which exempts States from administering the same assessment to all elementary and secondary students in the State once it has been granted demonstration authority, be clarified, as it suggests States may simultaneously pilot multiple innovative assessments even within the same grade or content area. If that was the Department's intent, the commenter suggested that multiple innovative assessments should each meet all applicable regulatory requirements.

Discussion: We appreciate the commenter's suggestion for clarification in this area. The Department intends for the demonstration authority to be used

to pilot a single innovative assessment system, which—if successful—will replace the current statewide assessment. It was not meant to allow for a State to try out multiple different innovative assessment systems simultaneously; accordingly, we are adding to new § 200.105(b)(1)(i) (proposed § 200.77(b)(1)(i)) to clarify that a State with demonstration authority may implement a single innovative assessment system, rather than ''innovative assessments,'' and that the requirement to administer the same assessment to all public school students in the State does not apply during the demonstration authority period, extension period, or waiver period, but does apply once the innovative assessment system is used statewide consistent with new § 200.107 (proposed § 200.79).

Changes: We have added to new § 200.105(b)(1)(i) (proposed § 200.77(b)(1)(i)) to specify that a State with demonstration authority may implement an ''innovative assessment system'' initially in a subset of LEAs, or a subset of schools within an LEA, during the demonstration authority period, extension period, or waiver period, but must administer the same assessment to all public school students upon transition to statewide use consistent with new § 200.107 (proposed § 200.79).

Comments: One commenter suggested that proposed § 200.77(b)(2) be modified to more clearly specify that all innovative assessments, including an innovative AA–AAAS for students with the most significant cognitive disabilities, align with challenging academic content standards for the grade in which the student is enrolled, similar to proposed requirements for statewide assessments under part A of title I of the ESEA.

Discussion: The regulations in new § 200.105(b)(1) (proposed § 200.77(b)(1)) require that the innovative assessment system meet the requirements of section 1111(b)(2)(B) of the ESEA, including demonstrating that it is aligned with the challenging State academic standards and provides information about student attainment of such standards and whether the student is performing at the student's grade level. The requirement in new § 200.105(b)(2)(i) (proposed § 200.77(b)(2)) applies to any innovative assessment developed under the demonstration authority, including an innovative AA–AAAS for students with the most significant cognitive disabilities.

We agree with the commenter that it is critical for requirements related to alignment of assessments with academic content standards to be the same for the innovative assessment demonstration authority under part B of title I as they are for statewide assessments under part A of title I; like statewide assessments, *all* innovative assessments must be aligned with the breadth and depth of the challenging State academic content standards. To improve consistency between these regulations and requirements for State assessment systems under title I, part A and to reiterate uniform expectations for alignment, we are revising these regulations by adding ''challenging'' to the reference to the State's academic content standards and removing ''full'' modifying depth and breadth of State academic content standards. We also agree with commenters that it would be helpful to clarify that these standards apply to the grade in which a student is enrolled, which also improves alignment of these requirements with those in section 1111(b)(2)(B) of the ESEA.

Changes: We have added § 200.105(b)(2)(i) to clarify that the innovative assessment must align to the challenging State academic content standards under section 1111(b)(1) of the ESEA, including their depth and breadth, for the grade in which a student is enrolled.

Comments: One commenter appreciated the clarification and the flexibility in the proposed regulations to allow implementation of the innovative assessment pilot in a subset of LEAs or schools in one or more LEAs. Another commenter, however, objected to this flexibility, believing that participating LEAs should be required to administer the same assessment in all schools in the LEA each year. The commenter was concerned the requirement would set a precedent for incomparable assessment results and different expectations among schools in a single school district.

Discussion: We appreciate commenters' feedback, but continue to believe that it is helpful to provide States and LEAs with flexibility to determine whether it is best to pilot the innovative assessment system in all schools within an LEA in the same year, or whether an LEA would be able to better support high-quality implementation if it has multiple years to expand the pilot within the LEA to all schools. In particular, we believe this flexibility will benefit especially large LEAs that will need to support hundreds of schools in implementing a new—and potentially quite different—system, which will require shifts in instruction, new professional development, and other significant investments of time and resources.

Further, we believe that the statutory and regulatory requirements that ensure valid, reliable, and comparable annual summative determinations, based on the State's academic standards, between the innovative assessment system and the statewide assessment, particularly in new § 200.105(b)(2)–(4), allay the commenter's concern that this flexibility will result in incomparable data and disparate expectations for students in participating and non-participating schools. To that end, we are adding to new § 200.105(b)(3) (proposed § 200.77(b)(3)) to clarify that the innovative assessment system must express student results ''consistent with'' the ''challenging'' State academic achievement standards; we are making these changes given that, as proposed, the provision to express results ''in terms consistent with'' the State's academic achievement standards could have been misinterpreted to only require that the same labels be used to describe student achievement on the innovative assessment as are used to describe student achievement on the statewide assessment—even if those labels carried very different meaning in terms of students' mastery of the challenging State academic achievement standards. We believe that removing ''in terms'' and adding ''challenging'' to new § 200.105(b)(3) helps clarify that the academic achievement standards must be consistent and comparable between the innovative and statewide assessment systems. This requirement is also reiterated in new § 200.105(b)(4)(ii), as discussed in response to comments on comparability of the two assessment systems.

Changes: We have added § 200.105(b)(3) (proposed § 200.77(b)(3)) to clarify that the innovative assessment system must express student results or competencies ''consistent with'' the ''challenging'' State academic achievement standards.

Comments: One commenter suggested the Department require SEAs to include demographically diverse LEAs or schools in the innovative assessment pilot from the very beginning of the demonstration authority period, as opposed to the requirement in the proposed regulations under which SEAs must ensure they are moving toward including demographically diverse LEAs over the course of the demonstration authority. The commenter pointed out that the inclusion of different types of LEAs from the outset, such as urban, suburban, and rural LEAs, will ensure that SEAs understand the needs of different types of districts and schools as they implement an innovative

assessment system. Another commenter supported the intent of proposed §§ 200.77(d)(3)(ii) and 200.78(a)(3)(iii), but suggested the final rule strengthen the selection criterion so that a State must use the demographic composition of its public school students, rather than its initially participating LEAs, as the baseline to measure progress toward a more demographically representative subset of schools participating in the innovative assessment system.

Discussion: The Department shares a commitment to ensuring that SEAs include demographically diverse LEAs and schools in their innovative assessment systems over time, but we continue to believe that it is necessary to provide States with reasonable flexibility in how they scale their innovative assessment system statewide during the demonstration authority period. While it is critically important for States to implement and pilot their new assessment systems in demographically diverse LEAs and schools as soon as possible in order to make sure the assessment system is viable and effective in a wide range of contexts, requiring implementation in demographically representative LEAs and schools in the first year could result in rushed implementation in LEAs and schools that are not fully prepared for the significant changes an innovative assessment system may require. With gradual implementation, SEAs may be better able to recruit districts and schools that are willing and prepared to try the innovative assessment system first, which can serve as proof points for other districts and help set the entire State and its schools up for success. Nonetheless, all participating States must demonstrate in their application under new § 200.105(b)(5) (proposed § 200.77(b)(5)) that the innovative assessment system will provide for the participation of, and be accessible to, all students, including children with disabilities and English learners, and provide appropriate accommodations consistent with section 1111(b)(2) of the ESEA.

Further, we believe that States will be most likely to succeed in scaling their innovative assessment if they can develop rigorous criteria for determining when to add new LEAs or schools, with a plan that includes annual benchmarks, as described in new § 200.106(a)(3)(iii) (proposed § 200.78(a)(3)(iii)), to achieve implementation in demographically diverse settings over time. We are, however, revising new § 200.106(a)(3)(iii) to clarify that the benchmarks are intended to achieve high-quality and consistent implementation across all participating *schools* that are similar demographically to the State as a whole during the demonstration authority period, using the demographics of participating *schools* as the baseline. Our intent in specifying that the demographics of initially participating schools must serve as the baseline in setting these benchmarks is to signal that the demographics of initial participants, which may be a subset of schools with an LEA, are the starting point—while the demographics of all students and schools in the State serve as the end point for these benchmarks.

Changes: We have added to new § 200.106(a)(3)(iii) (proposed § 200.78(a)(3)(iii)) to clarify that the baseline for setting annual benchmarks toward high-quality and consistent implementation across schools that are demographically similar to the State as a whole is the demographics of participating schools, not LEAs.

Comments: One commenter requested that the Department require innovative assessments to include items and tasks that are the same across all participating LEAs and schools. The commenter argued that administering identical assessments is a critical equity lever to ensure that all students are receiving rigorous instruction, and that schools are being held accountable for the performance of all students on high-quality assessments.

Discussion: Under new § 200.105(b)(1) (proposed § 200.77(b)(1)), the innovative assessments included within a State's innovative assessment system under the demonstration authority must meet the requirements of section 1111(b)(2)(B) of the ESEA. As section 1111(b)(2)(B) and corresponding regulations do not require a State to use the same items or tasks on an assessment administered statewide under part A of title I and allow for multiple forms of the statewide assessment, we believe it would be inappropriate, and counter to the purpose of encouraging assessment innovation and flexibility, to include such a requirement for assessments developed under the innovative assessment demonstration authority. In addition, we note that the requirements for valid, reliable, and comparable annual summative determinations, based on the State's academic standards, between the innovative assessment system and the statewide assessment, particularly as set forth in new § 200.105(b)(2)–(4), (proposed § 200.77(b)(2)–(4)) help ensure that accountability and data reporting will be consistent between participating and non-participating schools and help to protect equitable expectations for all students.

Changes: None.

Comments: A few commenters recommended that the regulations explicitly require that a State be able to calculate student growth from its innovative assessment system. Another commenter suggested that the peer review process should be used to make a determination on whether the innovative assessment system may be used to calculate student growth.

Discussion: The Department appreciates the commenters' views on the use of innovative assessments to estimate student growth, and encourages States to strongly consider if it will be beneficial for the innovative assessment to measure student growth when designing the system. However, the Department believes it is more consistent with both the requirements for State assessments under section 1111(b)(2)(B)(vi) of the ESEA, and the prohibition in section 1111(e)(1)(B)(iii)(III) of the ESEA, for the innovative assessment demonstration authority to not include a requirement for innovative assessments to measure student growth or for peer reviewers to make a determination of whether the innovative assessment system may be used to measure student growth.

Changes: None.

Comparability

Comments: Several commenters supported the requirement in proposed § 200.77(b)(4) that States demonstrate comparability of the innovative assessment results to the statewide academic assessment. One commenter, while providing general support for the requirement, also encouraged the Department to avoid adding burden with overly prescriptive requirements for comparability and for the design and implementation of an innovative assessment system. Another commenter did not agree with the requirement that the innovative assessment must provide comparable, valid, and reliable results to the statewide assessment.

Discussion: The Department agrees that comparability is key to the development of a valid and reliable innovative assessment system that meets the statutory requirements for innovative assessment demonstration authority. Additionally, the Department solicited feedback from the public during the notice and comment period of the NPRM to gather additional ideas on how the Department can ensure comparability between existing statewide assessments and innovative assessments a State may pilot. Section 1204(e)(2)(A)(iv) of the ESEA requires

that a State's innovative assessment system generate ''results that are valid and reliable, and comparable, for all students and for each subgroup of students'' compared to the results for those students on the statewide assessment under title I, part A. Section 1601(a) of the ESEA provides that the Secretary ''may issue . . . such regulations as are necessary to reasonably ensure that there is compliance'' with the law. The Department also has rulemaking authority under section 410 of the GEPA, 20 U.S.C. 1221e-3, and section 414 of the DEOA, 20 U.S.C. 3474.

We firmly believe that the requirements for comparability are necessary to reasonably ensure that States meet the requirement in section 1204(e)(2)(A)(iv) as well as other statutory requirements under section 1204(e)(2)(A)(xi) of the ESEA, such as the requirement ''to validly and reliably aggregate data from the innovative assessment system'' for purposes of school accountability and data reporting under title I, part A. Thus, these regulations are consistent and specifically intended to ensure compliance with section 1204 of the ESEA.

The Department acknowledges that the requirements for comparability for innovative assessment systems are rigorous in these regulations, but believes they are reasonable because setting clear expectations for comparability will lead to stronger evidence of validity and reliability from States. While the Department appreciates the need to allow States flexibility in designing innovative assessments, this flexibility must be balanced with the imperative that States meet all of the statutory provisions and ensure their innovative assessment systems are valid, reliable, fair, and of high-quality. In addition, by providing multiple paths to demonstrating comparability, including a State-determined method, we believe we are providing sufficient flexibility to States in how they may demonstrate comparability.

Changes: None.

Comments: One commenter urged the Department to ensure that the comparability requirements in proposed § 200.77(b)(4) provide for the evaluation of new innovative assessments in terms of their ability to allow for the comparison of student performance against the challenging State academic standards across districts and among subgroups of students.

