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Presidential Documents

Title 3—

The President

Proclamation 10330 of December 29, 2021

Death of Harry Reid

By the President of the United States of America

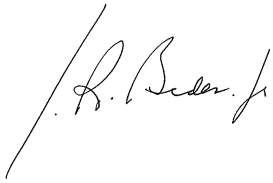
A Proclamation

From humble roots in Searchlight, Nevada, Harry Reid rose to become one of the great Senate Majority Leaders in American history. He was a man of action, and a man of his word—guided by faith, loyalty, and unshakeable resolve.

Throughout his long career of public service, Harry Reid was instrumental in passing landmark legislation that made a positive difference in the lives of countless Americans and made our Nation stronger and safer. His devoted service to our Nation was not about power for power's sake. It was about the power to do right by the American people.

As a mark of respect for his memory, I hereby order, by the authority vested in me by the Constitution and the laws of the United States of America, that on the day of his interment, the flag of the United States shall be flown at half-staff at the White House and upon all public buildings and grounds, at all military posts and naval stations, and on all naval vessels of the Federal Government in the District of Columbia and throughout the United States and its Territories and possessions until sunset on such day. I also direct that the flag shall be flown at half-staff for the same period at all United States embassies, legations, consular offices, and other facilities abroad, including all military facilities and naval vessels and stations.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-ninth day of December, in the year of our Lord two thousand twenty-one, and of the Independence of the United States of America the two hundred and forty-sixth.



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Rules and Regulations

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

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31407; Amdt. No. 3990]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide for the safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective January 4, 2022. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 4, 2022.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops-M30, 1200 New Jersey Avenue SE, West Bldg., Ground Floor, Washington, DC 20590–0001;

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Information Services, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA).

For information on the availability of this material at NARA, email *fr.inspection@nara.gov* or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center online at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedures and Airspace Group, Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration. Mailing Address: FAA Mike Monroney Aeronautical Center, Flight Procedures and Airspace Group, 6500 South MacArthur Blvd., Registry Bldg. 29, Room 104, Oklahoma City, OK 73169. Telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends 14 CFR part 97 by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (NFDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20. The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained on FAA form documents is unnecessary. This amendment provides the affected CFR sections, and specifies the SIAPs and Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPs, Takeoff Minimums and ODPs as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP and Takeoff Minimums and ODP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP and Takeoff Minimums and ODP as modified by FDC permanent NOTAMs.

The SIAPs and Takeoff Minimums and ODPs, as modified by FDC permanent NOTAM, and contained in this amendment are based on criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for these SIAP and Takeoff Minimums and ODP amendments require making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making these SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which

frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, Navigation (Air).

Issued in Washington, DC, on December 24, 2021.

Thomas J. Nichols,

Aviation Safety, Flight Standards Service, Manager, Standards Section, Flight Procedures & Airspace Group, Flight Technologies & Procedures Division.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, CFR part 97, (is amended by amending Standard Instrument Approach Procedures and Takeoff Minimums and ODPs, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

By Amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as Follows:

** * * Effective Upon Publication*

Airac date	State	City	Airport	FDC No.	FDC date	Subject
27–Jan–22	KY	Prestonsburg	Big Sandy Rgnl	1/4406	12/2/21	This NOTAM, published in Docket No. 31405, Amdt No. 3988, TL 22–03, (86 FR 73673, December 28, 2021) is hereby rescinded in its entirety.
27–Jan–22	TN	Lewisburg	Ellington	1/9064	11/3/21	This NOTAM, published in Docket No. 31405, Amdt No. 3988, TL 22–03, (86 FR 73673) is hereby rescinded in its entirety.
27–Jan–22	TX	Navasota	Navasota Muni	1/0090	12/14/21	VOR–A, Amdt 2B.
27–Jan–22	TN	Lewisburg	Ellington	1/0113	12/13/21	RNAV (GPS) RWY 20, Amdt 1A.
27–Jan–22	CA	Delano	Delano Muni	1/0150	12/13/21	VOR RWY 32, Amdt 8.
27–Jan–22	WY	Guernsey	Camp Guernsey	1/0157	12/13/21	RNAV (GPS) RWY 32, Orig-C.
27–Jan–22	PA	Harrisburg	Harrisburg Intl	1/0196	12/13/21	ILS OR LOC RWY 13, Amdt 2A.
27–Jan–22	PA	Harrisburg	Harrisburg Intl	1/0197	12/13/21	ILS OR LOC RWY 31, Amdt 1E.
27–Jan–22	PA	Harrisburg	Harrisburg Intl	1/0200	12/13/21	RNAV (GPS) RWY 13, Amdt 1.
27-Jan-22	PA	Harrisburg	Harrisburg Intl	1/0201	12/13/21	RNAV (GPS) RWY 31, Amdt 1.
27–Jan–22	TX	Midlothian/ Waxahachie.	Mid-Way Rgnl	1/0217	12/13/21	RNAV (GPS) RWY 18, Orig-B.
27–Jan–22	TX	Midlothian/ Waxahachie.	Mid-Way Rgnl	1/0218	12/13/21	RNAV (GPS) RWY 36, Orig.
27–Jan–22	TX	Giddings	Giddings-Lee County	1/0234	12/13/21	RNAV (GPS) RWY 17, Orig-A.
27–Jan–22	TX	Giddings	Giddings-Lee County	1/0235	12/13/21	RNAV (GPS) RWY 35, Orig-A.
27–Jan–22	TX	Giddings	Giddings-Lee County	1/0236	12/13/21	VOR/DME–A, Amdt 3A.
27–Jan–22	MA	Montague	Turners Falls	1/0361	12/13/21	RNAV (GPS)–B, Orig-A.
27–Jan–22	AR	Batesville	Batesville Rgnl	1/0564	12/13/21	LOC RWY 8, Amdt 1B.
27–Jan–22	OH	Marion	Marion Muni	1/0747	12/14/21	RNAV (GPS) RWY 7, Orig.
27–Jan–22	OH	Marion	Marion Muni	1/0748	12/14/21	RNAV (GPS) RWY 13, Orig-A.
27–Jan–22	OH	Marion	Marion Muni	1/0749	12/14/21	RNAV (GPS) RWY 25, Orig-A.
27–Jan–22	OH	Marion	Marion Muni	1/0750	12/14/21	VOR–A, Amdt 1A.
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27–Jan–22	HI	Kamuela	Waimea-Kohala	1/0786	12/14/21	VOR/DME RWY 4, Amdt 1B.
27–Jan–22	HI	Kamuela	Waimea-Kohala	1/0787	12/14/21	VOR/DME–A, Orig-A.
27–Jan–22	SC	Saluda	Saluda County	1/0927	12/7/21	RNAV (GPS) RWY 19, Orig.
27–Jan–22	AK	McGrath	Mc Grath	1/0944	11/24/21	LOC/DME RWY 16, Amdt 3A.
27–Jan–22	AK	McGrath	Mc Grath	1/0945	11/24/21	RNAV (GPS) RWY 16, Amdt 1A.
27–Jan–22	AK	McGrath	Mc Grath	1/0946	11/24/21	VOR/DME–C, Amdt 2.
27–Jan–22	MA	New Bedford	New Bedford Rgnl	1/1605	12/15/21	RNAV (GPS) RWY 32, Orig-B.
27–Jan–22	MA	New Bedford	New Bedford Rgnl	1/1608	12/15/21	RNAV (GPS) RWY 14, Orig-C.
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27–Jan–22	UT	Huntington	Huntington Muni	1/2746	12/13/21	VOR–B, Amdt 1A.
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27–Jan–22	FL	Sebring	Sebring Rgnl	1/2878	12/13/21	RNAV (GPS) RWY 14, Orig-B.
27–Jan–22	AL	Jackson	Jackson Muni	1/2931	12/10/21	RNAV (GPS) RWY 1, Orig-A.
27–Jan–22	AL	Jackson	Jackson Muni	1/2933	12/10/21	RNAV (GPS) RWY 19, Orig.
27–Jan–22	CA	Camarillo	Camarillo	1/3342	12/13/21	RNAV (GPS) Y RWY 26, Orig.

Airac date	State	City	Airport	FDC No.	FDC date	Subject
27–Jan–22	NY	Penn Yan	Penn Yan	1/3797	12/13/21	RNAV (GPS) RWY 19, Orig-C.
27–Jan–22	NY	Penn Yan	Penn Yan	1/3799	12/13/21	RNAV (GPS) RWY 1, Amdt 3B.
27–Jan–22	OH	Cleveland	Cleveland-Hopkins Intl	1/4047	12/13/21	ILS OR LOC RWY 24R, Amdt 7.
27–Jan–22	WI	Medford	Taylor County	1/4260	12/13/21	RNAV (GPS) RWY 16, Orig-B.
27–Jan–22	WI	Medford	Taylor County	1/4283	12/13/21	RNAV (GPS) RWY 34, Orig-B.
27–Jan–22	IL	Flora	Flora Muni	1/4361	12/13/21	LOC RWY 21, Orig-E.
27–Jan–22	MO	Joplin	Joplin Rgnl	1/4829	11/12/21	RNAV (GPS) RWY 31, Amdt 1B.
27–Jan–22	AR	Batesville	Batesville Rgnl	1/5239	12/13/21	RNAV (GPS) RWY 26, Amdt 1B.
27–Jan–22	AR	Batesville	Batesville Rgnl	1/5241	12/13/21	RNAV (GPS) RWY 8, Amdt 1C.
27–Jan–22	SC	Florence	Florence Rgnl	1/5831	12/13/21	RNAV (GPS) RWY 1, Orig-B.
27–Jan–22	SC	Florence	Florence Rgnl	1/6201	12/13/21	ILS OR LOC RWY 9, Amdt 12B.
27–Jan–22	SC	Florence	Florence Rgnl	1/6307	12/13/21	VOR OR TACAN–A, Amdt 6B.
27–Jan–22	MN	Warren	Warren Muni	1/6508	12/10/21	RNAV (GPS) RWY 30, Orig-A.
27–Jan–22	NE	Omaha	Millard	1/6811	12/13/21	RNAV (GPS) RWY 12, Orig-A.
27–Jan–22	NE	Omaha	Millard	1/6816	12/13/21	RNAV (GPS) RWY 30, Orig-A.
27–Jan–22	MD	Westminster	Clearview Airpark	1/7161	12/7/21	VOR–A, Amdt 4A.
27–Jan–22	UT	Blanding	Blanding Muni	1/7189	12/7/21	RNAV (GPS) RWY 35, Amdt 2C.
27–Jan–22	WI	Merrill	Merrill Muni	1/7191	12/7/21	RNAV (GPS) RWY 25, Amdt 1A.
27–Jan–22	WI	Merrill	Merrill Muni	1/7192	12/7/21	RNAV (GPS) RWY 7, Amdt 1B.
27–Jan–22	TN	Mountain City	Johnson County	1/7194	12/7/21	RNAV (GPS) RWY 24, Orig-A.
27–Jan–22	TN	Mountain City	Johnson County	1/7195	12/7/21	RNAV (GPS) RWY 6, Orig-A.
27–Jan–22	KS	Parsons	Tri-City	1/7198	12/7/21	VOR RWY 17, Orig-A.
27–Jan–22	KS	Parsons	Tri-City	1/7199	12/7/21	RNAV (GPS) RWY 17, Amdt 1A.
27–Jan–22	KS	Parsons	Tri-City	1/7200	12/7/21	RNAV (GPS) RWY 35, Amdt 1A.
27–Jan–22	AZ	Window Rock	Window Rock	1/7223	12/7/21	RNAV (GPS) RWY 3, Amdt 2.
27–Jan–22	OH	Tiffin	Seneca County	1/7268	12/13/21	RNAV (GPS) RWY 6, Orig-B.
27–Jan–22	OH	Tiffin	Seneca County	1/7269	12/13/21	RNAV (GPS) RWY 24, Amdt 1C.
27–Jan–22	OH	Tiffin	Seneca County	1/7270	12/13/21	NDB RWY 24, Amdt 7D.
27–Jan–22	CO	Cortez	Cortez Muni	1/7275	12/13/21	RNAV (GPS) Y RWY 21, Orig-B.
27–Jan–22	CO	Cortez	Cortez Muni	1/7276	12/13/21	VOR RWY 21, Amdt 5B.
27–Jan–22	GA	Atlanta	Cobb County Intl/Mccollum Fld	1/7279	12/13/21	ILS OR LOC RWY 27, Amdt 4E.
27–Jan–22	GA	Atlanta	Cobb County Intl/Mccollum Fld	1/7280	12/13/21	RNAV (GPS) RWY 27, Amdt 4B.
27–Jan–22	GA	Atlanta	Cobb County Intl/Mccollum Fld	1/7281	12/13/21	VOR/DME RWY 9, Amdt 2A.
27–Jan–22	GA	Atlanta	Cobb County Intl/Mccollum Fld	1/7282	12/13/21	RNAV (GPS) RWY 9, Amdt 3B.
27–Jan–22	KS	Colby	Shalz Fld	1/7514	12/13/21	NDB RWY 17, Amdt 1A.
27–Jan–22	IN	Knox	Starke County	1/7519	12/13/21	RNAV (GPS) RWY 18, Orig.
27–Jan–22	NY	Plattsburgh	Plattsburgh Intl	1/7558	12/7/21	RNAV (GPS) RWY 17, Amdt 1B.
27–Jan–22	MT	Fort Benton	Fort Benton	1/7564	12/7/21	RNAV (GPS) RWY 23, Orig.
27–Jan–22	NY	Endicott	Tri-Cities	1/7571	12/7/21	RNAV (GPS) RWY 21, Orig-B.
27–Jan–22	NY	Endicott	Tri-Cities	1/7572	12/7/21	VOR–A, Amdt 5A.
27–Jan–22	FL	Keystone Heights	Keystone Heights	1/7591	12/7/21	RNAV (GPS) RWY 5, Orig-B.
27–Jan–22	TX	Mineola/Quitman	Wood County—Collins Fld	1/7602	12/7/21	RNAV (GPS) RWY 18, Orig-C.
27–Jan–22	TX	Mineola/Quitman	Wood County—Collins Fld	1/7609	12/7/21	RNAV (GPS) RWY 36, Orig-D.
27–Jan–22	LA	Mansfield	C E 'Rusty' Williams	1/7823	12/10/21	RNAV (GPS) RWY 18, Orig-C.
27–Jan–22	ND	Harvey	Harvey Muni	1/8268	12/13/21	RNAV (GPS) RWY 29, Orig-D.
27–Jan–22	ME	Houlton	Houlton Intl	1/8290	12/13/21	RNAV (GPS)–A, Orig-A.
27–Jan–22	WA	Tacoma	Tacoma Narrows	1/9274	12/10/21	ILS OR LOC RWY 17, Amdt 8C.
27–Jan–22	AZ	Chandler	Stellar Airpark	1/9277	12/14/21	VOR–A, Amdt 1C.
27–Jan–22	WA	Ephrata	Ephrata Muni	1/9353	12/10/21	VOR RWY 21, Amdt 19.
27–Jan–22	IL	Benton	Benton Muni	1/9536	12/13/21	RNAV (GPS) RWY 18, Orig-B.
27–Jan–22	AR	De Queen	J Lynn Helms Sevier County	1/9540	12/10/21	RNAV (GPS) RWY 8, Orig-B.
27–Jan–22	MN	Albert Lea	Albert Lea Muni	1/9755	12/13/21	VOR RWY 35, Amdt 1C.
27–Jan–22	CA	Camarillo	Camarillo	1/9758	12/13/21	RNAV (GPS) RWY 8, Orig-A.
27–Jan–22	SC	Florence	Florence Rgnl	1/9774	12/13/21	RNAV (GPS) RWY 9, Orig-C.
27–Jan–22	SC	Florence	Florence Rgnl	1/9784	12/13/21	RNAV (GPS) RWY 19, Orig-A.
27–Jan–22	SC	Florence	Florence Rgnl	1/9786	12/13/21	RNAV (GPS) RWY 27, Orig-C.