Discussion: The Department agrees that it is important to establish comparability of student performance on the innovative assessment systems with statewide assessments, and believe the regulations sufficiently address the commenter's concern. New § 200.105(b)(2)–(3) (proposed § 200.77(b)(2)–(3)) requires the innovative assessment system to be aligned with the same academic content and achievement standards with which the statewide assessment is aligned, and as previously described, we are revising new § 200.105(b)(2)–(3) to further clarify these expectations. In addition, new § 200.105(b)(4)(i) (proposed § 200.77(b)(4)) will ensure that States plan, as described further in the selection criterion related to evaluation and continuous improvement in new § 200.106(e) (proposed § 200.78(e)), for how they will demonstrate that the annual summative determinations for students (which are based on the challenging State academic standards) are comparable between the two assessment systems, including for all students and for each subgroup of students under section 1111(b)(2)(B)(xi) of the ESEA.

Changes: None.

Comments: Many commenters requested that the Department make explicit that the requirement for comparability is based on the annual summative determinations of student proficiency on the innovative assessment as compared to the results (*i.e.,* the academic achievement levels) on the statewide assessment.

Discussion: The Department agrees with these commenters that comparability of the innovative assessment to the statewide assessment should be based on annual summative determinations of student proficiency on the innovative assessment system. While the two assessment systems must be aligned to the same challenging State academic content and achievement standards and produce student results that are valid, reliable, and comparable—as described in section 1204(e)(2)(A)(ii)–(iv) of the ESEA—we did not intend to imply that the raw scores or scale score levels must be directly comparable, and we are adding to new § 200.105(b)(4)(i) (proposed § 200.77(b)(4)) to clarify that the requirement for comparability between the two assessment systems is based on results, including annual summative determinations, generated for all students and for each subgroup of students.

Changes: We have added to new § 200.105(b)(4)(i) (proposed § 200.77(b)(4)) to clarify that determinations of the comparability between the innovative and statewide assessment systems must be based on results, including the annual summative determinations, as defined in new § 200.105(b)(7) (proposed § 200.77(b)(7)), that are generated for all students and for each subgroup of students and have made a conforming change to new § 200.106(b)(1)(ii)(C) (proposed § 200.78(b)(1)(ii)(C)).

Comments: A number of commenters urged the Department not to define comparability so narrowly that it would stifle innovation and generally advised the Department not to list specific methodologies for establishing comparability in regulation, but instead provide examples of various approaches in non-regulatory guidance. These commenters also recommended that the Department allow a State to develop an evaluation methodology for establishing comparability that is consistent with the design and context of its innovative assessment system. Similarly, some commenters advised that States should consider multiple approaches to comparability evaluations to provide a more complete picture of the degree of comparability.

Discussion: The Department agrees with commenters that States may need flexibility in establishing the comparability of their innovative assessment system with their statewide assessment system, and that it is important for a State to select a comparability methodology that is best aligned with the design and context of its innovative assessment system. To support these goals, new § 200.105(b)(4)(i)(E) (proposed § 200.77(b)(4)(iv)) allows for a State-designed comparability methodology should the State not wish to pursue one of the other four methods in the regulations; States may propose an alternate methodology that provides for an equally rigorous and statistically valid comparison between student performance on the innovative assessment and the statewide assessment.

However, we also believe that demonstrating comparability between the two assessment systems, as required by section 1204(e)(2)(A)(iv) of the ESEA is a critical safeguard for fairness and equity during the demonstration authority period, when both assessment systems will be in use throughout the State for school accountability and data reporting purposes under title I, part A for a period of five years, or more. If the data from the innovative assessment system are not comparable to the statewide assessment during this time, the integrity and validity of the school accountability system will be jeopardized; schools and students requiring additional supports may go

unidentified and not receive the extra resources they deserve; and parents, educators, and community members will lack transparent and clear data about student performance. Because the comparability requirement is paramount to consistently measuring student progress against the challenging State academic standards throughout the State, and recognizing that demonstrating comparability may be technically challenging for States, the regulations include examples of four methods a State may use to demonstrate comparability, in addition to providing the option for a State-designed methodology. We believe providing these examples in the regulations, which were developed based on public comment and recommendations from researchers and assessment experts, States and other stakeholders, will be helpful to States interested in the demonstration authority for several reasons. Having these examples in the regulation will help States in evaluating and adopting rigorous and well-established methods to meet the statutory requirement for comparable assessment systems; can support States in immediate planning for the activities and strategies that will be part of an innovative assessment pilot prior to the release of any Notice Inviting Applicants (NIA), peer review guidance, or additional non-regulatory guidance; and provides context and a helpful comparison if States decide to pursue their own State-designed method to demonstrate comparability. Because a State-designed method for demonstrating comparability between the two assessments is also permitted, we believe the regulations balance the requirement that States must sufficiently demonstrate comparability, as described in section 1204(e)(2)(A)(iv) of the ESEA, with the desire to provide States with flexibility and promote innovation in designing innovative assessment systems.

Changes: None.

Comments: Several commenters provided technical advice to the Department regarding the methodologies for demonstrating comparability. These commenters urged the Department to make judgments on the strength of the theory and evidence provided by States to support comparability for each innovative assessment system and avoid an overly prescriptive approach, offering a detailed list of considerations and decision points States could use in selecting a comparability method. Finally, while agreeing with the technical soundness of the methodologies provided in the regulations, these commenters described a dozen specific research approaches for evaluating comparability under proposed § 200.77(b)(4), such as propensity score matching. These commenters encouraged the Department to not include any specific methodologies in regulation but provide a multitude of methodologies in guidance.

Discussion: The Department appreciates these commenters' analysis and recommendations, but as previously discussed, continues to believe that new § 200.105(b)(4)(i) (proposed § 200.77(b)(4)) should include examples of methods that we believe a State could use in order to meet the requirement in section 1204(e)(2)(A)(iv) of the ESEA to generate results that are valid, reliable, and comparable between the two assessment systems—including a State-designed methodology—as a way to help States develop strong proposals and to clarify what the expectations of the peer reviewers will be, among other reasons. These examples were not intended to be the only methodologies the Department would consider for a State to demonstrate comparability. The Department agrees that there are a number of technically sound methodologies that, if well-designed, could support a State's demonstration of comparability for its innovative assessment system beyond those specified in new § 200.105(b)(4)(i)(A)–(D) (proposed § 200.77(b)(4)(i) through (iii)) and provide for an equally rigorous and statistically valid comparison. Further, we note that several of the specific suggestions (*e.g.,* propensity score matching) from the commenters could be used to evaluate comparability as part of any of the methods included in new § 200.105(b)(4)(i), as these methods consider how a State may use its innovative and statewide assessment systems during the demonstration authority in order to establish comparability between the two systems but do not specify a particular research or evaluation approach. We believe that States should administer the innovative and statewide assessments in participating schools and LEAs in a way that works best for the design of their innovative assessment system, and select an approach and research methodology for demonstrating comparability that is appropriate to that design. We believe that the regulations provide sufficient flexibility for States to do so—including by allowing for a State-determined method beyond the options described in new § 200.105(b)(4)(i)(A)–(D). We will consider providing additional examples in any technical assistance the Department may provide to States and in guidance for peer reviewers.

In response to the additional proposed methodologies that included a suggestion to allow States to administer items from the innovative assessment to students taking the statewide assessment, we are clarifying in new § 200.105(b)(4)(i)(C) and (D) that States may include items ''or performance tasks'' from the innovative assessment on the statewide assessment, and vice versa, if their inclusion constitutes a significant portion of the assessment and is appropriate for the research design to demonstrate comparability proposed by the State.

Changes: We have added to new § 200.105(b)(4)(i)(C) to clarify that States may include, as a significant portion of the innovative assessment system in each required grade and subject in which both an innovative and statewide assessment is administered, items or performance tasks from the statewide assessment system that, at a minimum, have been previously pilot tested or field tested for use in the statewide assessment system.

We have also added § 200.105(b)(4)(i)(D) to clarify that States may include, as a significant portion of the statewide assessment system in each required grade and subject in which both an innovative and statewide assessment is administered, items or performance tasks from the innovative assessment system that, at a minimum, have been previously pilot tested or field tested for use in the innovative assessment system.

Comments: Some commenters noted that as an innovative assessment system is taken to scale statewide, comparability with the statewide assessment systems becomes less important than the comparability of results among LEAs and schools using the innovative system of assessments. These commenters urged the Department to modify the regulations to not require an annual comparability evaluation between the statewide and innovative assessment systems; they argued that if the evidence for comparability across the two systems of assessment is strong, comparability of the innovative assessment with the statewide assessment need not be re-evaluated every year.

Discussion: The Department agrees that as the innovative assessment system scales into wider use among LEAs and schools, comparability among the LEAs and schools administering the innovative assessment system will become more important than in the beginning of the demonstration

authority period. Further, we note that the comparability, validity, reliability, and technical quality of innovative assessments across participating LEAs and schools will be one critical component of the peer review required to transition to statewide use of the innovative assessment for purposes of part A of title I, as described further in new § 200.107 (proposed § 200.79). Given these comments, the Department is also concerned that the requirement for comparable results within the innovative assessment system was unclear in the regulations, as proposed. As the innovative assessment system will be used during the demonstration authority period for purposes of school accountability and reporting, it is imperative for States to have plans and procedures in place to ensure the quality, validity, reliability, and consistency of assessment blueprints, items or tasks, test administration, scoring, and other components across participating LEAs and schools. To clarify that comparability between LEAs and schools participating in the innovative assessment is required and reinforce that States should take this into account as they develop and implement their innovative assessment system, we are adding new § 200.105(b)(4)(ii) to specify that States must annually determine the comparability of the innovative assessment system, including annual summative determinations that are valid, reliable, and comparable for all students and each subgroup of students, among participating schools and LEAs. This will also be part of a State's plan for evaluation and continuous improvement as described in new § 200.106(e) (proposed § 200.78(e)).

We disagree that an annual demonstration of comparability between the innovative and statewide assessment systems is unnecessary or overly burdensome as States focus on scaling their innovative systems. As provided in section 1601(a) of ESEA, ''[t]he Secretary may issue . . . such regulations as are necessary to reasonably ensure that there is compliance'' with the statute. Also, the Department has rulemaking authority under section 410 of the GEPA, 20 U.S.C. 1221e–3, and section 414 of the DEOA, 20 U.S.C. 3474. Section 1204(e)(2)(A)(iv) requires that the innovative assessment system generates valid, reliable, and comparable results relative to the statewide assessment during the demonstration authority period. We believe that as an innovative assessment system goes to scale, the regulations related to statewide assessment will remain a valuable reference to monitor effective implementation across the increasing number of LEAs and schools that adopt the innovative assessment. Further, annual information on comparability will enable the Department to better support and work with States to make needed adjustments over time to maintain a high level of comparability between the two assessment systems, which is not only required by the statute, but also critical to maintain fair and valid school accountability determinations and transparent data reporting while both assessment systems are in operation during the demonstration authority period. Finally, these final regulations are consistent and specifically intended to ensure compliance with section 1204 of the ESEA.

For example, the evidence a State will provide to demonstrate that its statewide and innovative assessment systems are comparable may need to change little from one year to next, particularly in any year of the demonstration authority period where the innovative assessment has not expanded to a large number of new schools or where implementation has been relatively stable—in such cases, providing this information will result in minimal work for SEAs and will assure the Department that the SEA continues to comply with the minimal requirements for demonstration authority. However, there are many cases where implementation from one year to the next will not be as stable, leading to variation in the results between the two assessments over time. For instance, comparability could be strengthened in later years if the State makes adjustments to modify its performance tasks to better align with the State's academic content standards or to improve the inter-rater reliability and training of evaluators. However, comparability could decline in later years of the demonstration authority period if the initial participating LEAs had greater prior experience with the innovative assessment system, and newly added LEAs struggle to implement the innovative assessment system with the same fidelity as early adopters. Similarly, if initially participating schools are not demographically representative of the State as a whole, the comparability of the innovative assessment system results to the statewide assessment could change as greater numbers of students take the innovative assessment, including children with disabilities and English learners. Without annual information on comparability between the statewide and innovative assessment systems, the Department would not be able to provide the necessary technical assistance to States that see these fluctuations over time and would not have essential information to ensure compliance with the statutory requirements in section 1204 for the demonstration authority.

Changes: We have added § 200.105(b)(4)(ii) to require that States' innovative assessment systems generate results, including annual summative determinations, that are valid, reliable, and comparable for all students and for each subgroup of students among participating schools and LEAs, which an SEA must annually determine as part of its evaluation plan described in § 200.106(e).

Accessibility

Comments: A few commenters supported proposed § 200.77(b)(5), which would require SEAs to ensure that the innovative assessment systems provide for the participation of, and are accessible to, all students, including students with disabilities and English learners. One commenter also expressed support for the provision that the innovative assessment system may incorporate, as appropriate, the principles of universal design for learning (UDL), noting that UDL includes principles for flexible approaches and accommodations in assessment. However, another recommended that the words ''as appropriate'' be removed, in order to require the use of the principles of UDL in the development of innovative assessments, which they believed would be more consistent with the requirements of section 1204(e) of the ESEA.