[FR Doc. 2021–28460 Filed 1–3–22; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

Docket No. 31406; Amdt. No. 3989]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or removes Standard Instrument Approach Procedures (SIAPS) and associated Takeoff Minimums and Obstacle Departure procedures (ODPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective January 4, 2022. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as January 4, 2022.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops-M30. 1200 New Jersey Avenue SE, West Bldg., Ground Floor, Washington, DC 20590–0001.

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Information Services, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fr.inspection@nara.gov* or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedures and Airspace Group, Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration. Mailing Address: FAA Mike Monroney Aeronautical Center, Flight Procedures and Airspace Group, 6500 South MacArthur Blvd., Registry Bldg. 29, Room 104, Oklahoma City, OK 73169. Telephone (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends 14 CFR part 97 by establishing, amending, suspending, or removes SIAPS, Takeoff Minimums and/or ODPS. The complete regulatory description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, 8260–15B, when required by an entry on 8260–15A, and 8260–15C.

The large number of SIAPs, Takeoff Minimums and ODPs, their complex nature, and the need for a special format make publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their graphic depiction on charts printed by publishers or aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the typed of SIAPS, Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure, and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPS, Takeoff Minimums and/or ODPs as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as amended in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flights safety relating directly to published aeronautical charts.

The circumstances that created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPs and Takeoff Minimums and ODPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making some SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Lists of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, Navigation (Air).

Issued in Washington, DC, on December 24, 2021.

Thomas J. Nichols,

Aviation Safety, Flight Standards Service Manager, Standards Section, Flight Procedures & Airspace Group, Flight Technologies & Procedures Division.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, Part 97 (14 CRF part 97) is amended by establishing, amending, suspending, or removing Standard Instrument Approach Procedures and/or Takeoff Minimums and Obstacle Departure Procedures effective at 0901 UTC on the dates specified, as follows:

Part 97—Standard Instrument Approach Procedures

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

Effective 27 January 2022

Huntsville, AL, KHSV, ILS OR LOC RWY 18R, ILS RWY 18R (CAT II), Amdt 26
Huntsville, AL, KHSV, ILS OR LOC RWY 36L, Amdt 12
Huntsville, AL, KHSV, RNAV (GPS) RWY 18R, Amdt 3
Huntsville, AL, KHSV, RNAV (GPS) RWY 36L, Amdt 3
Coolidge, AZ, P08, RNAV (GPS) RWY 23, Amdt 1
Cornelia, GA, KAJR, RNAV (GPS) RWY 6, Amdt 2
Cornelia, GA, KAJR, RNAV (GPS) RWY 24, Amdt 2
Cornelia, GA, Habersham County, Takeoff Minimums and Obstacle DP, Amdt 5
Cornelia, GA, KAJR, VOR RWY 6, Amdt 6C, CANCELLED
Dubuque, IA, KDBQ, LOC RWY 31, Amdt 2A
Huntington, IN, Huntington Muni, Takeoff Minimums and Obstacle DP, Amdt 2A
Kalamazoo, MI, KAZO, VOR RWY 35, Amdt 18A
Worthington, MN, KOTG, ILS OR LOC RWY 29, Amdt 2
Worthington, MN, KOTG, RNAV (GPS) RWY 29, Amdt 1
Worthington, MN, KOTG, RNAV (GPS) RWY 36, Amdt 1
Joplin, MO, KJLN, ILS OR LOC RWY 18, Amdt 3
Joplin, MO, KJLN, LOC BC RWY 31, Amdt 22
Miles City, MT, KMLS, RNAV (GPS) RWY 4, Amdt 4
Miles City, MT, KMLS, RNAV (GPS) RWY 22, Amdt 2
Miles City, MT, KMLS, VOR RWY 4, Amdt 14
Miles City, MT, KMLS, VOR RWY 22, Amdt 10
Moab, UT, KCNY, RNAV (GPS) RWY 3, Amdt 2
Moab, UT, KCNY, VOR–A, Amdt 12
Burlington, WI, KBUU, RNAV (GPS) RWY 11, Orig-D
Burlington, WI, KBUU, RNAV (GPS) RWY 29, Amdt 1D
Burlington, WI, KBUU, VOR–A, Amdt 2B

[FR Doc. 2021–28459 Filed 1–3–22; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Office of the Secretary

15 CFR Part 6

[Docket No. 211210–0257]

RIN 0605–AA63

Civil Monetary Penalty Adjustments for Inflation

AGENCY: Office of the Chief Financial Officer and Assistant Secretary for Administration, Department of Commerce.

ACTION: Final rule.

SUMMARY: This final rule is being issued to adjust for inflation each civil monetary penalty (CMP) provided by law within the jurisdiction of the United States Department of Commerce (Department of Commerce). The Department of Commerce's 2022 adjustments for inflation to CMPs apply only to CMPs with a dollar amount, and will not apply to CMPs written as functions of violations. The Department of Commerce's 2022 adjustments for inflation to CMPs apply only to those CMPs, including those whose associated violation predated such adjustment, which are assessed by the Department of Commerce after the effective date of the new CMP level.

DATES: This rule is effective January 15, 2022.

FOR FURTHER INFORMATION CONTACT: Stephen M. Kunze, Deputy Chief Financial Officer and Director for Financial Management, Office of Financial Management, at (202) 482–1207, Department of Commerce, 1401 Constitution Avenue NW, Room D200, Washington, DC 20230. The Department of Commerce's Civil Monetary Penalty Adjustments for Inflation are available for downloading from the Department of Commerce, Office of Financial Management's website at the following address: *http://www.osec.doc.gov/ofm/OFM_Publications.html.*

SUPPLEMENTARY INFORMATION:

Background

The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410; 28 U.S.C. 2461), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134), provided for agencies' adjustments for inflation to CMPs to ensure that CMPs continue to maintain their deterrent value and that CMPs due to the Federal Government were properly accounted for and collected.

A CMP is defined as any penalty, fine, or other sanction that:

1. Is for a specific monetary amount as provided by Federal law, or has a maximum amount provided for by Federal law; and,
2. Is assessed or enforced by an agency pursuant to Federal law; and,
3. Is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.

On November 2, 2015, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Section 701 of Pub. L. 114–74) further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 to improve the effectiveness of CMPs and to maintain their deterrent effect. This amendment (1) required agencies to adjust the CMP levels in effect as of November 2, 2015, with initial catch up adjustments for inflation through a final rulemaking to take effect no later than August 1, 2016; and (2) requires agencies to make subsequent annual adjustments for inflation to CMPs that shall take effect not later than January 15. The Department of Commerce's 2021 adjustments for inflation to CMPs were published in the **Federal Register** on January 11, 2021, and the new CMP levels became effective January 15, 2021.

The Department of Commerce's 2022 adjustments for inflation to CMPs apply only to CMPs with a dollar amount, and will not apply to CMPs written as functions of violations. These 2022 adjustments for inflation apply only to those CMPs, including those whose associated violation predated such adjustment, which are assessed by the Department of Commerce after the effective date of the new CMP level.

This regulation adjusts for inflation CMPs that are provided by law within the jurisdiction of the Department of Commerce. The actual CMP assessed for

a particular violation is dependent upon a variety of factors. For example, the National Oceanic and Atmospheric Administration's (NOAA) Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions (Penalty Policy), a compilation of NOAA internal guidelines that are used when assessing CMPs for violations for most of the statutes NOAA enforces, will be interpreted in a manner consistent with this regulation to maintain the deterrent effect of the CMPs. The CMP ranges in the Penalty Policy are intended to aid enforcement attorneys in determining the appropriate CMP to assess for a particular violation. NOAA's Penalty Policy is maintained and made available to the public on NOAA's Office of the General Counsel, Enforcement Section website at: *http://www.gc.noaa.gov/enforce-office.html.*

The Department of Commerce's 2022 adjustments for inflation to CMPs set forth in this regulation were determined pursuant to the methodology prescribed by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, which requires the maximum CMP, or the minimum and maximum CMP, as applicable, to be increased by the cost-of-living adjustment. The term ''cost-of-living adjustment'' is defined by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. For the 2022 adjustments for inflation to CMPs, the cost-of-living adjustment is the percentage for each CMP by which the Consumer Price Index for the month of October 2021 exceeds the Consumer Price Index for the month of October 2020.

Classification

Pursuant to 5 U.S.C. 553(b)(3)(B), there is good cause to issue this rule without prior public notice or opportunity for public comment because it would be impracticable and unnecessary. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Section 701(b)) requires agencies to make annual adjustments for inflation to CMPs notwithstanding section 553 of title 5, United States Code. Additionally, the methodology used for adjusting CMPs for inflation is given by statute, with no discretion provided to agencies regarding the substance of the adjustments for inflation to CMPs. The Department of Commerce is charged only with performing ministerial computations to determine the dollar amounts of adjustments for inflation to CMPs. Accordingly, prior public notice and an opportunity for public comment are not required for this rule. For the same reasons, there is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date.

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. Chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this rule because there are no new or revised recordkeeping or reporting requirements.

Regulatory Analysis

E.O. 12866, Regulatory Review

This rule is not a significant regulatory action as that term is defined in Executive Order 12866.

Regulatory Flexibility Act

Because notice of proposed rulemaking and opportunity for comment are not required pursuant to 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

List of Subjects in 15 CFR Part 6

Civil monetary penalties, Law enforcement.

Dated: December 21, 2021.

Stephen M. Kunze,

Deputy Chief Financial Officer and Director for Financial Management, Department of Commerce.

Authority and Issuance

■ For the reasons stated in the preamble, the Department of Commerce revise 15 CFR part 6 to read as follows:

PART 6—CIVIL MONETARY PENALTY ADJUSTMENTS FOR INFLATION

Sec.
6.1 Definitions.
6.2 Purpose and scope.
6.3 Adjustments for inflation to civil monetary penalties.
6.4 Effective date of adjustments for inflation to civil monetary penalties.
6.5 Subsequent annual adjustments for inflation to civil monetary penalties.

Authority: Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 104–134, 110 Stat. 1321 (31 U.S.C. 3701 note); Sec. 701 of Pub. L. 114–74, 129 Stat. 599 (28 U.S.C. 1 note; 28 U.S.C. 2461 note).

§ 6.1 Definitions.

(a) The *Department of Commerce* means the United States Department of Commerce.

(b) *Civil Monetary Penalty* means any penalty, fine, or other sanction that:

(1) Is for a specific monetary amount as provided by Federal law, or has a maximum amount provided for by Federal law; and

(2) Is assessed or enforced by an agency pursuant to Federal law; and

(3) Is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.

§ 6.2 Purpose and scope.

The purpose of this part is to make adjustments for inflation to civil monetary penalties, as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410; 28 U.S.C. 2461), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Section 701 of Pub. L. 114–74), of each civil monetary penalty provided by law within the jurisdiction of the United States Department of Commerce (Department of Commerce).

§ 6.3 Adjustments for inflation to civil monetary penalties.

The civil monetary penalties provided by law within the jurisdiction of the Department of Commerce, as set forth in paragraphs (a) through (f) of this section, are hereby adjusted for inflation in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, from the amounts of such civil monetary penalties that were in effect as of January 15, 2021, to the amounts of such civil monetary penalties, as thus adjusted. The year stated in parenthesis represents the year that the civil monetary penalty was last set by law or adjusted by law (excluding adjustments for inflation).

(a) *United States Department of Commerce.* (1) 31 U.S.C. 3802(a)(1), Program Fraud Civil Remedies Act of 1986 (1986), violation, maximum from $11,803 to $12,537.

(2) 31 U.S.C. 3802(a)(2), Program Fraud Civil Remedies Act of 1986 (1986), violation, maximum from $11,803 to $12,537.

(3) 31 U.S.C. 3729(a)(1)(G), False Claims Act (1986); violation, minimum from $11,803 to $12,537; maximum from $23,607 to $25,076.

(b) *Bureau of Economic Analysis.* 22 U.S.C. 3105(a), International Investment and Trade in Services Act (1990); failure to furnish information, minimum from $4,876 to $5,179; maximum from $48,762 to $51,796.

(c) *Bureau of Industry and Security.* (1) 15 U.S.C. 5408(b)(1), Fastener Quality Act (1990), violation, maximum from $48,762 to $51,796.

(2) 22 U.S.C. 6761(a)(1)(A), Chemical Weapons Convention Implementation Act (1998), violation, maximum from $39,693 to $42,163.

(3) 22 U.S.C. 6761(a)(l)(B), Chemical Weapons Convention Implementation Act (1998), violation, maximum from $7,939 to $8,433.

(4) 50 U.S.C. 1705(b), International Emergency Economic Powers Act (2007), violation, maximum from $311,562 to $330,947.

(5) 22 U.S.C. 8142(a), United States Additional Protocol Implementation Act (2006), violation, maximum from $32,258 to $34,265.

(6) 50 U.S.C. 4819, Export Controls Act of 2018 (2018), violation, maximum from $308,901 to $328,121.

(d) *Census Bureau.* (1) 13 U.S.C. 304, Collection of Foreign Trade Statistics (2002), each day's delinquency of a violation; total of not to exceed maximum per violation, from $1,436 to $1,525; maximum per violation, from $14,362 to $15,256.

(2) 13 U.S.C. 305(b), Collection of Foreign Trade Statistics (2002), violation, maximum from $14,362 to $15,256.

(e) *International Trade Administration.* (1) 19 U.S.C. 81s, Foreign Trade Zone (1934), violation, maximum from $3,011 to $3,198.

(2) 19 U.S.C. 1677f(f)(4), U.S.-Canada Free Trade Agreement Protective Order (1988), violation, maximum from $216,628 to $230,107.

(f) *National Oceanic and Atmospheric Administration.* (1) 51 U.S.C. 60123(a), Land Remote Sensing Policy Act of 2010 (2010), violation, maximum from $11,905 to $12,646.

(2) 51 U.S.C. 60148(c), Land Remote Sensing Policy Act of 2010 (2010), violation, maximum from $11,905 to $12,646.

(3) 16 U.S.C. 773f(a), Northern Pacific Halibut Act of 1982 (2007), violation, maximum from $249,251 to $264,759.

(4) 16 U.S.C. 783, Sponge Act (1914), violation, maximum from $1,780 to $1,891.

(5) 16 U.S.C. 957(d), (e), and (f), Tuna Conventions Act of 1950 (1962):

(i) Violation of 16 U.S.C. 957(a), maximum from $88,952 to $94,487.

(ii) Subsequent violation of 16 U.S.C. 957(a), maximum from $191,590 to $203,511.

(iii) Violation of 16 U.S.C. 957(b), maximum from $3,011 to $3,198.

(iv) Subsequent violation of 16 U.S.C. 957(b), maximum from $17,791 to $18,898.

(v) Violation of 16 U.S.C. 957(c), maximum from $383,182 to $407,024.

(6) 16 U.S.C. 957(i), Tuna Conventions Act of 1950,[1] violation, maximum from $195,047 to $207,183.

(7) 16 U.S.C. 959, Tuna Conventions Act of 1950,[2] violation, maximum from $195,047 to $207,183.

(8) 16 U.S.C. 971f(a), Atlantic Tunas Convention Act of 1975,[3] violation, maximum from $195,047 to $207,183.

(9) 16 U.S.C. 973f(a), South Pacific Tuna Act of 1988 (1988), violation, maximum from $541,570 to $575,266.

(10) 16 U.S.C. 1174(b), Fur Seal Act Amendments of 1983 (1983), violation, maximum from $25,780 to $27,384.

(11) 16 U.S.C. 1375(a)(1), Marine Mammal Protection Act of 1972 (1972), violation, maximum from $30,107 to $31,980.

(12) 16 U.S.C. 1385(e), Dolphin Protection Consumer Information Act,[4] violation, maximum from $195,047 to $207,183.

(13) 16 U.S.C. 1437(d)(1), National Marine Sanctuaries Act (1992), violation, maximum from $183,629 to $195,054.

(14) 16 U.S.C. 1540(a)(1), Endangered Species Act of 1973:

(i) Violation as specified (1988), maximum from $54,157 to $57,527.

(ii) Violation as specified (1988), maximum from $25,995 to $27,612.

(iii) Otherwise violation (1978), maximum from $1,780 to $1,891.

(15) 16 U.S.C. 1858(a), Magnuson-Stevens Fishery Conservation and Management Act (1990), violation, maximum from $195,047 to $207,183.

(16) 16 U.S.C. 2437(a), Antarctic Marine Living Resources Convention Act of 1984,[5] violation, maximum from $195,047 to $207,183.

(17) 16 U.S.C. 2465(a), Antarctic Protection Act of 1990,[6] violation, maximum from $195,047 to $207,183.

(18) 16 U.S.C. 3373(a), Lacey Act Amendments of 1981 (1981):

(i) 16 U.S.C. 3373(a)(1), violation, maximum from $27,879 to $29,614.

(ii) 16 U.S.C. 3373(a)(2), violation, maximum from $697 to $740.

(19) 16 U.S.C. 3606(b)(1), Atlantic Salmon Convention Act of 1982,[7] violation, maximum from $195,047 to $207,183.

(20) 16 U.S.C. 3637(b), Pacific Salmon Treaty Act of 1985,[8] violation, maximum from $195,047 to $207,183.

(21) 16 U.S.C. 4016(b)(1)(B), Fish and Seafood Promotion Act of 1986 (1986); violation, minimum from $1,180 to $1,253; maximum from $11,803 to $12,537.

(22) 16 U.S.C. 5010, North Pacific Anadromous Stocks Act of 1992,[9] violation, maximum from $195,047 to $207,183.

(23) 16 U.S.C. 5103(b)(2), Atlantic Coastal Fisheries Cooperative Management Act,[10] violation, maximum from $195,047 to $207,183.

(24) 16 U.S.C. 5154(c)(1), Atlantic Striped Bass Conservation Act,[11] violation, maximum from $195,047 to $207,183.

(25) 16 U.S.C. 5507(a), High Seas Fishing Compliance Act of 1995 (1995), violation, maximum from $169,412 to $179,953.

(26) 16 U.S.C. 5606(b), Northwest Atlantic Fisheries Convention Act of 1995,[12] violation, maximum from $195,047 to $207,183.

(27) 16 U.S.C. 6905(c), Western and Central Pacific Fisheries Convention Implementation Act,[13] violation, maximum from $195,047 to $207,183.

(28) 16 U.S.C. 7009(c) and (d), Pacific Whiting Act of 2006,[14] violation, maximum from $195,047 to $207,183.

(29) 22 U.S.C. 1978(e), Fishermen's Protective Act of 1967 (1971):

(i) Violation, maximum from $30,107 to $31,980.

(ii) Subsequent violation, maximum from $88,952 to $94,487.

(30) 30 U.S.C. 1462(a), Deep Seabed Hard Mineral Resources Act (1980), violation, maximum, from $76,764 to $81,540.

(31) 42 U.S.C. 9152(c), Ocean Thermal Energy Conversion Act of 1980 (1980), violation, maximum from $76,764 to $81,540.

(32) 16 U.S.C. 1827a, Billfish Conservation Act of 2012,[15] violation, maximum from $195,047 to $207,183.

(33) 16 U.S.C. 7407(b), Port State Measures Agreement Act of 2015,[16] violation, maximum from $195,047 to $207,183.

(34) 16 U.S.C. 1826g(f), High Seas Driftnet Fishing Moratorium Protection Act,[17] violation, maximum from $195,047 to $207,183.

(35) 16 U.S.C. 7705, Ensuring Access to Pacific Fisheries Act,[18] violation, maximum from $195,047 to $207,183.

[1] This National Oceanic and Atmospheric Administration maximum civil monetary penalty, as prescribed by law, is the maximum civil monetary penalty per 16 U.S.C. 1858(a), Magnuson-Stevens Fishery Conservation and Management Act civil monetary penalty (paragraph (f)(15) of this section).

[2] See footnote 1.

[3] See footnote 1.

[4] See footnote 1.

[5] See footnote 1.

[6] See footnote 1.

[7] See footnote 1.

[8] See footnote 1.

[9] See footnote 1.

[10] See footnote 1.

[11] See footnote 1.

[12] See footnote 1.

[13] See footnote 1.

[14] See footnote 1.

[15] See footnote 1.

[16] See footnote 1.

[17] See footnote 1.

[18] See footnote 1.

(36) 16 U.S.C. 7805, Ensuring Access to Pacific Fisheries Act,[19] violation, maximum from $195,047 to $207,183.

(g) *National Technical Information Service.* 42 U.S.C. 1306c(c), Bipartisan Budget Act of 2013 (2013), violation, minimum from $1,012 to $1,075; maximum total penalty on any person for any calendar year, excluding willful or intentional violations, from $252,955 to $268,694.

§ 6.4 Effective date of adjustments for inflation to civil monetary penalties.

The Department of Commerce's 2022 adjustments for inflation made by § 6.3, of the civil monetary penalties there specified, are effective on January 15, 2022, and said civil monetary penalties, as thus adjusted by the adjustments for inflation made by § 6.3, apply only to those civil monetary penalties, including those whose associated violation predated such adjustment, which are assessed by the Department of Commerce after the effective date of the new civil monetary penalty level, and before the effective date of any future adjustments for inflation to civil monetary penalties thereto made subsequent to January 15, 2022 as provided in § 6.5.