Discussion: We appreciate the support of commenters for ensuring innovative assessments are accessible to all students, and share their belief that innovative assessments should be accessible to all students. We agree that the language should encourage States to incorporate the principles of UDL. We also believe this language should be consistent with how principles of UDL are included in § 200.2(b)(2)(ii) with respect to the requirements for statewide assessments under part A of title I. This will help to reiterate for States that they should develop innovative assessment systems that will be able to meet the title I, part A requirements when the States seek to transition to statewide use of the innovative assessment and undergo peer review under title I, part A, as described in § 200.107 (proposed § 200.79).

We are therefore adding to new § 200.105(b)(5) (proposed § 200.77(b)(5)) to state that the principles of UDL should be incorporated ''to the extent practicable'' instead of ''as appropriate'' consistent with section 1111(b)(2)(B)(xiii) of the ESEA.

Changes: We have added to new § 200.105(b)(5) to make clearer the three concepts contained in that section include: Participation of all students; accessibility by incorporating principles of UDL; and accommodations. We have also specified in § 200.105(b)(5)(ii) that the principles of UDL should be incorporated ''to the extent practicable.''

Comments: Multiple commenters advocated amending proposed § 200.77(b)(5) to require specific accessibility standards for digital content, such as Web Content Accessibility Guidelines (WCAG) 2.0, as part of an innovative assessment system.

Discussion: Section 1204(e)(2)(A)(vi) of the ESEA requires all innovative assessment systems to be accessible to all students, such as by incorporating the principles of UDL. The requirement that assessment systems be accessible to individuals with disabilities is also based on the Federal civil rights requirements of section 504 of the Rehabilitation Act, 29 U.S.C. 794, title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.,* and their implementing regulations, all of which are enforced by the Department's Office for Civil Rights (OCR). In OCR's enforcement experience, where an SEA collects information through electronic and information technology, such as student assessment, it is difficult to ensure compliance with accessibility requirements without adherence to modern standards, such as the WCAG 2.0 Level AA standard. However, we do not think further requirements regarding digital content are appropriate here since the assessment models that States pilot could be quite different depending on a State's specific priorities and goals—some innovative assessments may be heavily dependent on digital content, while another innovative assessment system could use very little digital content. Regardless, the baseline requirement under both ESEA and Federal civil rights laws remains that the innovative assessment system must be accessible for all students, including all children with disabilities. In addition, we note that any innovative assessment system developed under the demonstration authority must, prior to transition to statewide use, undergo a second peer review as described in new § 200.107 (proposed § 200.79) to determine if the system meets the requirements for State assessments and accountability under part A, of title I, which includes a regulatory requirement related to accessibility and nationally recognized accessibility standards under § 200.2. Thus, it is clear that SEAs' innovative assessment systems will, when implemented at scale, also be subject to these same requirements to incorporate the principles of UDL to the extent practicable.

Changes: None.

Participation Rates

Comments: One commenter opposed the requirement in proposed § 200.77(b)(6) that, for purposes of the State accountability system, the innovative assessment system must annually measure the achievement of at least 95 percent of all students, and 95 percent of students in each subgroup. The commenter believes that this provision would impose an additional requirement taken from section 1111(c)(4)(E)(iii) of the ESEA on participating schools and additional consequences on such schools for not assessing 95 percent of students, contrary to congressional intent. The commenter recommended requiring innovative assessment participation in schools participating in the demonstration authority at a rate that is no less than the participation rate of students in the statewide assessment system. In particular, the commenter does not believe that demonstration authority should be placed at risk because of assessment participation requirements.

Discussion: We believe the commenter's concerns may be addressed by further clarifying the intent of new § 200.105(b)(6) (proposed § 200.77(b)(6)) and related requirements. The commenter is correct that section 1111(c)(4)(E)(iii) of the ESEA requires States to factor 95 percent participation in State assessments into their accountability systems. However, section 1111(c)(4)(E)(i)–(ii) also includes specific requirements for the measurement of academic achievement based on State assessments, including (1) a requirement that States annually measure, for school accountability, the progress of at least 95 percent of all students and 95 percent of students in each subgroup on the State's reading/language arts and mathematics assessments, and (2) a requirement that, for purposes of measuring, calculating, and reporting on the Academic Achievement indicator, the denominator must always include either the number of students with valid assessment scores or 95 percent of students enrolled in the school, whichever is greater. New § 200.105(b)(6) (proposed § 200.77(b)(6)) and related requirements for 95 percent assessment participation in the final regulations for innovative assessment demonstration authority were intended to clarify how these statutory requirements for measurement of academic achievement related to school accountability apply to participating schools in the demonstration authority.

Section 1204(e)(2)(A)(ix) of the ESEA requires that the innovative assessment system annually measure the progress of ''not less than the same percentage'' of all students and students in each subgroup in participating schools as were assessed by schools administering the statewide assessments and ''as *measured* under section 1111(c)(4)(E)'' (emphasis added). As explained previously, the percentage of all students and students in each subgroup whose performance on assessments must be *measured* for accountability under section 1111(c)(4)(E)(i) of the ESEA is 95 percent of students and 95 percent of students in each subgroup; the requirements in section 1111(c)(4)(E)(ii) of the ESEA reinforce this further by requiring that at least 95 percent of all students and students in each subgroup be included in calculating the Academic Achievement indicator. As a result, ''not less than the same percentage'' will always be 95 percent, because the Academic Achievement indicator—''as measured under ESEA section 1111(c)(4)(E)''—will always measure the performance of 95 percent of all students and 95 percent of students in each subgroup enrolled in a school.

New § 200.105(b)(6) does not prescribe how each State will factor participation rates into its accountability system for all public schools, as required under section 1111(c)(4)(E)(iii) of the ESEA. This requirement would still apply to all schools in the State, including schools participating in the innovative assessment demonstration authority, because of requirements in section 1204(e)(2)(A)(xi) and (C)(iii) of the ESEA to maintain consistent, valid, and reliable accountability for all schools, but the actions for holding schools accountable for improving school participation rates are determined by the State as described in the statutory requirements for statewide accountability systems. While the commenter is correct that the Secretary may withdraw demonstration authority for a number of reasons, including when a State cannot provide evidence that it is meeting the requirements under new § 200.105, this does not mean low

assessment participation in a school or LEA will automatically result in withdrawal of demonstration authority. In order for a State to meet the requirement under new § 200.105(b)(6), the State would need to hold participating schools accountable for 95 percent participation in assessments in the same way as it does for all public schools, including the calculation of the Academic Achievement indicator and the way the State determines it will factor the 95 percent participation requirement into its overall accountability system consistent with section 1111(c)(4)(E) of the ESEA. We believe the requirements in new § 200.105(b)(6) help clarify the statutory language and ensure fairness and consistency in accountability determinations between participating and non-participating schools, without creating any new requirements for participating schools.

Changes: None.

Annual Summative Determinations for Students

Comments: Several commenters supported requirements in proposed § 200.77(b)(7) regarding annual summative determinations for student performance on the innovative assessment. These commenters noted the importance of providing students and families an indicator of grade-level mastery of the State's academic content standards and making sure that all students are held to the same academic standards. One commenter also noted this requirement will help ensure comparability in student results between the statewide annual assessment and the innovative assessment. A few commenters requested further clarification in proposed §§ 200.76(b)(2) and 200.77(b)(1) that innovative assessments may assess a student on content that is above or below the content standards for the grade in which the student is enrolled, citing section 1111(b)(2)(J) of the ESEA, which allows computer-adaptive assessments to include items above or below grade level. These commenters believe that innovative assessments should be able to use a different approach for measuring student academic proficiency, while maintaining an annual grade-level determination of proficiency. Another commenter was concerned that the proposed requirements to produce an annual grade-level determination would mean innovative assessments would not also produce a valid result for a student's performance above or below that standard.

Discussion: Given that the assessment requirements in title I, part A of the ESEA focus on the alignment of the assessment system to the challenging State academic standards and these academic standards also apply to innovative assessments as described in section 1204(e)(2)(A)(ii)–(iii) of the ESEA, we believe it is both consistent with the statute and critically important to continue this focus within the demonstration authority. While we support the need for better and more valid assessments of student knowledge, we do not think that these assessments should set a different or lower expectation for student achievement. In addition, it is vital that the innovative assessment system provide valid, reliable, comparable, and fair determinations of student achievement against the challenging State academic standards for the student's grade, because the innovative assessments (1) will be used in place of the statewide assessments that are administered to meet the requirements in section 1111(b)(2)(B) of the ESEA; (2) will be required to meet these same requirements as described in section 1204(e)(2)(A)(i) of the ESEA; and (3) will be used in the State's accountability system for participating LEAs and schools.

There is nothing in these regulations that would preclude a State from including additional content to measure a student's mastery of content other than the content for the grade in which the student is enrolled, and we are revising the final regulations to make this clear. A State is able to include such content, whether through a computer-adaptive design or some other innovative design, provided the innovative assessment system meets the statutory and regulatory requirements, including by producing an annual summative determination that describes the student's mastery of the State's grade-level academic content standards based on the State's aligned academic achievement standards.

Changes: We have added new § 200.105(b)(2)(ii) (proposed § 200.77(b)(2)) to clarify that innovative assessments may include items above or below the State's academic content standards for the grade level in which a student is enrolled, so long as, for purposes of reporting and school accountability consistent with new § 200.105(b)(3) and (7)–(9), the State measures a student's academic proficiency based on the challenging State academic standards for the grade in which a student is enrolled.

Comments: One commenter recommended that the regulations clarify more specifically that the annual summative determination under proposed § 200.77(b)(7) be based on the State's academic achievement standards that are aligned to grade-level academic content standards. One commenter specifically recommended that proposed § 200.77(b)(7) be modified to state that the achievement standards must be ''aligned'' to the State's grade-level academic content standards, believing such an addition was especially critical if a State adopts an innovative AA–AAAS.

Discussion: The Department agrees that any innovative assessment (including an innovative AA–AAAS) must produce an annual summative determination for each student that describes the students' mastery of grade-level academic content standards, using either the State's academic achievement standards or, for students with the most significant cognitive disabilities, the State's alternate academic achievement standards. Section 1111(b)(1) of the ESEA requires that challenging State academic standards include academic content standards and aligned academic achievement standards, and these requirements apply whether or not a State applies for or receives innovative assessment demonstration authority. To clarify this in the final regulations, we are adding to new § 200.105(b)(7) to specify that (1) the annual summative determination of achievement for a student on the innovative assessment describes the student's achievement of the challenging State academic standards (*i.e.,* both the State's academic content and achievement standards) for the grade in which the student is enrolled; and (2) in the case of a student with the most significant cognitive disabilities assessed with an innovative AA–AAAS aligned with the challenging State academic content standards for the grade in which the student is enrolled, the innovative AA–AAAS must provide an annual summative determination of to the student's mastery of the alternate academic achievement standards for each such student.

Changes: We have added to new § 200.105(b)(7) (proposed § 200.77(b)(7)) to require that the innovative assessment produce an annual summative determination of achievement for each student that describes the student's mastery of the challenging State academic standards (*i.e.,* both the State's academic content and achievement standards) for the grade in which the student is enrolled, or, in the case of a student with the most significant cognitive disabilities assessed with an alternate assessment aligned with alternate academic

achievement standards under section 1111(b)(1)(E) of the ESEA, the student's mastery of those standards.

Reporting to Parents

Comments: Multiple commenters expressed strong support for the requirements in proposed § 200.77(d)(4). This section would require an SEA to provide an assurance that it will ensure each LEA provides information to parents in a timely, uniform, and understandable format. In particular, commenters asserted the importance of providing assessment information for non-English speaking parents in their native language. While appreciating the requirement to provide oral translations to parents with limited English proficiency when written translations are not practicable, one commenter suggested the regulations require LEAs to secure written translations for the most populous language spoken, other than English, by participating students. Another commenter, however, recommended removing altogether requirements related to written and oral translations and to alternate formats in proposed § 200.77(d)(4)(ii)–(iii), expressing concern about the financial burden placed on large urban districts with students and families who speak many different languages.

Discussion: We appreciate the strong support for proposed § 200.77(d)(4) and agree these regulations are critical to ensure that a parent receives needed information about a child's academic progress on State assessments. Section 1111(b)(2)(B)(x) of the ESEA requires a State to provide information to parents in an understandable and uniform format, and to the extent practicable, in a language that parents can understand. These requirements also apply to innovative assessment systems developed under the demonstration authority, consistent with section 1204(e)(2)(A)(i) of the ESEA and new § 200.105(b)(1) (proposed § 200.77(b)(1)). In addition, the statute includes these same requirements for accessibility of notices to parents under section 1112(e) of the ESEA, which requires LEAs to provide certain information to parents each year, including information pertaining to testing transparency. We believe the clarifications provided by new § 200.105(d)(4) (proposed § 200.77(d)(4)) will help parents take an active role in supporting their children's education, improve transparency and understanding of the innovative assessment system, and provide consistency among the statutory requirements, regulations, and applicable civil rights laws, as explained below.

We disagree with commenters that we should require written or oral translations and alternate formats only to the extent practicable. Parents with disabilities or parents who are limited English proficient have the right to request notification in accessible formats. Whenever practicable, written translations of printed information must be provided to parents with limited English proficiency in a language they understand, and the term ''language'' includes all languages, including Native American languages. However, if written translations are not practicable for a State or LEA to provide, it is permissible to provide information to limited English proficient parents orally in a language that they understand instead of a written translation. This requirement is consistent with Title VI of the Civil Rights Act of 1964 (Title VI), as amended, and its implementing regulations. Under Title VI, recipients of Federal financial assistance have a responsibility to ensure meaningful access to their programs and activities by persons with limited English proficiency. It is also consistent with Department policy under Title VI and Executive Order 13166 (Improving Access to Services for Persons with Limited English Proficiency).

We decline to further define the term ''to the extent practicable'' under these regulations, but remind States and LEAs of their Title VI obligation to take reasonable steps to communicate the information required by ESEA to parents with limited English proficiency in a meaningful way.[4] We also remind States and LEAs of their concurrent obligations under Section 504 and title II of the ADA, which require covered entities to provide persons with disabilities with effective communication and reasonable accommodations necessary to avoid discrimination unless it would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. Nothing in the ESSA or these regulations modifies those independent and separate obligations. Compliance with the ESEA, as amended by the ESSA, does not ensure compliance with Title VI, Section 504 or title II.

Changes: None.

Comments: Some commenters suggested that if an LEA begins to administer a general innovative assessment in some or all schools under the demonstration authority, the LEA should be required to notify parents of students with significant cognitive disabilities that their child will be assessed using an assessment other than the innovative assessment system and provide detail on that assessment.

Discussion: Section 1112(e) of the ESEA requires each LEA to provide annually to parents information on assessments required in their LEA, which would include, in the case of an LEA administering an innovative general assessment and the statewide AA–AAAS, details on the purpose of both assessments, the grades and subjects in which they are administered, and other information. In addition, section 1111(b)(2)(D)(i)(II) and related regulations require that parents of students assessed using an AA–AAAS receive information about that assessment. Accordingly, we believe that new § 200.105(d)(4) (proposed § 200.77(d)(4)) ensures that parents in participating schools will receive transparent information about all required assessments administered to students in the school; however, we are adding to new § 200.105(d)(4) in the final regulations to specify that this information must be sent to ''all'' parents of students in participating schools and include the grades and subjects in which the innovative assessment will be administered, to further clarify that an LEA must (1) include all parents in these notices, even if their student is not being assessed using an innovative assessment in the upcoming school year, and (2) provide information on any required statewide assessments that are still being given in other grades and subjects, including an AA–AAAS for students with the most significant cognitive disabilities.

Changes: We have added to new § 200.105(d)(4) to clarify that notices must be sent to parents of all students, including in a manner accessible to parents and families with limited English proficiency and those with disabilities, in participating schools and include specific information on the innovative assessment in each required grade and subject in which it is being administered.

200.106 Demonstration Authority Selection Criteria

General

Comments: One commenter supported the general depth of the selection criteria in the proposed regulations and believes the criteria,

[4] For more information on agencies' civil rights obligations to parents with limited English proficiency, see the Joint Dear Colleague Letter of Jan. 7, 2015, at Section J. (*http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf*).

particularly for a timeline and budget, hold States accountable for their financial capacity and technical expertise to develop an innovative assessment system. The commenter further encouraged the Department to provide sufficient notice of application requirements and selection criteria so that States can undergo extensive planning. Another commenter expressed general support for holding States to a high bar prior to awarding demonstration authority (including a rigorous evaluation and peer review of applications) and expressed strong support for the selection criteria, especially prior experience, capacity, and stakeholder support.

Discussion: We share the commenters' views that States should be held to rigorous expectations in the development of a valid, reliable, and comparable innovative assessment system and that the requirements and selection criteria—which will be outlined in any future NIA—will both support States in planning and developing strong, thorough proposals, as well as the Department and peers in reviewing and approving applications that are likely to be successful.

Changes: None.

Comments: Due to the small scale nature of the pilot, the limited number of test items available, and the cost of developing innovative items, one commenter stated that testing irregularities and breaches of test security pose a greater risk to innovative assessment pilots, and requested additional emphasis on test security measures. The commenter suggested an additional selection criterion outlining an SEA's or consortium's plans for test security, including a description of the security measures used to protect test content and ensure test validity and reliability.

Discussion: We appreciate the commenter's concern about the increased frequency of testing irregularities and security breaches. However, we do not believe it is necessary to add additional selection criterion for SEAs or consortia of SEAs with respect to test security measures. We believe that SEAs are aware of the test security risks, and will develop their implementation plans accordingly. In addition, SEAs are required to submit evidence of test security and monitoring practices, as described in the Department's current State assessment peer review guidance, to meet the requirements for State assessments in section 1111(b)(2)(B) of the ESEA. Because SEAs are aware that their innovative assessment systems will be subject to these requirements when transitioning to statewide use as described in new § 200.107 (proposed § 200.79), we believe there is sufficient incentive in the regulations, as proposed, to develop an innovative assessment system that considers and accounts for test security and necessary protocols. We strongly encourage SEAs and consortia to consider these peer review criteria when developing their innovative assessments under the demonstration authority.

Changes: None.

Prior Experience

Comments: Several commenters expressed strong support for proposed § 200.78(b)(1)(ii)(A), which creates a selection criterion for prior experience, and specifically any experience the SEA or its LEA has in developing or using effective supports and appropriate accommodations for administering innovative assessments to all students, including English learners and children with disabilities.

Discussion: We appreciate the support of these commenters, and agree that an important criterion for evaluating the strength of an application from an SEA or consortium of SEAs, and its ability to effectively implement and scale up a high-quality innovative assessment system, will be ensuring that appropriate accommodations are provided on the assessments so that all students may participate.

Changes: None.

Comments: One commenter recommended we revise proposed § 200.78(b)(1)(ii)(C) to require independent reviewers to provide an unbiased judgment of the validity, reliability, and comparability of scoring rubrics.

Discussion: We disagree that it is necessary to revise this selection criterion to provide for evaluation by an independent reviewer under new § 200.106(b)(1)(ii)(C) (proposed § 200.78(b)(1)(ii)(C)). Because all of the information pertaining to each selection criterion is submitted as part of the SEA or consortium's application for the demonstration authority (see § 200.105(c)) and because the application is subject to external peer review as part of the approval process (see § 200.104(c)), the recommended addition of an independent review requirement in new § 200.106(b)(1)(ii) is redundant. Any prior experience with developing or using scoring rubrics would be evaluated by independent, unbiased teams of external peer reviewers who will examine the evidence submitted by States that documents validity, reliability, and comparability of student determinations using standardized and calibrated scoring rubrics.

Changes: None.

Supports for Educators

Comments: Multiple commenters supported the proposed selection criterion in proposed § 200.78(d), which provides for an SEA to describe available supports for educators to help them understand and become familiar with the innovative assessment system. Some of these commenters further requested that the selection criterion be revised to provide for SEAs to include in their applications a detailed professional development plan to support the implementation of the innovative assessment system. According to the commenters, this plan should address how the State will, among other things: Scale its system of professional development to more LEAs over time; provide sufficient time for teachers and school leaders to participate in professional development; partner with educator preparation programs to ensure pre-service and in-service training is sufficiently preparing educators to implement and use data from the innovative assessment system to inform instruction; and use Federal funding under title II, and other public sources of funds, to provide supports for educators described in its plan. These commenters also suggested the Department issue additional non-regulatory guidance that could be beneficial to support effective professional development for educators as part of the demonstration authority. Similarly, other commenters requested that the Department add a requirement that SEAs include a description of the State's efforts to increase teacher and principal assessment literacy and provide incentives to teachers participating in professional development on the innovative assessment system.

Discussion: We appreciate the feedback on ways to clarify and strengthen the supports an SEA or consortium must provide to educators who will be implementing the innovative assessment demonstration authority and agree that this will be a critical component in effectively scaling a State's innovative assessment system. As proposed, the selection criterion would allow States to provide this type of information. However, we are adding to new § 200.106(d) (proposed § 200.78(d)) to clarify that each SEA or consortium's application must include a plan for delivering supports to educators that can be consistently provided at scale, recognizing the commenter's suggestion that successful

implementation will require a comprehensive plan for professional development and that States consider whether their plan can feasibly be delivered in all LEAs during the demonstration authority period, even if only a few LEAs are initially participating. We also are adding to new § 200.106(d)(1) to provide for applications to be evaluated on the extent to which an SEA or consortium's training for LEA and school staff will develop teacher capacity to provide instruction that is informed by the innovative assessment system and to use the results the system produces. Further, we are adding to new § 200.106(d)(4) to provide for SEAs to describe their strategies to support teachers and staff in carrying out their responsibilities under the State's chosen innovative assessment model, which may include developing, designing, implementing, and ''validly and reliably'' scoring the assessment results. We also note that the information in each application under the selection criteria for timeline and budget and evaluation and continuous improvement described in new § 200.106(c) and (e) (proposed § 200.78(c) and (e)), respectively, will include how the SEA or consortium plans to fund and support any evaluation of its professional development plans and activities, so it is unnecessary to add these elements to the selection criterion in § 200.106(d). Finally, we appreciate commenters' suggestions for additional non-regulatory guidance in this area and will take them into consideration as the Department moves forward with implementation of the innovative assessment demonstration authority.

Changes: We have added to the selection criterion in new § 200.106(d) to:

- Provide for each SEA or consortium's application to include a plan for delivering supports to educators that can be consistently provided at scale;
- Clarify that the SEA's or consortium's application will be evaluated on the extent to which training for LEA and school staff will develop teacher capacity to provide instruction that is informed by the innovative assessment system and to use the system's results; and
- Clarify that SEAs or consortia should describe strategies that will engage teachers and staff in carrying out their responsibilities under the State's chosen innovative assessment model, which may include ''designing'', ''implementing,'' and ''validly and reliably'' scoring the assessment results—not just in developing and scoring them, in general.

Comments: One commenter objected to the reference in proposed § 200.78(d)(4) regarding teachers developing and scoring innovative assessments administered in their school. The commenter was concerned about potential conflicts of interest and the validity and reliability of the resulting scores if educators providing instruction are also developing and scoring the assessments for the students they teach. The commenter suggested revising §§ 200.105 and 200.106 to restrict teacher involvement in item development and scoring.

Discussion: We believe that teachers play a critical role in the development of assessments and should be involved throughout test development. This is true in all test development, but may be especially relevant with respect to innovative assessment systems, given changes in test design and delivery with an innovative assessment that may necessitate changes in instruction and additional or new responsibilities for educators. In addition, restricting teacher involvement in the development of the innovative assessment system or scoring such innovative assessments would place an additional restriction on the development of these assessments beyond what is required of State assessment systems in section 1111(b)(2) of the ESEA—the requirements these innovative assessment systems will need to meet in order to be used for statewide use at the end of the demonstration authority period.

We agree, however, with the commenter that States should establish reasonable safeguards within their assessment systems, including any innovative assessment system. For example, teachers, in general, should not be permitted to score the assessments taken by students for which the teacher is considered the teacher of record or the assessments taken by students in a school in which the teacher is employed, as this could affect the reliability of the scores and create incentives for improper behavior given that the results will be used in the State's accountability system. We believe that States should have flexibility to design and develop a truly innovative assessment system and do not want to restrict innovation by placing extensive restrictions on the development and scoring of these new assessments. We do want to ensure that States are considering proper safeguards (*e.g.,* quality control procedures, inter-rater reliability checks, audit plans) to avoid any conflicts, or the appearance of conflict, of interest and note that the innovative assessment system will undergo a peer review process prior to a State receiving demonstration authority and following the statewide transition of the innovative assessment system, and are clarifying final § 200.106(d)(4) (proposed § 200.78(d)(4)) to require States to describe in their applications any ''safeguards'' they are using when teachers are involved in developing or scoring assessments and how they are sufficient to ensure objective and unbiased scoring of innovative assessments. Further, the Department's external peer review of State assessment systems under title I, part A of the ESEA, which is based on the APA's *Standards for Psychological and Educational Testing,* includes specific criteria related to sections on the State's plans for scoring assessments and for demonstrating the reliability of the assessment scores. To meet these criteria, States need to ensure adequate training, calibration, and monitoring for all scoring conducted within their assessment system. We believe these criteria will serve to mitigate the commenter's concern.

Changes: We have added language to new § 200.106(d)(4) (proposed § 200.78(d)(4)) to include both strategies and safeguards related to the development and scoring of innovative assessments by teachers and other school staff and to require States to describe in their applications how the strategies and safeguards are sufficient to ensure objective and unbiased scoring of innovative assessments.

Comments: One commenter requested the inclusion of specialized instructional support personnel among the list of school staff in proposed § 200.78(d) for which the SEA must demonstrate a plan for training and support, noting the important role that specialized instructional support personnel, such as audiologists and speech-language pathologists, play in providing curriculum and instructional supports for students.