§ 6.5 Subsequent annual adjustments for inflation to civil monetary penalties.

The Secretary of Commerce or his or her designee by regulation shall make subsequent adjustments for inflation to the Department of Commerce's civil monetary penalties annually, which shall take effect not later than January 15, notwithstanding section 553 of title 5, United States Code.

[FR Doc. 2021–28118 Filed 1–3–22; 8:45 am]

BILLING CODE 3510–DP–P

[19] See footnote 1.

DEPARTMENT OF COMMERCE

Office of the Secretary

15 CFR Part 15

[Docket No. 211210–0256]

RIN 0605–AA52

Department of Commerce Regulations on Procedures for Responding to Requests for Documents or Testimony for Use in Legal Proceedings

AGENCY: Office of the Secretary, Commerce.

ACTION: Final rule.

SUMMARY: This final rule revises the Department of Commerce's (Commerce) regulations, known as ''Touhy regulations,'' that set forth the procedures for responding to requests for documents or testimony for use in legal proceedings. The revisions provide greater clarity to entities seeking documents or testimony from current or former Department employees. Specifically, these revisions clarify, update, and streamline the language of several provisions, provide greater transparency regarding the factors that the agency will consider when reviewing such requests, and more directly address issues that frequently arise in requests for documents or testimony based on the facts of the request, such as whether the testimony requested is that of a former employee, whether the United States is a party to the underlying legal proceedings, or whether the testimony or documents are requested from the Office of the Inspector General.

DATES: Effective January 4, 2022.

FOR FURTHER INFORMATION CONTACT: Megan Heller, Chief, General Litigation Division, Office of the General Counsel, U.S. Department of Commerce, 1401 Constitution Ave. NW, Rm. 5896, Washington, DC 20230; telephone, (202) 482–1328.

SUPPLEMENTARY INFORMATION: This final rule revises the Department's regulations promulgated pursuant to 5 U.S.C. 301. The regulations at 15 CFR 15.11 through 15.18 set forth the procedures applicable to requests submitted to Commerce for the testimony of employees and the production of documents for use in legal proceedings to which the agency is not a party. These regulations are also known as ''Touhy regulations,'' in reference to the case in which the Supreme Court upheld the validity of such agency regulations promulgated pursuant to 5 U.S.C. 301. *See United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951).

These revisions to the Department's regulations clarify the process by which demands for documents or testimony are to be made and considered. They also update and streamline the language of several provisions where past experiences suggest need for elucidation. Additionally, the Department is revising these regulations to more directly address issues that arise frequently in requests for documents or testimony. The Department intends these revisions to provide greater clarity to entities seeking documents or testimony from current or former Department employees. Following is a description of the revisions to specific provisions of the Touhy regulations.

Section 15.11—Scope.

Paragraph (a) has been revised to more clearly set forth the scope and applicability of this subpart, and to state upfront that an employee's compliance with any demand for information or testimony requires prior authorization by the appropriate legal officers. New paragraph (c) clarifies that this subpart does not apply to proceedings in which the Department is a party. New paragraph (d) has been added to direct requests for documents or testimony from the United States Patent and Trademark Office (USPTO) to the applicable USPTO *Touhy* regulations; all references to the USPTO in the previous regulations have been deleted throughout the revised subpart B. New paragraph (e) combines previous paragraph (c) with previous § 15.17 to clarify that the Department will determine if other statutory authorities exist that address disclosure of the requested information before applying the procedures in this subpart.

Section 15.12—Definitions.

Broadly, this section has been revised to provide additional detail in definitions and add definitions for new terms used in the proposed revisions. Paragraph (a) has been revised to provide more detail in the definition of *agency counsel.* Paragraphs (c) and (i) define the Office of the Inspector General and its Counsel, reflecting the addition of new § 15.17 to address requests that are made for documents or testimony from the Office of the Inspector General. Paragraphs (b), (d) through (h), and (j) through (m) has been revised to clarify language and provide greater detail.

Section 15.13—Demand for testimony or production of documents: Department procedures.

This rule significantly revises § 15.13. The rule moves from § 15.13 to § 15.16(a) the policies and considerations that Commerce will use in determining responses to demands for documents or testimony. Paragraph (a) of revised § 15.13 restates the existing rule that no document or information may be produced without authorization from the General Counsel or appropriate agency counsel. Paragraph (b) of revised § 15.13 sets forth in more detail the notification requirements for requests submitted pursuant to this subpart; these notification requirements were formerly found at § 15.14(c). Paragraph (b)(1) has been revised to include the full address for mailed requests and an email address for submitting requests electronically. Paragraph (b)(2) refers requestors to regulations for the United States Patent and Trademark Office, for requests relating to that agency.

Paragraph (c) directs employees to forward any demand to the appropriate office within the General Counsel's Office; this direction and contact information is currently set forth in § 15.14(a) of the regulations. Paragraph (d) specifically addresses the course of action that the Department will take if it determines its employee should not comply with a subpoena. In addition, this paragraph specifies that electronic service of subpoenas is not authorized.

Section 15.14—Demand for testimony or production of documents in matters in which the United States is not a party.

This section has been revised to consolidate the procedures to be followed for requests relating to matters in which the United States is not a party to proceedings, which were previously interspersed in §§ 15.14, 15.15, and 15.16 of the regulations. Notably, paragraph (g)(2) of revised § 15.14 sets forth new rules and procedures for former Department employees who are asked to provide opinion or expert testimony in such proceedings; these rules and procedures had not previously been addressed. The procedures for matters in which the United States is a party are now provided separately in new § 15.15.

Section 15.15—Demand for testimony or production of documents in matters in which the United States is a party.

This section is partly new, and encompasses provisions found previously in §§ 15.16 and 15.18 on expert and opinion testimony. It sets forth the procedures for requests relating to matters in which the United States, but not the Department, is a named party. Paragraph (a) addresses requests received from entities other than the United States, in proceedings in which the United States is a party, and requires that counsel of record representing the interests of the United States or one of its other agencies and instrumentalities be informed of such demands. Paragraph (b) addresses requests received from agencies or instrumentalities of the United States other than the Department. Notably, and consistent with past practice, paragraph (b) now states that the General Counsel may require reimbursement to the Department of expenses associated with a Department employee providing consultations on behalf of the United States. Paragraph (c) separately sets forth the procedures for expert or opinion testimony for both current and former employees in matters in which the United States, but not the Department, is a named party.

Section 15.16—Demand for testimony or production of documents: Department and Policy Considerations.

This rule revises § 15.16 to set forth in greater detail the factors that, as appropriate, will be considered in deciding whether the requested disclosure of information or testimony is in the interests of the Department. The policy factors in previous § 15.13(a) through (f) have been moved to this section and expanded to better inform non-government requesters. Paragraphs (a)(1) through (9) sets forth a list of factors to be considered. Paragraphs (b)(1) through (3) sets forth additional considerations for the General Counsel to weigh, once requirements in §§ 15.14 and 15.15 of this subpart have been satisfied. Finally, new paragraphs (c)(1) through (8) sets forth a non-exclusive list of the factors that preclude disclosure of information that may be requested.

Section 15.17—Subpoenas and demands served upon employees or former employees of the Office of the Inspector General.

This final rule adds this new section to address requests that are made for documents or testimony from the Office of the Inspector General and to clarify that this subpart applies to requests for documents or testimony from the Office of the Inspector General. This section provides the notification procedures for requests to the Inspector General.

Comments on the Proposed Rule

The proposed rule was published in the **Federal Register** on September 27, 2021 (86 FR 53251), with a request for comments to be submitted by October 27, 2021. No comments were received.

No Substantive Changes From the Proposed Rule

This final rule makes no substantive changes to the proposed rule. We note that the regulatory text of this final rule contains two minor typographical corrections in the regulatory text of the proposed rule: The deletion of an extra word, ''a'', in the first sentence of 15 CFR 15.13(d)(1), and the addition of a missing semi-colon after the phrase ''the intended use of the testimony'' in 15 CFR 15.14(a)(6).

Classification

This final rule is published under the authority of 15 CFR part 15, subpart B (§§ 15.11 through 15.18), which sets forth the procedures applicable to requests submitted to the Department for the testimony of employees and the production of documents for use in legal proceedings to which the Department is not a party. These regulations are also known as ''Touhy regulations,'' in reference to the case in which the Supreme Court upheld the validity of such agency regulations promulgated pursuant to 5 U.S.C. 301. *See United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951).

This final rule has been determined to be not significant for the purposes of Executive Order (E.O.) 12866. The Department has identified no duplicative, overlapping, or conflicting Federal rules.

Pursuant to 5 U.S.C. 553(d)(3), the Department of Commerce has determined that there is good cause to waive the 30-day delay in the date of effectiveness for this final action. Specifically, there is good cause to waive the 30-day delay in the date of effectiveness, because this final rule provides clarifications that will reduce confusion for entities seeking documents or testimony from current or former Department employees, for use in legal proceedings. The Department of Commerce's *Touhy* regulations were last revised in 1995. This final rule improves the readability of the regulations, and provides clarifications on several points that have been the subject of consideration over the past twenty-five years. It is not necessary to have a 30-day delay in effectiveness for this final rule because (1) it imposes no additional burdens on entities seeking documents or testimony from the agency, and (2) clarifies the process making such requests, thereby making it easier for entities to submit requests to the agency. As such, the Department believes that a 30-day delay in the date of effectiveness of this final rule would be contrary to the public interest. For the reasons described above, the Department finds good cause to make this rule effective immediately upon publication in the **Federal Register**.

Congressional Review Act

The changes in this final rule are not expected to result in an annual effect on the economy of $100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, this final rule is not expected to be considered a ''major rule'' as defined in 5 U.S.C. 804(2) of the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*).

Regulatory Flexibility Act

The Chief Counsel for Regulation, Department of Commerce, has certified to the Chief Counsel for Advocacy, Small Business Administration, under the provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities. This final rule amends existing regulations in order to clarify the policies, practices, responsibilities, and procedures for Department of Commerce employees related to production of official Departmental documents and testimony by current or former employees as witnesses in legal proceedings. Specifically, the changes in this rule fall into three categories: (1) Clarifying the requirements for individuals or entities making requests for Department information or testimony for use in legal proceedings; (2) refining the procedures the Department uses and elaborating on the polices that support the Department's decision regarding whether to grant such requests; and (3) making non-substantive clarifying changes in the regulations. This rule applies to any individual or entity or their legal representative who requests information from the Department or testimony from Departmental employees for use in legal proceedings. There is no requirement that an individual or entity or their legal representative make such a request to the Department unless they seek information or testimony for use in a legal proceeding. If such a request is made, however, this final rule clarifies the current regulatory language that describes to whom in the Department the request should be sent, the standards that the request must meet, and the procedures the Department will apply to process the request and determine whether to grant it. The revisions made by this final rule are not expected to have any impact on affected entities. For example, the clarifying changes applicable to the actions of Department employees, reorganization of certain provisions, and harmonization of terminology have no impact on affected entities seeking information or testimony from the Department for use in legal proceedings. Other changes impose no additional burden on individuals or entities seeking information or testimony from the Department for use in legal proceedings. For these reasons, this final rule will not have a significant economic impact on a substantial number of small entities.

No comments were received on this determination during the public comment period for the proposed rule. Nor has the Department received any new information that would affect its determination that this rule would not have a significant economic impact on a substantial number of small entities. As a result, a final regulatory flexibility analysis was not required and none was prepared.

Paperwork Reduction Act

This final rule contains no new collection of information subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 15 CFR Part 15

Administrative practice and procedure, Courts, Government employees.

Brian D. DiGiacomo,

Assistant General Counsel for Employment, Litigation, and Information, Office of the General Counsel.

For the reasons set out in the preamble, Commerce amends 15 CFR part 15 as follows:

PART 15—LEGAL PROCEEDINGS

■ 1. The authority for part 15 continues to read as follows:

Authority: 5 U.S.C. 301; 15 U.S.C. 1501, 1512, 1513, 1515 and 1518; Reorganization Plan No. 5 of 1950; 3 CFR, 1949–1953 Comp., p. 1004; 44 U.S.C. 3101; subpart C is issued under 37 U.S.C. 101, 706; 15 U.S.C. 1673; 42 U.S.C. 665.