Discussion: The selection criterion in new § 200.106(d) (proposed § 200.78(d)) is intended to ensure that States applying for demonstration authority have carefully considered how they will support LEA and school staff in participating schools during implementation of the innovative assessment system. While the proposed regulations specifically mention that these staff must include ''teachers, principals, and other school leaders,'' an SEA could certainly respond to this selection criterion by including other LEA and school staff, including specialized instructional support

personnel, paraprofessionals, and district administrators, in their plans to support LEA and school personnel in effective implementation—which could likely improve the strength of the SEA's application in this area as it is evaluated by peers. However, we decline to modify the selection criterion to specifically list examples of other LEA and school staff, as enumerating ''teachers, principals, and other school leaders'' is more consistent with the statutory requirements for demonstration authority, which only reference teachers, principals, and other school leaders.[5]

Changes: None.

Supports for Parents

Comments: Several commenters supported the selection criterion in proposed § 200.78(d) providing for States to detail their strategies to support students in the transition to a new innovative assessment system, believing that these strategies will be critical to ensure a successful transition to a new assessment system. One commenter recommended that the final regulations also require States to describe strategies to acquaint parents with the innovative assessment system, including additional expectations for SEAs and consortia to describe plans to better communicate and explain assessment results to parents and families of students in participating LEAs and schools so that they, too, can play a critical role in using those results to improve academic outcomes for their children.

Discussion: We agree with commenters and appreciate the support for including a selection criterion related to supports for students that will familiarize them with the innovative assessment system. We further agree that States, in order to effectively implement and scale their innovative assessment systems, will need strategies to familiarize parents and families with the new assessments. We are revising the regulations in new § 200.106 to this effect in order to reinforce requirements elsewhere in the regulations for collaborating with parents in the development of the innovative assessment system, soliciting their feedback and input regularly on implementation, and providing annual information to parents about the innovative assessments and the results for their children, as required in other sections of the regulations.

Changes: We have added to the introductory paragraph of new § 200.106(d) (proposed § 200.78) to include references to supports for parents, in addition to educators and students, and § 200.106(d)(2) to provide for States to describe their strategies to familiarize parents, as well as students, with the innovative assessment system.

200.107 Transition to Statewide Use

General

Comments: One commenter stated that the requirement for a full, statewide transition at the end of the pilot makes assumptions about the finality and success of the pilot.

Discussion: The Department appreciates the concern about the requirement for transition to statewide use. However, the Department disagrees that such a requirement presumes that statewide implementation of the innovative assessment system will be successful. The requirements of new § 200.105 (proposed § 200.77) must be met in order for a State to implement the innovative assessment statewide. The Department is establishing these requirements in part to ensure a higher likelihood of successful implementation, but the Department does not believe that success is a forgone conclusion.

The regulations in new § 200.107(a) and (b) (proposed § 200.79(a) and (b)) represent another significant set of criteria that the innovative assessment must meet in order to achieve acceptance as a statewide assessment. Additionally, new § 200.108 (proposed § 200.80) provides that the Department may withdraw the innovative assessment authority from a State when it cannot produce a high-quality plan for transition or evidence that the innovative assessment systems meets specific conditions. Given these provisions, we disagree that these regulations collectively presume that an innovative assessment system which achieves statewide implementation status will automatically be deemed final or successful.

Changes: None.

Comments: One commenter suggested that the Department include additional steps in the transition to statewide use of the innovative assessment to strengthen the transparency and ensure the quality of the system to be implemented. First, the commenter suggested that an SEA be required to affirmatively notify the Secretary and the LEAs in the State of its intention to move forward with the innovative assessment, replacing the statewide assessment. Second, the commenter recommended that the State receive validation that the innovative assessment meets peer review before the State makes the transition, instead of after, as in proposed § 200.79(a)(1).

Discussion: The Department appreciates the concerns voiced by this commenter. The Department believes that the requirements in new §§ 200.105 and 200.106 (proposed §§ 200.77 and 200.78) collectively address the concerns of the commenter regarding LEA notification and transparency. The application requirements in new § 200.105(d)(3), requiring an annual update on the SEA's progress in scaling the innovative assessment system statewide, are sufficient to ensure that the Secretary will be notified when the State begins implementing the innovative assessment system statewide. Specifically, the annual report must include a timeline for and an update on progress toward full statewide implementation of the innovative assessment system. In addition, consistent with final §§ 200.105(d)(3) and 200.106(e), the annual report must include the results of the comparability determination required under final § 200.105(b)(4).

Finally, the requirements for peer review of the innovative assessment system in new § 200.107(a)(1) (proposed § 200.79(a)(1)) that is required for transitioning out of the demonstration authority are the same requirements for peer review that apply to all statewide assessments used to meet the requirements under title I, part A, that is, the peer review is conducted after the first administration of a new statewide assessment, which ensures that all necessary evidence will be available for submission to the Department.

Changes: None.

Comments: One commenter asked the Department to provide greater clarity on what steps the State will need to take if the innovative assessment system does not meet the requirements of proposed § 200.79(b). That section outlines the requirements the assessment system must meet before it can be used for purposes of both academic assessments and accountability under section 1111 of the ESEA. The commenter recommended that in such situations, a State be granted an extension under proposed § 200.80 or be required to return immediately to the previous statewide academic assessment.

Discussion: The Department agrees that States need to follow a clearly defined process in the event that the innovative assessment system does not meet the requirements of new § 200.107(b) (proposed § 200.79(b)). The Department believes, however, that the

[5] For example, see the following sections of the ESEA: Section 1204(c)(2)(A)(i)–(ii); section 1204(e)(2)(A)(v)(II), (vii), and (viii); section 1204(e)(2)(B)(v), (ix), and (x)(III); and section 1204(j)(1)(B)(iv).

regulations in new § 200.108(a)–(b) (proposed § 200.80(a)–(b)) provide such a clearly defined process both in the case of granting an extension, and for a withdrawal and return to a statewide assessment, and declines to make further changes.

Changes: None.

Flexibility in Scaling Statewide

Comments: Multiple commenters requested that States be permitted to administer multiple assessments as part of the innovative assessment system. Commenters recommended that States should not be required to scale a single innovative assessment.

Discussion: The Department believes that the intent of the statute is to provide States the ability to implement an innovative assessment system as defined in final § 200.104(b)(3) (proposed § 200.76(b)(2)). States have broad flexibility to develop and design their system within the parameters of this definition, which allows for multiple assessments to be given in a single grade, including performance tasks, instructionally embedded assessments, and interim assessments.

Changes: None.

Comments: One commenter requested that States receive flexibility such that at the end of the innovative assessment demonstration authority, once the innovative assessment system has been successfully piloted, peer reviewed, and approved, the State could keep both its statewide assessment system and its innovative assessment system and allow LEAs to choose one for purposes of accountability and reporting.

Discussion: The purpose of innovative assessment demonstration authority under section 1204 of the ESEA is to provide States the flexibility to pilot an innovative assessment system with the purpose of scaling the innovative assessment system to statewide use. Once the State transitions to statewide use, the innovative assessment system must meet the requirements of section 1111(b)(2) of the ESEA. Under section 1111(b)(2)(B), a State must use the same academic assessment system to measure the achievement of all students and evaluate their achievement against the same challenging State academic achievement standards. To meet the requirement under section 1111(b)(2)(B), the State must select either its statewide assessment system or the innovative assessment system; it cannot offer a choice to LEAs. Finally, we note that section 1204(i) of the ESEA grants the Secretary authority to withdraw demonstration authority if the State cannot provide a high-quality plan for transition to full statewide use of the innovative assessment system. Thus, we believe allowing States to offer a choice to LEAs would be inconsistent with this statutory provision as well.

Changes: None.

Evaluation of Demonstration Authority

Comments: One commenter expressed concern about how the proposed regulations define a baseline year for purposes of evaluating the innovative assessment system. Since States may pilot their innovative assessment systems prior to receiving demonstration authority, the first year of innovative demonstration authority may not be the first year the test is administered, but may be the first year the test is administered for accountability purposes.

Discussion: The Department appreciates the commenter's request for clarification. We are adding to new § 200.107(c) (proposed § 200.79(c)) to clarify that the baseline year for an evaluation of the innovative assessment system is the first year the innovative assessment system is administered in an LEA under the demonstration authority.

Changes: We have added to § 200.107(c) to clarify that the baseline year is the first year the innovative assessment system is administered in an LEA under the demonstration authority.

Comments: Several commenters supported proposed § 200.79(b)(2), which would require that the SEA evaluate the statistical relationship between student performance on the innovative assessment and other measures of success. The commenters proposed a clarification to allow for the Department, peer reviewers, and States to take into account measures other than student performance. They strongly encouraged the Department to clarify that student performance should not be the only criterion used to determine that the innovative assessment system is of high quality, can replace the statewide assessments, and can be used for both accountability and reporting.

Discussion: The Department appreciates the commenters' concerns. The requirement to provide evidence of the statistical relationship between student performance on the innovative assessment and student performance on other measures of success is just one requirement in final § 200.107 (proposed § 200.79) for States to demonstrate that their innovative assessments are of ''high quality'' and may be used for purposes of State assessments and accountability under section 1111 of the ESEA. The relationship of student performance on the innovative assessment for each grade and subject to other measures must consider the relationship between the innovative assessment and the measures used in the remaining accountability indicators that do not rely on data from the State's academic content assessments (*e.g.,* the Graduation Rate indicator, Progress in Achieving English Language Proficiency indicator, a School Quality or Student Success indicator), and may also examine the relationship of student performance on the innovative assessment to student performance on other assessments like NAEP, TIMMS, or college entrance exams, or measures other than test scores like college enrollment rates or success in related entry-level, college credit-bearing courses. This analysis provides validity evidence and is considered in the Department's peer review of State assessments under section 1111(a)(4) of the ESEA, as well as final § 200.107(b)(2). Additional evidence is required in peer review and will be considered in the determination that an innovative assessment system is of high quality. Since other measures would be included in peer review, as reflected in final § 200.107, to evaluate whether an innovative assessment is of high quality, we do not believe it is necessary to clarify that measures other than student performance can be taken into account.

Changes: None.

200.108 Extension, Waivers, and Withdrawal of Authority

Withdrawal of Authority

Comments: One commenter urged the Department to clearly articulate the Secretary's ability to withdraw innovative assessment authority if a State cannot demonstrate comparability or sufficient quality in order to ensure the innovative assessment system is an objective measure of student performance.

Discussion: Under section 1204 of the law, the Secretary must withdraw a State's authority to implement an innovative assessment system if, at any time during the initial demonstration period or an extension period, the State cannot meet certain requirements, including requirements pertaining to comparability to statewide assessments (section 1204(i)(5) of the ESEA) and system quality (section 1204(j)(1)(A) of the ESEA).

Changes: None.

Extension

Comments: One commenter supported proposed § 200.80(a)(1)(iii) requiring SEAs requesting an extension to address the capacity of all LEAs to full implement the innovative

assessment system by the end of the extension period.

Discussion: The Department agrees with the commenter that SEAs must consider the readiness and capacity of all LEAs in planning for statewide implementation of the innovative assessment system. The regulations in this section help ensure that States are on track to implement the innovative assessment system statewide before receiving an extension.

Changes: None.

Waivers

Comments: Several commenters agreed with proposed § 200.80(c)(2), under which the Secretary may grant a one-year waiver to a State to delay withdrawal of the demonstration authority at the end of the extension period if a State's innovative assessment system has not yet met peer review requirements described in proposed § 200.79. One commenter supported the one-year cap on this waiver because, it asserted, States should not be given unlimited time to transition to statewide use of the innovative assessment system. Another commenter supported this requirement because it would ensure that States cannot operate two separate assessment systems for an extended period of time.

Several commenters requested that the Department remove the provision in proposed § 200.80(c)(2) because they opposed a one-year limitation on such waivers and asserted that this timeline was inconsistent with section 1204(j)(3) of the ESEA, which provides the Secretary with the authority to grant a waiver to delay withdrawal of authority in order to provide the State the time necessary to fully implement the innovative assessment system statewide. Commenters asserted that the variation in structure, design, and complexity of innovative assessment systems requires flexibility for States, and that the Department should not apply a standard expectation to all States and innovative assessment systems.

Discussion: We appreciate that innovative assessment systems will vary in complexity, and that some States may require more time than others to implement the innovative assessment system statewide. However, under the regulations, States have five years within the initial demonstration authority period to implement innovative assessments statewide. Then, States can request up to two years of extensions beyond that five year period. Given that States requesting the waiver would be in their eighth year of implementing the innovative assessments, we believe that a one-year limitation on the waiver is reasonable and appropriate to ensure that States move forward in implementing statewide assessment systems, consistent with the requirements of title I. The purpose of the innovative demonstration authority is to scale innovative assessments statewide, not to indefinitely allow States to administer two assessments. In the unlikely scenario that a State needs more than eight years to implement its innovative assessment system statewide, including having such a system peer reviewed, the Secretary maintains authority under section 8401 of the ESEA to waive requirements of the ESEA.

Changes: None.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, OMB must determine whether this regulatory action is significant and, therefore, subject to the requirements of the Executive order and to review by OMB. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an ''economically significant'' rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This final regulatory action is significant and is subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account, among other things and to the extent practicable, the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives such as user fees or marketable permits, to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing these final regulations only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these final regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities.

In this regulatory impact analysis we discuss the need for regulatory action and the potential costs and benefits. Elsewhere in this section under *Paperwork Reduction Act of 1995,* we discuss burdens associated with information collection requirements.

Need for Regulatory Action

The Department believes that regulatory action is needed to ensure effective implementation of section 1204 of the ESEA, which permits the Secretary to provide an SEA or consortium of SEAs that meets the application requirements with authority to establish, operate, and evaluate a system of innovative assessments. Crucially, and as discussed elsewhere in this document in response to concerns expressed by commenters that the regulations are overly prescriptive or might limit innovation, the Department believes that regulatory action is needed to ensure that these assessments ultimately can meet requirements for academic assessments and be used in statewide accountability systems under section 1111 of the ESEA, including requirements for assessment validity, reliability, technical quality, and alignment to challenging State academic standards. Absent regulatory action, SEAs implementing innovative assessment authority run a greater risk of developing assessments that are inappropriate or inadequate for these purposes, which could hinder State and local efforts to provide all children significant opportunity to receive a fair, equitable, and high-quality education and to close educational achievement gaps consistent with the purpose of title I of the ESEA.

Discussion of Potential Costs and Benefits

The primary benefit of these regulations is the administration of statewide assessments that more effectively measure student mastery of challenging State academic standards and better inform classroom instruction and student supports, ultimately leading to improved academic outcomes for all students. We believe that this benefit outweighs associated costs to an SEA, which may use funds received under the Grants for State Assessments and Related Activities program and funds reserved for State administration under part A of title I to participate in the demonstration authority. In addition, high-quality, innovative assessment models developed by participating SEAs under the demonstration authority can benefit other SEAs by providing examples of new assessment strategies for those SEAs to consider.

Participation in the innovative assessment demonstration authority is voluntary and limited during the initial demonstration period to seven SEAs. In light of the initial limits on participation, the number and rigor of the statutory application requirements, and the high degree of technical complexity involved in establishing, operating, and evaluating innovative assessment systems, we anticipate that few SEAs will seek to participate. Based on currently available information, we estimate that, initially, up to five SEAs will apply.

For those SEAs that apply and are provided demonstration authority (consistent with the final regulations), implementation costs may vary considerably based on a multitude of factors, including: The number and type(s) of assessments the SEA elects to include in its system; the differences between those assessments and the SEA's current statewide assessments, including with respect to assessment type, use of assessment items, and coverage of State academic content standards; the number of grades and subjects in which the SEA elects to administer those assessments; whether the SEA will implement its system statewide upon receiving demonstration authority and, if not, the SEA's process and timeline for scaling the system up to statewide implementation; and whether the SEA is part of a consortium (and thus may share certain costs with other consortium members). Because of the potential wide variation in innovative assessment systems along factors such as these, we did not provide estimates of the potential cost to implement innovative assessment demonstration authority for the typical SEA participant in the NPRM, stating that we believed such estimates would not be reliable or useful. We continue to believe that is the case, and note that we received no comments from SEAs providing specific anticipated costs that could inform our production of estimates.

That said, we received several comments expressing general concern about the potential cost of implementing innovative assessment demonstration authority, including concerns about additional costs to SEAs of implementing innovative assessments while also administering current State assessments in non-participating LEAs. Although we appreciate these general concerns, we remind the commenters that participation in innovative assessment demonstration authority is voluntary and that no SEA is required to develop and implement innovative assessments under this authority. Moreover, an SEA that chooses to participate has considerable flexibility in determining the number, types, and breadth of innovative assessments to include in its system. In selecting its assessments, such an SEA should accordingly be mindful of development and implementation costs, including the extent to which those costs can be supported with Federal grant funds not needed for other assessment purposes.

Regulatory Flexibility Act Certification

The Secretary certifies that these final requirements will not have a significant economic impact on a substantial number of small entities. Under the U.S. Small Business Administration's Size Standards, small entities include small governmental jurisdictions such as cities, towns, or school districts (LEAs) with a population of less than 50,000. Although the majority of LEAs that receive ESEA funds qualify as small entities under this definition, these regulations will not have a significant economic impact on these small LEAs because few SEAs are expected to participate in this voluntary innovative assessment demonstration authority and the costs of participation will be borne largely by SEAs and can be supported with Federal grant funds. We believe the benefits provided under this regulatory action outweigh any associated costs for these small LEAs. In particular, the final regulations will help ensure that the LEAs can implement assessments that measure student mastery of challenging State academic standards more effectively and better inform classroom instruction and student supports, ultimately leading to improved academic outcomes for all students.

Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 does not require you to respond to a collection of information unless it displays a valid OMB control number. We display the valid OMB control numbers assigned to the collections of information in these final regulations at the end of the affected sections of the regulations.

Sections 200.104(c), 200.105, and 200.106 of the final regulations contain information collection requirements. The Department will develop an Information Collection Request based upon these final regulations, and will submit a copy of these sections and the information collection instrument to OMB for its review before requiring the submission of any information based upon these regulations.

Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Assessment of Educational Impact

In the NPRM we requested comments on whether the proposed regulations would require transmission of

information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, or electronic format) on request to the person listed under **FOR FURTHER INFORMATION CONTACT**.

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List of Subjects in 34 CFR Part 200

Elementary and secondary education, Grant programs—education, Indians—education, Infants and children, Juvenile delinquency, Migrant labor, Private schools, Reporting and recordkeeping requirements.

Dated: November 30, 2016.

John B. King, Jr.,

Secretary of Education.

For the reasons discussed in the preamble, the Department of Education amends part 200 of title 34 of the Code of Federal Regulations as follows:

PART 200—TITLE I—IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

■ 1. The authority citation for part 200 continues to read as follows:

Authority: 20 U.S.C 6301–6576, unless otherwise noted.

■ 2. Add a new undesignated center heading following § 200.103 to read as follows:

Innovative Assessment Demonstration Authority

■ 3. Add § 200.104 to read as follows:

§ 200.104 Innovative assessment demonstration authority.

(a) *In general.* (1) The Secretary may provide a State educational agency (SEA), or consortium of SEAs, with authority to establish and operate an innovative assessment system in its public schools (hereinafter referred to as ''innovative assessment demonstration authority'').

(2) An SEA or consortium of SEAs may implement the innovative assessment demonstration authority during its demonstration authority period and, if applicable, extension or waiver period described in § 200.108(a) and (c), after which the Secretary will either approve the system for statewide use consistent with § 200.107 or withdraw the authority consistent with § 200.108(b).

(b) *Definitions.* For purposes of §§ 200.104 through 200.108—

(1) *Affiliate member of a consortium* means an SEA that is formally associated with a consortium of SEAs that is implementing the innovative assessment demonstration authority, but is not yet a full member of the consortium because it is not proposing to use the consortium's innovative assessment system under the demonstration authority, instead of, or in addition to, its statewide assessment under section 1111(b)(2) of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (hereinafter ''the Act'') for purposes of accountability and reporting under sections 1111(c) and 1111(h) of the Act.

(2) *Demonstration authority period* refers to the period of time over which an SEA, or consortium of SEAs, is authorized to implement the innovative assessment demonstration authority, which may not exceed five years and does not include the extension or waiver period under § 200.108. An SEA must use its innovative assessment system in all participating schools instead of, or in addition to, the statewide assessment under section 1111(b)(2) of the Act for purposes of accountability and reporting under section 1111(c) and 1111(h) of the Act in each year of the demonstration authority period.

(3) *Innovative assessment system* means a system of assessments, which may include any combination of general assessments or alternate assessments aligned with alternate academic achievement standards, in reading/language arts, mathematics, or science administered in at least one required grade under § 200.5(a)(1) and section 1111(b)(2)(B)(v) of the Act that—

(i) Produces—

(A) An annual summative determination of each student's mastery of grade-level content standards aligned to the challenging State academic standards under section 1111(b)(1) of the Act; or

(B) In the case of a student with the most significant cognitive disabilities assessed with an alternate assessment aligned with alternate academic achievement standards under section 1111(b)(1)(E) of the Act and aligned with the State's academic content standards for the grade in which the student is enrolled, an annual summative determination relative to such alternate academic achievement standards for each such student; and

(ii) May, in any required grade or subject, include one or more of the following types of assessments:

(A) Cumulative year-end assessments.

(B) Competency-based assessments.

(C) Instructionally embedded assessments.

(D) Interim assessments.

(E) Performance-based assessments.

(F) Another innovative assessment design that meets the requirements under § 200.105(b).

(4) *Participating LEA* means a local educational agency (LEA) in the State with at least one school participating in the innovative assessment demonstration authority.

(5) *Participating school* means a public school in the State in which the innovative assessment system is administered under the innovative assessment demonstration authority instead of, or in addition to, the statewide assessment under section 1111(b)(2) of the Act and where the results of the school's students on the innovative assessment system are used by its State and LEA for purposes of accountability and reporting under section 1111(c) and 1111(h) of the Act.

(c) *Peer review of applications.* (1) An SEA or consortium of SEAs seeking innovative assessment demonstration authority under paragraph (a) of this section must submit an application to the Secretary that demonstrates how the applicant meets all application requirements under § 200.105 and that addresses all selection criteria under § 200.106.

(2) The Secretary uses a peer review process, including a review of the SEA's application to determine that it meets or will meet each of the requirements under § 200.105 and sufficiently addresses each of the selection criteria

under § 200.106, to inform the Secretary's decision of whether to award the innovative assessment demonstration authority to an SEA or consortium of SEAs. Peer review teams consist of experts and State and local practitioners who are knowledgeable about innovative assessment systems, including—

(i) Individuals with past experience developing innovative assessment and accountability systems that support all students and subgroups of students described in section 1111(c)(2) of the Act (*e.g.,* psychometricians, measurement experts, researchers); and

(ii) Individuals with experience implementing such innovative assessment and accountability systems (*e.g.,* State and local assessment directors, educators).

(3)(i) If points or weights are assigned to the selection criteria under § 200.106, the Secretary will inform applicants in the application package or a notice published in the **Federal Register** of—

(A) The total possible score for all of the selection criteria under § 200.106; and

(B) The assigned weight or the maximum possible score for each criterion or factor under that criterion.

(ii) If no points or weights are assigned to the selection criteria and selected factors under § 200.106, the Secretary will evaluate each criterion equally and, within each criterion, each factor equally.

(d) *Initial demonstration period.* (1) The initial demonstration period is the first three years in which the Secretary awards at least one SEA, or consortium of SEAs, innovative assessment demonstration authority, concluding with publication of the progress report described in section 1204(c) of the Act. During the initial demonstration period, the Secretary may provide innovative assessment demonstration authority to—

(i) No more than seven SEAs in total, including those SEAs participating in consortia; and

(ii) Consortia that include no more than four SEAs.

(2) An SEA that is an affiliate member of a consortium is not included in the application under paragraph (c) of this section or counted toward the limitation in consortia size under paragraph (d)(1)(ii) of this section.

(Authority: 20 U.S.C. 1221e–3, 3474, 6364, 6571)

■ 4. Add § 200.105 to read as follows:

§ 200.105 Demonstration authority application requirements.

An SEA or consortium of SEAs seeking the innovative assessment demonstration authority must submit to the Secretary, at such time and in such manner as the Secretary may reasonably require, an application that includes the following:

(a) *Consultation.* Evidence that the SEA or consortium has developed an innovative assessment system in collaboration with—

(1) Experts in the planning, development, implementation, and evaluation of innovative assessment systems, which may include external partners; and

(2) Affected stakeholders in the State, or in each State in the consortium, including—

(i) Those representing the interests of children with disabilities, English learners, and other subgroups of students described in section 1111(c)(2) of the Act;

(ii) Teachers, principals, and other school leaders;

(iii) LEAs;

(iv) Representatives of Indian tribes located in the State;

(v) Students and parents, including parents of children described in paragraph (a)(2)(i) of this section; and

(vi) Civil rights organizations.

(b) *Innovative assessment system.* A demonstration that the innovative assessment system does or will—

(1) Meet the requirements of section 1111(b)(2)(B) of the Act, except that an innovative assessment—

(i) Need not be the same assessment administered to all public elementary and secondary school students in the State during the demonstration authority period described in § 200.104(b)(2) or extension period described in § 200.108 and prior to statewide use consistent with § 200.107, if the innovative assessment system will be administered initially to all students in participating schools within a participating LEA, provided that the statewide academic assessments under § 200.2(a)(1) and section 1111(b)(2) of the Act are administered to all students in any non-participating LEA or any non-participating school within a participating LEA; and

(ii) Need not be administered annually in each of grades 3–8 and at least once in grades 9–12 in the case of reading/language arts and mathematics assessments, and at least once in grades 3–5, 6–9, and 10–12 in the case of science assessments, so long as the statewide academic assessments under § 200.2(a)(1) and section 1111(b)(2) of the Act are administered in any required grade and subject under § 200.5(a)(1) in which the SEA does not choose to implement an innovative assessment;

(2)(i) Align with the challenging State academic content standards under section 1111(b)(1) of the Act, including the depth and breadth of such standards, for the grade in which a student is enrolled; and

(ii) May measure a student's academic proficiency and growth using items above or below the student's grade level so long as, for purposes of meeting the requirements for reporting and school accountability under sections 1111(c) and 1111(h) of the Act and paragraphs (b)(3) and (b)(7)–(9) of this section, the State measures each student's academic proficiency based on the challenging State academic standards for the grade in which the student is enrolled;

(3) Express student results or competencies consistent with the challenging State academic achievement standards under section 1111(b)(1) of the Act and identify which students are not making sufficient progress toward, and attaining, grade-level proficiency on such standards;

(4)(i) Generate results, including annual summative determinations as defined in paragraph (b)(7) of this section, that are valid, reliable, and comparable for all students and for each subgroup of students described in § 200.2(b)(11)(i)(A)–(I) and sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the Act, to the results generated by the State academic assessments described in § 200.2(a)(1) and section 1111(b)(2) of the Act for such students. Consistent with the SEA's or consortium's evaluation plan under § 200.106(e), the SEA must plan to annually determine comparability during each year of its demonstration authority period in one of the following ways:

(A) Administering full assessments from both the innovative and statewide assessment systems to all students enrolled in participating schools, such that at least once in any grade span (*i.e.,* 3–5, 6–8, or 9–12) and subject for which there is an innovative assessment, a statewide assessment in the same subject would also be administered to all such students. As part of this determination, the innovative assessment and statewide assessment need not be administered to an individual student in the same school year.