Subpart B—Testimony by Employees and the Production of Documents in Legal Proceedings

■ 2. Revise §§ 15.11 through 15.17 to read as follows:

Sec.

* * * * *

15.11 Scope.
15.12 Definitions.
15.13 Demand for testimony or production of documents: Department procedures.
15.14 Demand for testimony or production of documents in matters in which the United States is not a party.
15.15 Demand for testimony or production of documents in matters in which the United States is a party.
15.16 Demand for testimony or production of documents: Department policy and considerations.
15.17 Subpoenas and demands served upon employees or former employees of the Office of the Inspector General.

* * * * *

§ 15.11 Scope.

(a) This subpart sets forth the policies and procedures to be followed with respect to the production or disclosure of the testimony of employees and former employees of the Department of Commerce as witnesses in legal proceedings and the production or disclosure of information contained in Department of Commerce documents, or any information acquired by any person while such person was an employee of the Department of Commerce, for use in legal proceedings pursuant to a request, order, or subpoena (collectively referred to in this subpart as a ''demand''). No Department employee or former employee shall comply with such a demand without the prior authorization of the General Counsel or appropriate agency counsel, in accordance with this subpart.

(b) This subpart does not apply to any legal proceeding in which an employee is to testify while on leave status, regarding facts or events unrelated to the official business of the Department or the duties of the employee.

(c) This subpart does not apply to any legal proceeding in which the Department is a party or to subpoenas for testimony or documents received from Congress, a Federal agency Inspector General, or a Special Prosecutor.

(d) This subpart does not apply to any demand for testimony of employees and former employees of the United States Patent and Trademark Office (USPTO) or to demands for the production of USPTO documents. The process for any demand for testimony of an employee or for the production of documents of the USPTO can be found at 37 CFR 104.21 through 104.24, and any such demands must be sent directly to the USPTO.

(e) This subpart in no way affects the rights and procedures governing public access to records pursuant to the Freedom of Information Act, the Privacy Act, or the Trade Secrets Act or other Federal law restricting the disclosure of information. Moreover, demands in legal proceedings for the production of records, or for the testimony of Department employees regarding information protected by the Privacy Act, 5 U.S.C. 552a, the Trade Secrets Act, 18 U.S.C. 1905, Census data under Title 13, U.S.C., or other confidentiality statutes, must satisfy the requirements for disclosure set forth in those statutes, if any, before the records may be provided or testimony given. The General Counsel or appropriate agency counsel should first determine if there is a legal basis to provide the testimony or records sought under applicable confidentiality statutes before applying the procedures established in this subpart.

(f) This subpart is not intended to be relied upon to, and does not, create any right or benefit, substantive or

procedural, enforceable at law by any party against the United States.

§ 15.12 Definitions.

For the purpose of this subpart:

(a) *Agency counsel* means the Chief Counsel/s or General Counsel/s (or that official's designee) of a bureau or operating unit within the U.S. Department of Commerce who is the senior legal officer responsible for overseeing legal advice and guidance provided to a particular bureau or operating unit.

(b) *Component* means Office of the Secretary or a bureau or operating unit of the Department as defined in Department Organization Order 1–1.

(c) *Counsel to the Inspector General* means Counsel to the Inspector General of the U.S. Department of Commerce.

(d) *Demand* means a request, order, or subpoena for testimony or documents for use in any legal proceeding, regardless of whether the United States is a party to the proceeding.

(e) *Department* means the United States Department of Commerce and any of its components, bureaus, or operating units.

(f) *Document* or *information* means any record, regardless of format, medium or physical characteristic, document, electronically stored information, paper and other property of the Department, including without limitation, official letters, telegrams, memoranda, reports, studies, writings, emails, calendar and diary entries, text or chat messages, maps, graphs, pamphlets, notes, charts, tabulations, analyses, statistical or informational accumulations, any kind of summaries of meetings and conversations, film impressions, magnetic tapes or sound or mechanical reproductions. Nothing in this paragraph (f) shall be interpreted as requiring the creation of a new document to respond to any demand.

(g) *Employee* means any current or former employees or officers of the U.S. Department of Commerce, including any commissioned officer of the National Oceanic and Atmospheric Administration or any other individual who has been appointed by, or is subject to the supervision, jurisdiction, or control of the U.S. Department of Commerce, including contract employees. Contractors may be included.

(h) *General Counsel* means the General Counsel of the U.S. Department of Commerce or other U.S. Department of Commerce employee to whom the General Counsel has delegated authority to act under this subpart.

(i) *Inspector General* means the Inspector General of the U.S. Department of Commerce.

(j) *Legal proceeding* means all pretrial, trial, and post-trial stages of any existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before administrative, civil, or criminal courts, commissions, boards, or other tribunals, domestic—including local, tribal, state, and Federal—foreign, or international. ''Legal proceedings'' includes all phases of discovery as well as responses to any formal or informal requests by attorneys, investigators, or other persons not employed by the Department, regarding, testimony, documents, information, or consultation, solicited for use in any legal proceedings.

(k) *Official business* means the authorized business of the U.S. Department of Commerce.

(l) *Secretary* means the Secretary of the U.S. Department of Commerce.

(m) *Testimony* means a statement in any form, including personal appearances before a judge, magistrate, administrative law judge, administrative judge, hearing officer, special master, special counsel, investigating officer or board, or any other court or legal tribunal; declarations made pursuant to 28 U.S.C. 1746; interviews; depositions; telephonic, televised, or videotaped statements; or any responses given during discovery or similar proceedings, which response would involve more than the production of documents.

(n) *United States* means the Federal Government, its departments and agencies, and individuals acting on behalf of the Federal Government.

§ 15.13 Demand for testimony or production of documents: Department procedures.

(a) *General.* No employee, in response to a demand, shall produce any documents or information of the Department, or provide testimony regarding any information relating to, or based upon Department documents, or disclose any information or produce documents acquired or generated as part of the performance of that employee's official duties or because of that employee's official status without the prior authorization of the General Counsel or appropriate agency counsel.

(b) *Notifications.* (1) A demand for the testimony of an employee or for the production of documents of the Department shall be made in writing and addressed to the Assistant General Counsel for Employment, Litigation, and Information, U.S. Department of Commerce, 1401 Constitution Avenue NW, Room 5896, Washington, DC 20230; or by email to: *Touhy@doc.gov;* or to appropriate agency counsel.

(2) The process for any demand for testimony of an employee or for the production of documents of the USPTO can be found at 37 CFR 104.21 through 104.24, and any such demands should be sent directly to the USPTO, in accordance with § 15.11(d).

(c) *Employee procedure.* Whenever a Department employee receives an inquiry or demand for testimony or production of documents, that employee shall not respond, and shall immediately notify the Office of the Assistant General Counsel for Employment, Litigation, and Information as provided in paragraph (b)(1) of this section, or appropriate agency counsel, and provide a copy of the demand. An employee may not answer inquiries from a person not employed by the Department regarding testimony or documents subject to a demand or a potential demand under the provisions of this subpart without the approval of the General Counsel or appropriate agency counsel.

(d) *Subpoenas.* A subpoena for testimony or production of documents by a Department employee must be served in person, at the office or home, or by mail in accordance with the Federal Rules of Civil or Criminal Procedure or applicable state procedure. Service solely by electronic means is not authorized. If service is made upon anyone other than the General Counsel or appropriate agency counsel, then a copy of the subpoena shall also be contemporaneously sent to the General Counsel at the appropriate addresses in paragraph (b) of this section, or appropriate agency counsel.

(1) An employee who receives such a subpoena shall not respond and shall immediately forward the subpoena to the Office of the Assistant General Counsel for Employment, Litigation, and Information or the appropriate agency counsel. The General Counsel or appropriate agency counsel will determine the extent to which a Department employee will comply with the subpoena.

(2) If the General Counsel or appropriate agency counsel determines that an employee should not comply with a properly-served subpoena, the General Counsel or agency counsel will attempt to have the subpoena withdrawn or modified. If this cannot be done with regard to a subpoena for documents, the Department will provide the tribunal with an objections letter or other notification that the documents will not be produced. If this cannot be done with regard to a subpoena for

testimony, the General Counsel or appropriate agency counsel will attempt to obtain U.S. Department of Justice representation for the employee and move to have the subpoena modified or quashed. If, because of time constraints, this is not possible prior to the compliance date specified in the subpoena, the employee should appear at the time and place set forth in the subpoena. If legal counsel cannot appear on behalf of the employee, the employee should produce a copy of the Department's regulations in this subpart and inform the legal tribunal that the employee has been advised by counsel not to provide the requested testimony and/or produce documents. If the legal tribunal rules that the demand in the subpoena must be complied with, the employee shall respectfully decline to comply with the demand. *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951).

§ 15.14 Demand for testimony or production of documents in matters in which the United States is not a party.

(a) *General.* Every demand for testimony or documents in a legal matter in which the United States is not a named party shall be made in writing, delivered in accordance with § 15.13(b) no later than 30 days before the document or testimony is required, and shall be accompanied by an affidavit or written declaration under 28 U.S.C. 1746, or, if an affidavit or declaration is not feasible, a written statement setting forth:

(1) The title of the legal proceeding,

(2) The forum;

(3) The requesting party's interest in the legal proceeding;

(4) The reason for the demand and the relevance of the request to the legal proceeding;

(5) A showing that the desired testimony or document is not reasonably available from any other source; and

(6) If testimony is requested, the intended use of the testimony; a general summary of the desired testimony; the time that will be required to prepare for, travel to, and present testimony; and a showing that no document could be provided and used in lieu of testimony, including from opposing parties via discovery proceedings.

(b) *Purpose.* The purpose of the requirement in this section is to assist the General Counsel or appropriate agency counsel in making an informed decision regarding whether testimony or the production of a document(s) should be authorized, in accordance with § 15.16. Any authorization for testimony by an employee of the Department shall be limited to the scope of the demand as summarized in the statement or as negotiated in paragraph (e) of this section.

(c) *Prior authorization.* A certified copy of a document that has been authorized pursuant to § 15.16(a) for use in a legal proceeding may be provided upon written request and payment of applicable fees. Written requests for certification must be addressed to the agency counsel for the component having possession, custody, or control of the document. The requestor must provide the agency with information regarding the prior authorization for release of the requested document pursuant to § 15.16(a), including date of release and parties to whom the document was released.

(d) *Secretary's authority.* The Secretary retains the authority to authorize and direct testimony in those cases where a statute or Presidential order mandates a personal decision by the Secretary.

(e) *Consultation.* The General Counsel or appropriate agency counsel may consult or negotiate with an attorney for a party, or with the party if not represented by an attorney, to refine or limit a demand so that compliance is less burdensome or seek additional information about the demand necessary to make the determination required by paragraph (b) of this section. Failure of the attorney or party to cooperate in good faith to enable the General Counsel or the appropriate agency counsel to make an informed decision under this subpart may serve, where appropriate, as a basis for a determination not to comply with the demand. In addition, the General Counsel or appropriate agency counsel may impose further conditions or restrictions on the production of any document or testimony when that is in the best interests of the United States.

(f) *Fact witness.* If an employee is authorized to give testimony in a legal proceeding not involving the United States, the testimony, if otherwise proper, shall be limited to facts within the personal knowledge of the employee that are not classified, privileged, or protected from disclosure under applicable law or regulation. If asked to provide factual testimony that the employee believes may be classified, privileged, or protected from disclosure under applicable law or regulation, then the witness shall:

(1) Respectfully decline to answer on the grounds that such testimony is prohibited; and

(2) Request an opportunity to consult with the General Counsel or appropriate agency counsel.

(g) *Expert or opinion witness.* (1) Current employees, with or without compensation, shall not provide expert or opinion testimony in any legal proceedings regarding Department information, subjects, or activities except on behalf of the United States or a party represented by the United States Department of Justice. However, upon a showing by the requester that there are exceptional circumstances and that the anticipated testimony will not be adverse to the interests of the Department or the United States, the General Counsel, or appropriate agency counsel after consultation with the Office of the General Counsel, may grant special authorization in writing for a current employee to appear and give the expert or opinion testimony.

(i) If, while testifying in any legal proceeding, an employee is asked for expert or opinion testimony regarding official information, subjects, or activities, which testimony has not been approved in advance in accordance with the regulations in this subpart, the witness shall:

(A) Respectfully decline to answer on the grounds that such expert or opinion testimony is forbidden by the regulations in this subpart;

(B) Request an opportunity to consult with the General Counsel or appropriate agency counsel before giving such testimony; and

(C) Explain that upon such consultation, approval for such testimony may be provided.

(ii) If the body conducting the proceeding then orders the witness to provide expert or opinion testimony regarding official information, subjects, or activities without the opportunity to consult with either the General Counsel or appropriate agency counsel, the witness shall respectfully refuse to provide such testimony. *See United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951).

(iii) If an employee is unaware of the regulations in this subpart and provides expert or opinion testimony regarding official information, subjects, or activities in a legal proceeding without the consultation discussed in paragraph (g)(1)(i) of this section, the witness must, as soon as possible after testifying, inform the General Counsel or appropriate agency counsel that such testimony was given and provide a written summary of the expert or opinion testimony provided.

(2) Former employees may provide opinion or expert testimony if:

(i) The testimony does not involve non-public facts, information, or documents about a particular matter that were acquired by the former

employee during the performance of their employment with the United States; and

(ii) The involvement of the former employee in the proceeding as a witness complies with 18 U.S.C. 207 and applicable post-employment ethics rules. *See* 5 CFR part 2641. Former employees offering expert or opinion testimony and those seeking such testimony from former employees, must confer with the General Counsel or appropriate agency counsel to ascertain if the prospective expert or opinion testimony is consistent with this subpart.

(h) *Decision.* A decision under this subpart to comply or not to comply with a demand is neither an assertion or waiver of privilege, nor an assertion of lack of relevance or technical deficiency, nor does it reflect any other ground for noncompliance.

(i) *Waiver.* The General Counsel or appropriate agency counsel may waive any requirements set forth under this section to the extent allowed by law, when circumstances warrant.

§ 15.15 Demand for testimony or production of documents in matters in which the United States is a party.

If a demand is received pertaining to a legal matter in which the United States but not the Department is a named party, or where a party other than the Department is represented by the Department of Justice, the following rules apply.

(a) *Demand not from the United States.* For demands for documents from, or testimony of an employee of the Department, from an entity other than the United States pursuant to a legal proceeding in which the United States is a party, the demand must be in writing and signed, delivered in accordance with § 15.13(b), setting forth the information required in § 15.14(a), and copied to the attorneys of record representing or acting under the authority of the United States in the legal proceeding. Upon receipt of the demand, the General Counsel or appropriate agency counsel shall promptly contact the appropriate Department of Justice office to coordinate any response in accordance with applicable Federal or state rules of civil procedure governing discovery matters.

(b) *Demand from the United States.* When a demand for documents from, testimony of, or consultation with an employee of the Department comes from an attorney representing or acting under the authority of the United States concerning a legal proceeding in which the United States is a party, every such demand should be accompanied by a statement setting forth the legal proceeding, the forum, the United States' interest in the legal proceeding, and the relevance and use of the requested documents or testimony. The purpose of the requirement in this paragraph (b) is to assist the General Counsel or the appropriate agency counsel in making all necessary arrangements to facilitate the demand on behalf of the United States. Where appropriate, the General Counsel or appropriate agency counsel may require reimbursement to the Department of the expenses associated with a Department employee giving testimony or providing consultation on behalf of the United States.

(c) *Expert or opinion witness.* In a legal proceeding in which the United States is a party, a current Department employee may not testify as an expert or opinion witness for any other party other than the United States. However, a former employee may provide opinion or expert testimony for a party other than the United States if:

(1) The testimony does not involve facts, information, or documents about a particular matter that were acquired by the former employee during the performance of their official duties as an employee of the United States; and

(2) The involvement of the former employee in the proceeding as a witness complies with applicable post-employment conflict of interest laws. *See* 18 U.S.C. 207 and 5 CFR part 2641. A former employee offering expert or opinion testimony or consulting, and those seeking such testimony from a former employee, shall confer with the General Counsel or appropriate agency counsel to ascertain if the prospective expert or opinion testimony or consulting is consistent with this subpart.

§ 15.16 Demand for testimony or production of documents: Department policy and considerations.

(a) *Decision.* In deciding whether to authorize a demand for testimony or documents under this subpart, the General Counsel or appropriate agency counsel shall consider whether the disclosure or testimony is in the interests of the Department. The following factors should be considered:

(1) Conserving the time of Department employees for conducting official business;

(2) Minimizing the possibility of involving the Department in controversial issues that are not related to the Department's mission or matters that do not further the Department's mission;

(3) Preventing the possibility that the public will misconstrue variances between personal opinions of Department employees and official Department policy;

(4) Avoiding spending the time and money of the United States for private purposes;

(5) Preserving the integrity of the administrative or judicial process;

(6) Protecting classified, confidential, or controlled unclassified information, and the deliberative process of the Department;

(7) Preventing the appearance of improperly favoring one litigant over another;

(8) Avoiding the denial of a party's constitutional or statutory rights;

(9) Whether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose;

(10) Whether disclosure is appropriate under the relevant substantive law concerning privilege; and

(11) Any other issue that is relevant to the decision.

(b) *Non-disclosure factors.* Demands for testimony or documents in response to which disclosure will not be made by any Department official include, but are not limited to, those demands with respect to which any of the following factors exist:

(1) Disclosure is restricted by statute or regulation, or would violate a rule of procedure, Executive order, policy, or an applicable Government directive;

(2) Disclosure would reveal classified or controlled unclassified information, unless appropriately declassified or decontrolled by the originating agency;

(3) Disclosure would reveal a confidential source or informant, unless the investigative agency and the source or informant have no objection;

(4) Disclosure would reveal investigatory records compiled for law enforcement purposes and would interfere with enforcement proceedings or disclose investigative techniques and procedures, the effectiveness of which would thereby be impaired;

(5) Disclosure would improperly reveal trade secrets or disclose information protected by law, a non-disclosure agreement, or court order without authorized consent;

(6) Disclosure would be unduly costly, burdensome, or otherwise inappropriate under applicable court rules;

(7) Disclosure would involve the Department in controversial issues that are not related to the Department's mission or issues that do not further the Department's mission; or

(8) Disclosure would involve scientific or expert opinion on research

that is controversial or contrary to Department policy, or would result in burdensome repetition of similar testimony in subsequent proceedings.

§ 15.17 Subpoenas and demands served upon employees or former employees of the Office of the Inspector General.

Notwithstanding the requirements set forth in §§ 15.11 through 15.16, this subpart is applicable to demands served on employees or former employees of the Office of the Inspector General (OIG), except that wherever in §§ 15.11 through 15.16 there appear the phrases General Counsel, agency counsel, or Assistant General Counsel for Employment, Litigation, and Information, there shall be substituted in lieu thereof the Inspector General or Counsel to the Inspector General. In addition, the appropriate address for notifications specified in § 15.13(b) pertaining to employees and former employees covered under this section is Office of the Inspector General, U.S. Department of Commerce, 1401 Constitution Avenue NW, Room 7896, Washington, DC 20230.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[TD 9961]

RIN 1545–BO91

Guidance on the Transition From Interbank Offered Rates to Other Reference Rates

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that provide guidance on the tax consequences of the transition away from the use of certain interbank offered rates in debt instruments, derivative contracts, and other contracts. The final regulations are necessary to address the possibility that a modification of the terms of a contract to replace such an interbank offered rate with a new reference rate could result in the realization of income, deduction, gain, or loss for Federal income tax purposes or could have other tax consequences. The final regulations will affect parties to contracts that reference certain interbank offered rates.

DATES:

Effective date: These final regulations are effective on March 7, 2022.

Applicability date: For dates of applicability, see §§ 1.860A–1(b)(7), 1.1001–6(k), and 1.1275–2(m)(5).

FOR FURTHER INFORMATION CONTACT: Spence Hanemann at (202) 317–4554 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) under sections 860A, 860G, 1001, 1271, 1275, and 7701(l) of the Internal Revenue Code (Code) and to the Procedure and Administration Regulations (26 CFR part 301) under section 7701 of the Code.

1. Discontinuation of LIBOR and Tax Implications

On July 27, 2017, the Financial Conduct Authority, the United Kingdom regulator tasked with overseeing the London Interbank Offered Rate (LIBOR), announced that publication of all currency and term variants of LIBOR, including U.S.-dollar LIBOR (USD LIBOR), may cease after the end of 2021. The administrator of LIBOR, the ICE Benchmark Administration, announced on March 5, 2021, that publication of overnight, one-month, three-month, six-month, and 12-month USD LIBOR will cease immediately following the LIBOR publication on June 30, 2023, and that publication of all other currency and tenor variants of LIBOR will cease immediately following the LIBOR publication on December 31, 2021.

On September 29, 2021, the Financial Conduct Authority announced that it will compel the ICE Benchmark Administration to continue to publish one-month, three-month, and six-month sterling LIBOR and Japanese yen LIBOR after December 31, 2021, using a ''synthetic'' methodology that is not based on panel bank contributions (*synthetic GBP LIBORs* and *synthetic JPY LIBORs,* respectively). The Financial Conduct Authority has indicated that it may also require the ICE Benchmark Administration to publish one-month, three-month, and six-month USD LIBOR after June 30, 2023, using a similar synthetic methodology (*synthetic USD LIBORs*). However, these synthetic GBP LIBORs, synthetic JPY LIBORs, and synthetic USD LIBORs are expected to be published for a limited period of time.

Various tax issues may arise when taxpayers modify contracts in anticipation of the discontinuation of LIBOR or another interbank offered rate (IBOR). For example, such a modification may be treated as an exchange of property for other property differing materially in kind or extent for purposes of § 1.1001–1(a), giving rise to gain or loss. Such a modification may also have consequences under the rules for integrated transactions and hedging transactions, withholding under chapter 4 of the Code, fast-pay stock, investment trusts, original issue discount, and real estate mortgage investment conduits (REMICs). To minimize potential market disruption and to facilitate an orderly transition in connection with the discontinuation of LIBOR and other IBORs, the Treasury Department and the IRS published proposed regulations (REG–118784–18) in the **Federal Register** (84 FR 54068) on October 9, 2019 (Proposed Regulations). The Proposed Regulations generally provide that modifying a debt instrument, derivative, or other contract in anticipation of an elimination of an IBOR is not treated as an exchange of property for other property differing materially in kind or extent for purposes of § 1.1001–1(a). The Proposed Regulations also adjust other tax rules to minimize the collateral consequences of the transition away from IBORs.

2. Rev. Proc. 2020–44

The Alternative Reference Rates Committee (ARRC), whose ex officio members include the Treasury Department, was convened by the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of New York in 2014. To support the transition away from USD LIBOR, the ARRC has published recommended fallback language for inclusion in the terms of certain cash products, such as syndicated loans and securitizations. The ARRC has also been actively engaged in work led by the International Swaps and Derivatives Association (ISDA) to ensure that the contractual fallback provisions in derivative contracts are sufficiently robust to prevent serious market disruptions when LIBOR is discontinued or becomes unreliable. To that end, ISDA developed the *ISDA 2020 IBOR Fallbacks Protocol* by which the parties to certain derivative contracts can incorporate certain improved fallback provisions into the terms of those contracts.

On October 9, 2020, the Treasury Department and the IRS released Rev. Proc. 2020–44, 2020–45 I.R.B. 991, in advance of finalizing the Proposed Regulations to support the adoption of the ARRC's recommended fallback provisions and the *ISDA 2020 IBOR Fallbacks Protocol.* Rev. Proc. 2020–44 provides that a modification within the scope of the revenue procedure is not treated as an exchange of property for

other property differing materially in kind or extent for purposes of § 1.1001–1(a). In addition, Rev. Proc. 2020–44 generally provides that a modification within the scope of the revenue procedure will not result in legging out of an integrated transaction or terminating either leg of a hedging transaction.

3. The Final Regulations

The Treasury Department and the IRS received public comments on the Proposed Regulations from eight commenters. Copies of these comments are available for public inspection at *https://www.regulations.gov* or upon request. No public hearing was requested, and none was held. After consideration of the public comments, the Treasury Department and the IRS adopt the Proposed Regulations as amended by this Treasury decision (Final Regulations).

Summary of Comments and Explanation of Revisions

The Final Regulations are intended to provide special rules to help taxpayers adjust to the discontinuation of certain widely used interest rate benchmarks. To achieve this purpose, the Treasury Department and the IRS have concluded that it is appropriate in this context to depart from the ordinary tax rules to the degree and in the manner provided in the Final Regulations. One commenter recommended that the Treasury Department and the IRS supplement the rules in the Final Regulations with ''rules of construction'' based on the reasonableness of taxpayers' actions. The Treasury Department and the IRS decline to adopt this comment because such a principles-based rule would blur the carefully circumscribed degree and manner in which the Final Regulations authorize taxpayers to depart from the ordinary tax rules.