(B) Administering full assessments from both the innovative and statewide assessment systems to a demographically representative sample of all students and subgroups of students described in section 1111(c)(2) of the Act, from among those students enrolled in participating schools, such that at least once in any grade span (*i.e.,* 3–5, 6–8, or 9–12) and subject for which

there is an innovative assessment, a statewide assessment in the same subject would also be administered in the same school year to all students included in the sample.

(C) Including, as a significant portion of the innovative assessment system in each required grade and subject in which both an innovative and statewide assessment are administered, items or performance tasks from the statewide assessment system that, at a minimum, have been previously pilot tested or field tested for use in the statewide assessment system.

(D) Including, as a significant portion of the statewide assessment system in each required grade and subject in which both an innovative and statewide assessment are administered, items or performance tasks from the innovative assessment system that, at a minimum, have been previously pilot tested or field tested for use in the innovative assessment system.

(E) An alternative method for demonstrating comparability that an SEA can demonstrate will provide for an equally rigorous and statistically valid comparison between student performance on the innovative assessment and the statewide assessment, including for each subgroup of students described in § 200.2(b)(11)(i)(A)–(I) and sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the Act; and

(ii) Generate results, including annual summative determinations as defined in paragraph (b)(7) of this section, that are valid, reliable, and comparable, for all students and for each subgroup of students described in § 200.2(b)(11)(i)(A)–(I) and sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the Act, among participating schools and LEAs in the innovative assessment demonstration authority. Consistent with the SEA's or consortium's evaluation plan under § 200.106(e), the SEA must plan to annually determine comparability during each year of its demonstration authority period;

(5)(i) Provide for the participation of all students, including children with disabilities and English learners;

(ii) Be accessible to all students by incorporating the principles of universal design for learning, to the extent practicable, consistent with § 200.2(b)(2)(ii); and

(iii) Provide appropriate accommodations consistent with § 200.6(b) and (f)(1)(i) and section 1111(b)(2)(B)(vii) of the Act;

(6) For purposes of the State accountability system consistent with section 1111(c)(4)(E) of the Act, annually measure in each participating school progress on the Academic Achievement indicator under section 1111(c)(4)(B) of the Act of at least 95 percent of all students, and 95 percent of students in each subgroup of students described in section 1111(c)(2) of the Act, who are required to take such assessments consistent with paragraph (b)(1)(ii) of this section;

(7) Generate an annual summative determination of achievement, using the annual data from the innovative assessment, for each student in a participating school in the demonstration authority that describes—

(i) The student's mastery of the challenging State academic standards under section 1111(b)(1) of the Act for the grade in which the student is enrolled; or

(ii) In the case of a student with the most significant cognitive disabilities assessed with an alternate assessment aligned with alternate academic achievement standards under section 1111(b)(1)(E) of the Act, the student's mastery of those standards;

(8) Provide disaggregated results by each subgroup of students described in § 200.2(b)(11)(i)(A)–(I) and sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the Act, including timely data for teachers, principals and other school leaders, students, and parents consistent with § 200.8 and section 1111(b)(2)(B)(x) and (xii) and section 1111(h) of the Act, and provide results to parents in a manner consistent with paragraph (b)(4)(i) of this section and § 200.2(e); and

(9) Provide an unbiased, rational, and consistent determination of progress toward the State's long-term goals for academic achievement under section 1111(c)(4)(A) of the Act for all students and each subgroup of students described in section 1111(c)(2) of the Act and a comparable measure of student performance on the Academic Achievement indicator under section 1111(c)(4)(B) of the Act for participating schools relative to non-participating schools so that the SEA may validly and reliably aggregate data from the system for purposes of meeting requirements for—

(i) Accountability under sections 1003 and 1111(c) and (d) of the Act, including how the SEA will identify participating and non-participating schools in a consistent manner for comprehensive and targeted support and improvement under section 1111(c)(4)(D) of the Act; and

(ii) Reporting on State and LEA report cards under section 1111(h) of the Act.

(c) *Selection criteria.* Information that addresses each of the selection criteria under § 200.106.

(d) *Assurances.* Assurances that the SEA, or each SEA in a consortium, will—

(1) Continue use of the statewide academic assessments in reading/language arts, mathematics, and science required under § 200.2(a)(1) and section 1111(b)(2) of the Act—

(i) In all non-participating schools; and

(ii) In all participating schools for which such assessments will be used in addition to innovative assessments for accountability purposes under section 1111(c) of the Act consistent with paragraph (b)(1)(ii) of this section or for evaluation purposes consistent with § 200.106(e) during the demonstration authority period;

(2) Ensure that all students and each subgroup of students described in section 1111(c)(2) of the Act in participating schools are held to the same challenging State academic standards under section 1111(b)(1) of the Act as all other students, except that students with the most significant cognitive disabilities may be assessed with alternate assessments aligned with alternate academic achievement standards consistent with § 200.6 and section 1111(b)(1)(E) and (b)(2)(D) of the Act, and receive the instructional support needed to meet such standards;

(3) Report the following annually to the Secretary, at such time and in such manner as the Secretary may reasonably require:

(i) An update on implementation of the innovative assessment demonstration authority, including—

(A) The SEA's progress against its timeline under § 200.106(c) and any outcomes or results from its evaluation and continuous improvement process under § 200.106(e); and

(B) If the innovative assessment system is not yet implemented statewide consistent with § 200.104(a)(2), a description of the SEA's progress in scaling up the system to additional LEAs or schools consistent with its strategies under § 200.106(a)(3)(i), including updated assurances from participating LEAs consistent with paragraph (e)(2) of this section.

(ii) The performance of students in participating schools at the State, LEA, and school level, for all students and disaggregated for each subgroup of students described in section 1111(c)(2) of the Act, on the innovative assessment, including academic achievement and participation data required to be reported consistent with

section 1111(h) of the Act, except that such data may not reveal any personally identifiable information.

(iii) If the innovative assessment system is not yet implemented statewide, school demographic information, including enrollment and student achievement information, for the subgroups of students described in section 1111(c)(2) of the Act, among participating schools and LEAs and for any schools or LEAs that will participate for the first time in the following year, and a description of how the participation of any additional schools or LEAs in that year contributed to progress toward achieving high-quality and consistent implementation across demographically diverse LEAs in the State consistent with the SEA's benchmarks described in § 200.106(a)(3)(iii).

(iv) Feedback from teachers, principals and other school leaders, and other stakeholders consulted under paragraph (a)(2) of this section, including parents and students, from participating schools and LEAs about their satisfaction with the innovative assessment system;

(4) Ensure that each participating LEA informs parents of all students in participating schools about the innovative assessment, including the grades and subjects in which the innovative assessment will be administered, and, consistent with section 1112(e)(2)(B) of the Act, at the beginning of each school year during which an innovative assessment will be implemented. Such information must be—

(i) In an understandable and uniform format;

(ii) To the extent practicable, written in a language that parents can understand or, if it is not practicable to provide written translations to a parent with limited English proficiency, be orally translated for such parent; and

(iii) Upon request by a parent who is an individual with a disability as defined by the Americans with Disabilities Act, provided in an alternative format accessible to that parent; and

(5) Coordinate with and provide information to, as applicable, the Institute of Education Sciences for purposes of the progress report described in section 1204(c) of the Act and ongoing dissemination of information under section 1204(m) of the Act.

(e) *Initial implementation in a subset of LEAs or schools.* If the innovative assessment system will initially be administered in a subset of LEAs or schools in a State—

(1) A description of each LEA, and each of its participating schools, that will initially participate, including demographic information and its most recent LEA report card under section 1111(h)(2) of the Act; and

(2) An assurance from each participating LEA, for each year that the LEA is participating, that the LEA will comply with all requirements of this section.

(f) *Application from a consortium of SEAs.* If an application for the innovative assessment demonstration authority is submitted by a consortium of SEAs—

(1) A description of the governance structure of the consortium, including—

(i) The roles and responsibilities of each member SEA, which may include a description of affiliate members, if applicable, and must include a description of financial responsibilities of member SEAs;

(ii) How the member SEAs will manage and, at their discretion, share intellectual property developed by the consortium as a group; and

(iii) How the member SEAs will consider requests from SEAs to join or leave the consortium and ensure that changes in membership do not affect the consortium's ability to implement the innovative assessment demonstration authority consistent with the requirements and selection criteria in this section and § 200.106.

(2) While the terms of the association with affiliate members are defined by each consortium, consistent with § 200.104(b)(1) and paragraph (f)(1)(i) of this section, for an affiliate member to become a full member of the consortium and to use the consortium's innovative assessment system under the demonstration authority, the consortium must submit a revised application to the Secretary for approval, consistent with the requirements of this section and § 200.106 and subject to the limitation under § 200.104(d).

(Authority: 20 U.S.C. 1221e–3, 3474, 6364, 6571; 29 U.S.C. 794; 42 U.S.C. 2000d–1; 42 U.S.C. 12101; 42 U.S.C. 12102)

■ 5. Add § 200.106 to read as follows:

§ 200.106 Demonstration authority selection criteria.

The Secretary reviews an application by an SEA or consortium of SEAs seeking innovative assessment demonstration authority consistent with § 200.104(c) based on the following selection criteria:

(a) *Project narrative.* The quality of the SEA's or consortium's plan for implementing the innovative assessment demonstration authority. In determining the quality of the plan, the Secretary considers—

(1) The rationale for developing or selecting the particular innovative assessment system to be implemented under the demonstration authority, including—

(i) The distinct purpose of each assessment that is part of the innovative assessment system and how the system will advance the design and delivery of large-scale, statewide academic assessments in innovative ways; and

(ii) The extent to which the innovative assessment system as a whole will promote high-quality instruction, mastery of challenging State academic standards, and improved student outcomes, including for each subgroup of students described in section 1111(c)(2) of the Act;

(2) The plan the SEA or consortium, in consultation with any external partners, if applicable, has to—

(i) Develop and use standardized and calibrated tools, rubrics, methods, or other strategies for scoring innovative assessments throughout the demonstration authority period, consistent with relevant nationally recognized professional and technical standards, to ensure inter-rater reliability and comparability of innovative assessment results consistent with § 200.105(b)(4)(ii), which may include evidence of inter-rater reliability; and

(ii) Train evaluators to use such strategies, if applicable; and

(3) If the system will initially be administered in a subset of schools or LEAs in a State—

(i) The strategies the SEA, including each SEA in a consortium, will use to scale the innovative assessment to all schools statewide, with a rationale for selecting those strategies;

(ii) The strength of the SEA's or consortium's criteria that will be used to determine LEAs and schools that will initially participate and when to approve additional LEAs and schools, if applicable, to participate during the requested demonstration authority period; and

(iii) The SEA's plan, including each SEA in a consortium, for how it will ensure that, during the demonstration authority period, the inclusion of additional LEAs and schools continues to reflect high-quality and consistent implementation across demographically diverse LEAs and schools, or contributes to progress toward achieving such implementation across demographically diverse LEAs and schools, including diversity based on enrollment of subgroups of students described in section 1111(c)(2) of the

Act and student achievement. The plan must also include annual benchmarks toward achieving high-quality and consistent implementation across participating schools that are, as a group, demographically similar to the State as a whole during the demonstration authority period, using the demographics of initially participating schools as a baseline.

(b) *Prior experience, capacity, and stakeholder support.* (1) The extent and depth of prior experience that the SEA, including each SEA in a consortium, and its LEAs have in developing and implementing the components of the innovative assessment system. An SEA may also describe the prior experience of any external partners that will be participating in or supporting its demonstration authority in implementing those components. In evaluating the extent and depth of prior experience, the Secretary considers—

(i) The success and track record of efforts to implement innovative assessments or innovative assessment items aligned to the challenging State academic standards under section 1111(b)(1) of the Act in LEAs planning to participate; and

(ii) The SEA's or LEA's development or use of—

(A) Effective supports and appropriate accommodations consistent with § 200.6(b) and (f)(1)(i) and section 1111(b)(2)(B)(vii) of the Act for administering innovative assessments to all students, including English learners and children with disabilities, which must include professional development for school staff on providing such accommodations;

(B) Effective and high-quality supports for school staff to implement innovative assessments and innovative assessment items, including professional development; and

(C) Standardized and calibrated tools, rubrics, methods, or other strategies for scoring innovative assessments, with documented evidence of the validity, reliability, and comparability of annual summative determinations of achievement, consistent with § 200.105(b)(4) and (7).