Although the Final Regulations and Proposed Regulations share many of the same fundamental rules, the structure of § 1.1001–6 in the Final Regulations differs from that of the Proposed Regulations. These structural changes are primarily intended to simplify the operative rules, which are in § 1.1001–6(b) through (g) of the Final Regulations. For example, while the Proposed Regulations separately state the rules for debt and non-debt contracts, the Final Regulations provide a single set of rules for all contracts. The Final Regulations define contract broadly to include not only debt instruments and derivative contracts but also insurance contracts, stock, leases, and other contractual relationships.

The Final Regulations also make use of defined terms, located in § 1.1001–6(h), to streamline references to concepts that are frequently used in the operative rules in § 1.1001–6(b) through (g). In particular, the defined term ''covered modification'' is the cornerstone of these rules and serves to restructure several of the fundamental rules set forth in the Proposed Regulations. For example, § 1.1001–6 of the Proposed Regulations generally provides certain beneficial tax consequences when the parties to a contract modify the contract to replace an IBOR-based rate with a ''qualified rate'' and make certain ''associated modifications,'' which may include a ''one-time payment.'' The Final Regulations unite these various elements of the Proposed Regulations (that is, modification of a contract, an IBOR-based rate, a qualified rate, associated modifications, and a one-time payment) in the single defined term ''covered modification.''

1. Treatment Under Section 1001

Section 1.1001–6(a) of the Proposed Regulations generally provides rules for applying section 1001 to a contract that is modified to replace an IBOR-based rate or IBOR-based fallback provisions or to add or amend fallback provisions that would replace an IBOR-based rate. Section 1.1001–6(a) of the Proposed Regulations generally provides that such a modification is not treated as an exchange of property under section 1001 and extends this treatment to any reasonably necessary conforming modifications. When modifications that qualify for this special treatment under proposed § 1.1001–6(a) occur contemporaneously with modifications that do not qualify, the non-qualifying modifications are subject to the ordinary rules under § 1.1001–1(a) or § 1.1001–3 and the modifications that qualify for special treatment under proposed § 1.1001–6(a) are treated as part of the existing terms of the contract. Section 1.1001–6(b) of the Final Regulations provides similar rules but makes use of the defined terms ''covered modification'' and ''noncovered modification.''

a. Treatment of Covered and Noncovered Modifications

Under § 1.1001–6(b)(1) of the Final Regulations, a covered modification of a contract is not treated as an exchange of property for other property differing materially in kind or in extent for purposes of § 1.1001–1(a). Consequently, in the case of a debt instrument, a covered modification to which § 1.1001–6(b)(1) applies is not treated as a significant modification for purposes of § 1.1001–3. As defined in § 1.1001–6(h)(1) of the Final Regulations, a covered modification is generally comprised of four elements: (1) A contract with an operative rate or fallback provision that references a discontinued IBOR; (2) a modification of that contract (a) to replace an operative rate that refers to a discontinued IBOR with a qualified rate and, if the parties so choose, to add an obligation for one party to make a qualified one-time payment, (b) to include a qualified rate as a fallback to an operative rate that refers to a discontinued IBOR, or (c) to replace a fallback rate that refers to a discontinued IBOR with a qualified rate; (3) any associated modifications with respect to those modifications of the operative rate or fallback provisions; and (4) satisfaction of rules in § 1.1001–6(j) of the Final Regulations that exclude certain modifications from the definition of covered modification. The defined terms ''discontinued IBOR,'' ''qualified rate,'' ''qualified one-time payment,'' and ''associated modification'' and the rules in § 1.1001–6(j) of the Final Regulations that exclude certain modifications are discussed in more detail in the sections of this preamble entitled *Discontinued IBOR, Qualified rate, Qualified one-time payments, Associated modifications,* and *Fair market value requirement and excluded modifications,* respectively. A modification described in section 4.02 of Rev. Proc. 2020–44, as supplemented by any guidance that may be published in the Internal Revenue Bulletin, is also treated as a covered modification. Rev. Proc. 2020–44 is discussed in more detail in the section of this preamble entitled *Rev. Proc. 2020–44.* For purposes of the definition of a covered modification, the term ''modification'' is broadly construed to include any modification, regardless of its form. For example, a holding corporation that issued preferred stock may modify that stock for purposes of the Final Regulations by means of an exchange offer conducted by the corporation's subsidiary. The term also includes any modification regardless of whether the modification is evidenced by an express agreement (oral or written), conduct of the parties, or otherwise. For example, any agreement to make additional payments with respect to a contract is a modification of that contract, regardless of whether the parties memorialize the obligation to make those payments in an amendment to the original contract or in a new, standalone contract.

Although § 1.1001–6(b)(1) of the Final Regulations generally provides that a covered modification of a contract is not treated as an exchange of property for other property differing materially in kind or in extent for purposes of § 1.1001–1(a), whether a noncovered modification that occurs contemporaneously with the covered modification is an exchange of property for other property differing materially in kind or in extent is determined under the ordinary rules in § 1.1001–1(a) or § 1.1001–3. The Final Regulations define a noncovered modification as any modification or portion of a modification of a contract that is not a covered modification. Two commenters asked whether pairing a modification that would otherwise qualify for beneficial treatment under the Proposed Regulations with a contemporaneous modification that does not so qualify prevents both modifications from benefitting from the Proposed Regulations. The reference to a ''portion of a modification'' in the definitions of covered modification and noncovered modification in the Final Regulations indicates that a modification is a noncovered modification only to the extent that it fails to be a covered modification.

Two commenters requested that the Treasury Department and the IRS clarify whether, following a covered modification by which the parties add or amend fallback provisions, the change to the terms of the contract that results from the activation of the new fallback provisions must be tested separately at the time of activation to determine whether that change is an exchange of property for other property differing materially in kind or in extent for purposes of § 1.1001–1(a). As is ordinarily the case, a change to the terms of the contract that results from the activation of a fallback provision must be tested at the time of activation to determine whether that change results in such an exchange under § 1.1001–1(a). If the change resulting from the activation of a fallback is a covered modification under § 1.1001–6(h)(1) of the Final Regulations, then the special rules provided in the Final Regulations for covered modifications apply to that change. Otherwise, whether that change is an exchange of property for other property differing materially in kind or in extent is generally determined under § 1.1001–3 for debt instruments and under § 1.1001–1(a) for other kinds of contracts.

b. Discontinued IBOR

Section 1.1001–6(h)(4) of the Final Regulations defines ''discontinued IBOR,'' a term not used in the Proposed Regulations. Sections 1.860G–1(e) and 1.1275–2(m) of the Final Regulations also incorporate this definition. Under this new definition, a discontinued IBOR is generally an IBOR that will be discontinued, and an IBOR ceases to be a discontinued IBOR a year after the IBOR's discontinuation. The purpose of this new definition is to tailor the relief provided in the Final Regulations to better match the problem that the Final Regulations are intended to address.

One commenter requested that the Final Regulations apply when the parties to a contract modify the terms of the contract after the existing fallback provisions have already replaced all references to the IBOR with another rate. The commenter noted that, in the case of some widely held debt instruments, securing the consent of enough holders to modify the terms of the debt instrument may delay the modification so that the existing fallback provisions are triggered before the modification is complete. In such cases, the Proposed Regulations would not apply to the modification because the qualified rate would not be replacing an IBOR-based rate. The purpose of the Final Regulations is to facilitate the transition away from discontinued IBORs in order to avoid the market disruption that may occur if parties to contracts referencing discontinued IBORs fail to transition before the discontinued IBOR ceases. The change suggested by the commenter is not necessary to achieve this purpose. Moreover, the discontinuation of the most commonly used tenors of USD LIBOR has been deferred until June 30, 2023, giving parties to contracts such as those described by the commenter an additional 18 months to act. Accordingly, the Final Regulations do not adopt this comment.

As discussed in the section of this preamble entitled *Discontinuation of LIBOR and Tax Implications,* the ICE Benchmark Administration will continue to publish synthetic GBP LIBORs and synthetic JPY LIBORs for a limited time after December 31, 2021, and may publish synthetic USD LIBORs for a limited time after June 30, 2023. The Treasury Department and the IRS have determined that, for purposes of the Final Regulations, these synthetic LIBORs are a continuation of the currency and tenor variant of LIBOR that they succeed. Thus, for example, three-month sterling LIBOR became a discontinued IBOR on March 5, 2021, the date on which the ICE Benchmark Administration announced that it would permanently cease to publish three-month sterling LIBOR, and will cease to be a discontinued IBOR one year after the date on which the ICE Benchmark Administration ceases to publish the three-month tenor of synthetic GBP LIBOR.

c. Qualified Rate

The definition of ''qualified rate'' in § 1.1001–6(b) of the Proposed Regulations generally includes three elements: (1) The putative qualified rate must appear on a list of rates eligible to be a qualified rate in § 1.1001–6(b)(1); (2) the fair market values of the contract before and after the modification involving the putative qualified rate must be substantially equivalent under § 1.1001–6(b)(2); and (3) the interest rate benchmark to which the putative qualified rate refers and the relevant IBOR generally must be based on the same currency under § 1.1001–6(b)(3). The fair market value requirement is addressed in more detail in the section of this preamble entitled *Fair market value requirement and excluded modifications.*

One commenter recommended streamlining the list of rates that are eligible to be a ''qualified rate'' in § 1.1001–6(b)(1) of the Proposed Regulations. The commenter pointed out that § 1.1001–6(b)(1)(x) of the Proposed Regulations generally includes qualified floating rates without regard to the limitations on multiples and that the interest rate benchmarks listed in § 1.1001–6(b)(1)(i) through (viii) of the Proposed Regulations are merely examples of qualified floating rates. In response, the Treasury Department and the IRS have merged § 1.1001–6(b)(1)(i) through (viii) and (x) of the Proposed Regulations into a single entry in § 1.1001–6(h)(3)(ii)(A) of the Final Regulations, which includes a non-exclusive list of rates that are generally qualified floating rates, such as the Secured Overnight Financing Rate published by the Federal Reserve Bank of New York (SOFR), the Sterling Overnight Index Average, the Tokyo Overnight Average Rate, the Swiss Average Rate Overnight, and the euro short-term rate administered by the European Central Bank.

This commenter also suggested that § 1.1001–6(b)(1)(xi) of the Proposed Regulations, which describes any rate determined by reference to another rate included in the list of eligible rates, is unnecessary because any rate described in that paragraph is also described in § 1.1001–6(b)(1)(x) of the Proposed Regulations, which is any qualified

floating rate without regard to the limitations on multiples. However, certain IBOR-based objective rates (as defined in § 1.1275–5(c)) and certain IBOR-based rates on contingent payment debt instruments (within the meaning of § 1.1275–4) may not be described in § 1.1001–6(b)(1)(x) of the Proposed Regulations. Accordingly, the Final Regulations do not adopt this comment and retain both § 1.1001–6(b)(1)(x) and (xi) of the Proposed Regulations in the list of eligible rates at § 1.1001–6(h)(3)(ii)(A) and (D) of the Final Regulations, respectively.

Other commenters suggested that the list of rates that are eligible to be qualified rates in the Proposed Regulations be expanded to include any rate identified by the ARRC or ISDA as a replacement for an IBOR. The Treasury Department and the IRS have concluded that allowing any purely private organizations the authority to add to the list of rates eligible to be qualified rates would be inconsistent with the carefully circumscribed degree and manner in which the Final Regulations authorize taxpayers to depart from the ordinary tax rules. Accordingly, the Final Regulations extend such authority only to the ARRC and only for as long as the Federal Reserve Bank of New York continues to be an ex officio member of the ARRC.