(2) The extent and depth of SEA, including each SEA in a consortium, and LEA capacity to implement the innovative assessment system considering the availability of technological infrastructure; State and local laws; dedicated and sufficient staff, expertise, and resources; and other relevant factors. An SEA or consortium may also describe how it plans to enhance its capacity by collaborating with external partners that will be participating in or supporting its demonstration authority. In evaluating the extent and depth of capacity, the Secretary considers—

(i) The SEA's analysis of how capacity influenced the success of prior efforts to develop and implement innovative assessments or innovative assessment items; and

(ii) The strategies the SEA is using, or will use, to mitigate risks, including those identified in its analysis, and support successful implementation of the innovative assessment.

(3) The extent and depth of State and local support for the application for demonstration authority in each SEA, including each SEA in a consortium, as demonstrated by signatures from the following:

(i) Superintendents (or equivalent) of LEAs, including participating LEAs in the first year of the demonstration authority period.

(ii) Presidents of local school boards (or equivalent, where applicable), including within participating LEAs in the first year of the demonstration authority.

(iii) Local teacher organizations (including labor organizations, where applicable), including within participating LEAs in the first year of the demonstration authority.

(iv) Other affected stakeholders, such as parent organizations, civil rights organizations, and business organizations.

(c) *Timeline and budget.* The quality of the SEA's or consortium's timeline and budget for implementing the innovative assessment demonstration authority. In determining the quality of the timeline and budget, the Secretary considers—

(1) The extent to which the timeline reasonably demonstrates that each SEA will implement the system statewide by the end of the requested demonstration authority period, including a description of—

(i) The activities to occur in each year of the requested demonstration authority period;

(ii) The parties responsible for each activity; and

(iii) If applicable, how a consortium's member SEAs will implement activities at different paces and how the consortium will implement interdependent activities, so long as each non-affiliate member SEA begins using the innovative assessment in the same school year consistent with § 200.104(b)(2); and

(2) The adequacy of the project budget for the duration of the requested demonstration authority period, including Federal, State, local, and non-public sources of funds to support and sustain, as applicable, the activities in the timeline under paragraph (c)(1) of this section, including—

(i) How the budget will be sufficient to meet the expected costs at each phase of the SEA's planned expansion of its innovative assessment system; and

(ii) The degree to which funding in the project budget is contingent upon future appropriations at the State or local level or additional commitments from non-public sources of funds.

(d) *Supports for educators, students, and parents.* The quality of the SEA or consortium's plan to provide supports that can be delivered consistently at scale to educators, students, and parents to enable successful implementation of the innovative assessment system and improve instruction and student outcomes. In determining the quality of supports, the Secretary considers—

(1) The extent to which the SEA or consortium has developed, provided, and will continue to provide training to LEA and school staff, including teachers, principals, and other school leaders, that will familiarize them with the innovative assessment system and develop teacher capacity to implement instruction that is informed by the innovative assessment system and its results;

(2) The strategies the SEA or consortium has developed and will use to familiarize students and parents with the innovative assessment system;

(3) The strategies the SEA will use to ensure that all students and each subgroup of students under section 1111(c)(2) of the Act in participating schools receive the support, including appropriate accommodations consistent with § 200.6(b) and (f)(1)(i) and section 1111(b)(2)(B)(vii) of the Act, needed to meet the challenging State academic standards under section 1111(b)(1) of the Act; and

(4) If the system includes assessment items that are locally developed or locally scored, the strategies and safeguards (*e.g.,* test blueprints, item and task specifications, rubrics, scoring tools, documentation of quality control procedures, inter-rater reliability checks, audit plans) the SEA or consortium has developed, or plans to develop, to validly and reliably score such items, including how the strategies engage and support teachers and other staff in designing, developing, implementing, and validly and reliably scoring high-quality assessments; how the safeguards are sufficient to ensure unbiased, objective scoring of assessment items; and how the SEA will use effective professional development to aid in these efforts.

(e) *Evaluation and continuous improvement.* The quality of the SEA's or consortium's plan to annually evaluate its implementation of innovative assessment demonstration authority. In determining the quality of the evaluation, the Secretary considers—

(1) The strength of the proposed evaluation of the innovative assessment system included in the application, including whether the evaluation will be conducted by an independent, experienced third party, and the likelihood that the evaluation will sufficiently determine the system's validity, reliability, and comparability to the statewide assessment system consistent with the requirements of § 200.105(b)(4) and (9); and

(2) The SEA's or consortium's plan for continuous improvement of the innovative assessment system, including its process for—

(i) Using data, feedback, evaluation results, and other information from participating LEAs and schools to make changes to improve the quality of the innovative assessment; and

(ii) Evaluating and monitoring implementation of the innovative assessment system in participating LEAs and schools annually.

(Authority: 20 U.S.C. 1221e–3, 3474, 6364, 6571)

■ 6. Add § 200.107 to read as follows:

§ 200.107 Transition to statewide use.

(a)(1) After an SEA has scaled its innovative assessment system to operate statewide in all schools and LEAs in the State, the SEA must submit evidence for peer review under section 1111(a)(4) of the Act and § 200.2(d) to determine whether the system may be used for purposes of both academic assessments and the State accountability system under sections 1111(b)(2), (c), and (d) and 1003 of the Act.

(2) An SEA may only use the innovative assessment system for the purposes described in paragraph (a)(1) of this section if the Secretary determines that the system is of high quality consistent with paragraph (b) of this section.

(b) Through the peer review process of State assessments and accountability systems under section 1111(a)(4) of the Act and § 200.2(d), the Secretary determines that the innovative assessment system is of high quality if—

(1) An innovative assessment developed in any grade or subject under § 200.5(a)(1) and section 1111(b)(2)(B)(v) of the Act—

(i) Meets all of the requirements under section 1111(b)(2) of the Act and § 200.105(b) and (c);

(ii) Provides coherent and timely information about student achievement based on the challenging State academic standards under section 1111(b)(1) of the Act;

(iii) Includes objective measurements of academic achievement, knowledge, and skills; and

(iv) Is valid, reliable, and consistent with relevant, nationally recognized professional and technical standards;

(2) The SEA provides satisfactory evidence that it has examined the statistical relationship between student performance on the innovative assessment in each subject area and student performance on other measures of success, including the measures used for each relevant grade-span within the remaining indicators (*i.e.,* indicators besides Academic Achievement) in the statewide accountability system under section 1111(c)(4)(B)(ii)–(v) of the Act, and how the inclusion of the innovative assessment in its Academic Achievement indicator under section 1111(c)(4)(B)(i) of the Act affects the annual meaningful differentiation of schools under section 1111(c)(4)(C) of the Act;

(3) The SEA has solicited information, consistent with the requirements under § 200.105(d)(3)(iv), and taken into account feedback from teachers, principals, other school leaders, parents, and other stakeholders under § 200.105(a)(2) about their satisfaction with the innovative assessment system; and

(4) The SEA has demonstrated that the same innovative assessment system was used to measure—

(i) The achievement of all students and each subgroup of students described in section 1111(c)(2) of the Act, and that appropriate accommodations were provided consistent with § 200.6(b) and (f)(1)(i) under section 1111(b)(2)(B)(vii) of the Act; and

(ii) For purposes of the State accountability system consistent with section 1111(c)(4)(E) of the Act, progress on the Academic Achievement indicator under section 1111(c)(4)(B)(i) of the Act of at least 95 percent of all students, and 95 percent of students in each subgroup of students described in section 1111(c)(2) of the Act.

(c) With respect to the evidence submitted to the Secretary to make the determination described in paragraph (b)(2) of this section, the baseline year for any evaluation is the first year that a participating LEA in the State administered the innovative assessment system under the demonstration authority.

(d) In the case of a consortium of SEAs, evidence may be submitted for the consortium as a whole so long as the evidence demonstrates how each member SEA meets each requirement of paragraph (b) of this section applicable to an SEA.

(Authority: 20 U.S.C. 1221e–3, 3474, 6311(a), 6364, 6571)

■ 7. Add § 200.108 to read as follows:

§ 200.108 Extension, waivers, and withdrawal of authority.

(a) *Extension.* (1) The Secretary may extend an SEA's demonstration authority period for no more than two years if the SEA submits to the Secretary—

(i) Evidence that its innovative assessment system continues to meet the requirements under § 200.105 and the SEA continues to implement the plan described in its application in response to the selection criteria in § 200.106 in all participating schools and LEAs;

(ii) A high-quality plan, including input from stakeholders under § 200.105(a)(2), for transitioning to statewide use of the innovative assessment system by the end of the extension period; and

(iii) A demonstration that the SEA and all LEAs that are not yet fully implementing the innovative assessment system have sufficient capacity to support use of the system statewide by the end of the extension period.

(2) In the case of a consortium of SEAs, the Secretary may extend the demonstration authority period for the consortium as a whole or for an individual member SEA.

(b) *Withdrawal of demonstration authority.* (1) The Secretary may withdraw the innovative assessment demonstration authority provided to an SEA, including an individual SEA member of a consortium, if at any time during the approved demonstration authority period or extension period, the Secretary requests, and the SEA does not present in a timely manner—

(i) A high-quality plan, including input from stakeholders under § 200.105(a)(2), to transition to full statewide use of the innovative assessment system by the end of its approved demonstration authority period or extension period, as applicable; or

(ii) Evidence that—

(A) The innovative assessment system meets all requirements under § 200.105, including a demonstration that the innovative assessment system has met the requirements under § 200.105(b);

(B) The SEA continues to implement the plan described in its application in response to the selection criteria in § 200.106;

(C) The innovative assessment system includes and is used to assess all students attending participating schools in the demonstration authority, consistent with the requirements under section 1111(b)(2) of the Act to provide for participation in State assessments, including among each subgroup of students described in section 1111(c)(2) of the Act, and for appropriate accommodations consistent with § 200.6(b) and (f)(1)(i) and section 1111(b)(2)(B)(vii) of the Act;

(D) The innovative assessment system provides an unbiased, rational, and consistent determination of progress toward the State's long-term goals and measurements of interim progress for academic achievement under section 1111(c)(4)(A) of the Act for all students and subgroups of students described in section 1111(c)(2) of the Act and a comparable measure of student performance on the Academic Achievement indicator under section 1111(c)(4)(B)(i) of the Act for participating schools relative to non-participating schools; or

(E) The innovative assessment system demonstrates comparability to the statewide assessments under section 1111(b)(2) of the Act in content coverage, difficulty, and quality.

(2)(i) In the case of a consortium of SEAs, the Secretary may withdraw innovative assessment demonstration authority for the consortium as a whole at any time during its demonstration authority period or extension period if the Secretary requests, and no member of the consortium provides, the information under paragraph (b)(1)(i) or (ii) of this section.

(ii) If innovative assessment demonstration authority for one or more SEAs in a consortium is withdrawn, the consortium may continue to implement the authority if it can demonstrate, in an amended application to the Secretary that, as a group, the remaining SEAs continue to meet all requirements and selection criteria in §§ 200.105 and 200.106.

(c) *Waiver authority.* (1) At the end of the extension period, an SEA that is not yet approved consistent with § 200.107 to implement its innovative assessment system statewide may request a waiver from the Secretary consistent with section 8401 of the Act to delay the withdrawal of authority under paragraph (b) of this section for the purpose of providing the SEA with the time necessary to receive approval to transition to use of the innovative assessment system statewide under § 200.107(b).

(2) The Secretary may grant an SEA a one-year waiver to continue the innovative assessment demonstration authority, if the SEA submits, in its request under paragraph (c)(1) of this section, evidence satisfactory to the Secretary that it—

(i) Has met all of the requirements under paragraph (b)(1) of this section and of §§ 200.105 and 200.106; and

(ii) Has a high-quality plan, including input from stakeholders under § 200.105(a)(2), for transition to statewide use of the innovative assessment system, including peer review consistent with § 200.107, in a reasonable period of time.

(3) In the case of a consortium of SEAs, the Secretary may grant a one-year waiver consistent with paragraph (c)(1) of this section for the consortium as a whole or for individual member SEAs, as necessary.

(d) *Return to the statewide assessment system.* If the Secretary withdraws innovative assessment demonstration authority consistent with paragraph (b) of this section, or if an SEA voluntarily terminates use of its innovative assessment system prior to the end of its demonstration authority, extension, or waiver period under paragraph (c) of this section, as applicable, the SEA must—

(1) Return to using, in all LEAs and schools in the State, a statewide assessment that meets the requirements of section 1111(b)(2) of the Act; and

(2) Provide timely notice to all participating LEAs and schools of the withdrawal of authority and the SEA's plan for transition back to use of a statewide assessment.

(**AUTHORITY:** 20 U.S.C. 1221e–3, 3474, 6364, 6571)

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