One commenter recommended that the currency element of the definition of qualified rate in § 1.1001–6(b)(3) of the Proposed Regulations be removed. After stating that a qualified rate under the Proposed Regulations must generally be a qualified floating rate, the commenter reasoned that the currency requirement in the definition of qualified rate is unnecessary because that requirement is already built into the definition of qualified floating rate under § 1.1275–5(b). The Final Regulations do not adopt this comment because a qualified rate under the Final Regulations is not required to be a qualified floating rate. For example, an objective rate based on a qualified floating rate may be described in § 1.1001–6(h)(3)(ii)(D) of the Final Regulations but not in § 1.1001–6(h)(3)(ii)(A) of the Final Regulations. Also, although the currency requirements in § 1.1001–6(h)(3)(i) of the Final Regulations and § 1.1275–5(b) may overlap in many cases, these requirements are not identical. The currency requirement for qualified rates in the Final Regulations requires that the discontinued IBOR and the interest rate benchmark included in the qualified rate be based on the same currency, whereas the currency requirement for qualified floating rates in § 1.1275–5(b) requires that the currency on which the qualified floating rate is based match the currency in which the debt instrument is denominated.

The definition of qualified rate has also been amended in the Final Regulations in response to public comments that identify gaps in how the definition of qualified rate in the Proposed Regulations applies to covered modifications that involve the addition or amendment of fallback provisions. In particular, commenters asked how the definition of qualified rate applies when a contract is modified to include a waterfall of fallback rates, the individual tiers of which may not independently satisfy the definition of qualified rate. Commenters also asked how the definition of qualified rate applies to a fallback rate that will be determined on the date that the fallback rate is triggered and cannot be determined on the date of the modification by which that fallback rate is added to the contract.

The Final Regulations address these comments by providing a series of rules in sect; 1.1001–6(h)(3)(i) and (iii) for determining whether a fallback rate or a collection of fallback rates meet the definition of a qualified rate. Section 1.1001–6(h)(3)(i) of the Final Regulations provides that a single qualified rate may be comprised of more than one fallback rate, such as when the parties add a fallback waterfall. In other words, this rule treats a waterfall of fallbacks as a unit and evaluates that unit to determine if it is a qualified rate. Thus, if the waterfall is designed so that each tier replaces the preceding tier when triggered (for example, when USD LIBOR ceases, USD LIBOR is replaced by the first tier of the waterfall and, if the first tier of the waterfall ceases, that first tier is replaced by the second tier), the entire waterfall is treated as a fallback to a discontinued IBOR even though, as a technical matter, only the first tier of the waterfall is a fallback to the discontinued IBOR. Section 1.1001–6(h)(3)(iii)(A) of the Final Regulations generally provides that, when a collection of fallback rates is added to the contract (for example, a fallback waterfall), that collection of fallback rates is a qualified rate only if each individual fallback rate in the collection meets the requirements to be a qualified rate. Sections 1.1001–6(h)(3)(iii)(B) and (C) of the Final Regulations apply for purposes of determining whether an individual fallback rate (regardless of whether that fallback rate was added to the contract individually or the fallback rate was added as a collection of fallback rates and is being tested individually under § 1.1001–6(h)(3)(iii)(A) of the Final Regulations) meets the requirements to be a qualified rate. Under § 1.1001–6(h)(3)(iii)(B) of the Final Regulations, a fallback rate is treated as not meeting the requirements to be a qualified rate if the contractual terms that comprise the fallback rate do not ensure at the time of the modification that the fallback rate will meet the requirements to be a qualified rate identified in the first sentence of § 1.1001–6(h)(3)(i) of the Final Regulations when the fallback rate is triggered. Under § 1.1001–6(h)(3)(iii)(C) of the Final Regulations, a fallback rate is treated as meeting the requirements to be a qualified rate if the likelihood that it will ever be triggered is remote. If § 1.1001–6(h)(3)(iii)(B) and (C) of the Final Regulations both apply to a given fallback rate, the rule in § 1.1001–6(h)(3)(iii)(C) takes priority over the rule in § 1.1001–6(h)(3)(iii)(B). Examples in § 1.1001–6(h)(3)(iv) of the Final Regulations illustrate the operation of these rules for fallback rates.

d. Associated Modifications

The Proposed Regulations generally define an associated modification as a modification that is both associated with the replacement of an IBOR-based rate or the inclusion of fallbacks to an IBOR-based rate and that is reasonably necessary to adopt or to implement that replacement or inclusion. Section 1.1001–6(h)(5) of the Final Regulations generally defines an associated modification similarly but eliminates the requirement that an associated modification be ''associated with'' such a replacement or inclusion because any modification that is reasonably necessary to adopt or to implement the replacement or inclusion is necessarily associated with that replacement or inclusion.

The definition of ''associated modification'' in the Proposed Regulations also includes a ''one-time payment,'' which is generally defined as a payment to offset the change in value of the contract that results from replacing an IBOR-based rate with a qualified rate. One commenter asked whether certain cash payments can qualify as associated modifications even if they do not qualify as one-time payments. For example, if the parties to an interest rate swap agree to replace USD LIBOR with a replacement rate comprised of a compounded average of SOFR (computed in arrears using a two-day observation period shift without payment lag) and a fixed adjustment spread, one party might also agree to make an incidental cash payment to compensate the counterparty for small valuation differences between the pre-

modification LIBOR-based contract and the post-modification SOFR-based contract, such as the valuation differences resulting from the difference in observation period. The Treasury Department and the IRS have concluded that including such limited payments within the definition of an associated modification would further the policy goal of the Final Regulations to facilitate the transition away from discontinued IBORs. Accordingly, the definition of ''associated modification'' in § 1.1001–6(h)(5) of the Final Regulations includes an incidental cash payment intended to compensate a counterparty for small valuation differences resulting from a modification of the administrative terms of a contract, such as the valuation differences resulting from a change in observation period. The Treasury Department and the IRS caution, however, that a payment of an amount that is not incidental cannot qualify as an associated modification.

e. Qualified One-Time Payments

The Proposed Regulations provide that a ''one-time payment,'' generally defined as a payment to offset the change in value of the contract that results from replacing an IBOR-based rate with a qualified rate, may be an associated modification. To improve readability and clarity, the Final Regulations redesignate ''one-time payments'' as ''qualified one-time payments'' and define the new term in a standalone definition rather than as a kind of associated modification.

Commenters asked whether the Proposed Regulations cap the amount of a one-time payment and described certain abuses that may result if the amount of the payment is not limited in some way. To clarify the intent of the Proposed Regulations and to prevent excessive payments from satisfying the definition of qualified one-time payments, the Final Regulations generally limit a qualified one-time payment to the amount intended to compensate for the basis difference between the discontinued IBOR and the interest rate benchmark to which the qualified rate refers. Any portion in excess of that cap is a noncovered modification.

f. Fair Market Value Requirement and Excluded Modifications

The Proposed Regulations generally require that the fair market value of the modified contract be substantially equivalent before and after the modification. The Proposed Regulations provide two safe harbors to the fair market value requirement: The historical average safe harbor and the arm's length safe harbor. Under the historical average safe harbor, the fair market value requirement is generally satisfied if, on the date of the modification, the historical average of the IBOR-based rate is within 25 basis points of the historical average of the putative qualified rate. To qualify for the arm's length safe harbor, the parties to the contract generally must not be related under § 267(b) or § 707(b)(1), must conduct bona fide, arm's length negotiations, and must determine based on those negotiations that the fair market value requirement is satisfied. The Treasury Department and the IRS received many public comments identifying practical problems and technical issues with the fair market value requirement and its two safe harbors. In response to these public comments, the Treasury Department and the IRS have replaced the fair market value requirement with rules that describe specific modifications (the excluded modifications) and exclude those modifications from the definition of covered modification. These excluded modifications are described in § 1.1001–6(j)(1) through (5) of the Final Regulations.

One significant purpose of the fair market value requirement in the Proposed Regulations is to ensure that the modifications to the cash flows of an IBOR-referencing contract are intended to address the replacement of the IBOR-based rate in the contract. Because the excluded modifications replace the fair market value requirement, each of the excluded modifications described in § 1.1001–6(j)(1) through (5) of the Final Regulations involves modifying the contract in a way that changes the amount or timing of contractual cash flows.

In addition to a change in cash flows, each of the excluded modifications also describes a particular purpose or intent of the parties making the modification. Section 1.1001–6(j)(1) of the Final Regulations generally describes a situation in which the parties to a contract change the contractual cash flows to induce one or more of the parties to perform any act necessary to consent to a covered modification of the contract. Example 3 in § 1.1001–6(j)(6)(iii) illustrates the operation of § 1.1001–6(j)(1). Section 1.1001–6(j)(2) of the Final Regulations generally describes a situation in which the parties to a contract agree to a contemporaneous noncovered modification of that contract that does not necessarily change contractual cash flows and, in consideration for that change, also agree to change contractual cash flows. Example 5 in § 1.1001–6(j)(6)(v) illustrates the operation of § 1.1001–6(j)(2). Section 1.1001–6(j)(3) of the Final Regulations generally describes a situation in which one party to a contract is experiencing financial distress and another party either makes a concession to or secures a concession from the distressed party in the form of a change in contractual cash flows. Example 6 in § 1.1001–6(j)(6)(vi) illustrates the operation of § 1.1001–6(j)(3). Section 1.1001–6(j)(4) of the Final Regulations generally describes a situation in which the parties to a contract agree to change contractual cash flows on that contract as consideration for some extra-contractual arrangement. Example 7 in § 1.1001–6(j)(6)(vii) illustrates the operation of § 1.1001–6(j)(4). Section 1.1001–6(j)(4) of the Final Regulations also includes a special rule that applies when the parties make an aggregate qualified one-time payment on a portfolio of modified contracts. In that case, the portion of the qualified one-time payment allocable to any one contract in the portfolio is treated as not intended to compensate for any changes in rights or obligations under any other contract in the portfolio.

In § 1.1001–6(j)(5) of the Final Regulations, the Treasury Department and the IRS reserve the authority to expand this list of excluded modifications in guidance published in the Internal Revenue Bulletin. To exercise this authority, the Treasury Department and the IRS must conclude that the modification to be described in such guidance has a principal purpose of achieving a result that is unreasonable in light of the purpose of § 1.1001–6. The Treasury Department and the IRS have concluded that this reservation of authority is necessary to prevent any unforeseen abuses of the significant flexibility granted to taxpayers in the Final Regulations. However, the Treasury Department and the IRS anticipate that any such guidance would be prospective in effect.

g. Rev. Proc. 2020–44

In Rev. Proc. 2020–44, the Treasury Department and the IRS provided rules that overlap with certain of the rules in the Final Regulations. Like § 1.1001–6(b)(1) of the Final Regulations, section 5.01 of Rev. Proc. 2020–44 provides that a modification within the scope of the revenue procedure is not treated as an exchange of property for other property differing materially in kind or extent for purposes of § 1.1001–1(a). And like § 1.1001–6(c)(1)(iii) and (c)(2) of the Final Regulations, section 5.02 of Rev. Proc. 2020–44 generally provides that a modification within the scope of the

revenue procedure will not result in legging out of an integrated transaction or terminating either leg of a hedging transaction. Section 4.02 of Rev. Proc. 2020–44 generally limits the scope of the revenue procedure to modifications to a contract to incorporate certain fallback provisions published by the ARRC or ISDA, labeled the ''ARRC Fallbacks'' and the ''ISDA Fallbacks'' by the revenue procedure. The parties modifying a contract under Rev. Proc. 2020–44 may also deviate in certain limited ways from the ARRC and ISDA Fallbacks. The Treasury Department and the IRS noted that the scope of the revenue procedure may be expanded in subsequent guidance published in the Internal Revenue Bulletin to address developments in the transition away from IBORs. The revenue procedure applies to modifications that occur on or after October 9, 2020, and before January 1, 2023, although the parties to a contract may rely on the revenue procedure for modifications that occur before October 9, 2020.

In the definition of covered modification in § 1.1001–6(h)(1), the Final Regulations generally provide that a modification described in section 4.02 of Rev. Proc. 2020–44 is treated as a covered modification. A modification described in section 4.02 of Rev. Proc. 2020–44 is treated as a covered modification even if the revenue procedure does not apply to that modification, for example, because the modification occurs after the revenue procedure's sunset date of December 31, 2022. The effect of this provision is that the rules in §§ 1.1001–6(b) through (g) and 1.860G–1(e), which rely on the definition of covered modification in § 1.1001–6(h)(1), apply to modifications described in section 4.02 of Rev. Proc. 2020–44. Because of the substantive overlap between the rules in § 1.1001–6(b) and (c) of the Final Regulations and the rules in section 5 of Rev. Proc. 2020–44, it is possible for a single modification to be subject to both sets of rules. As a practical matter, however, the rules in § 1.1001–6(b) and (c) of the Final Regulations are consistent with the rules in section 5 of Rev. Proc. 2020–44, so no conflict is expected to arise.

Prior to the release of Rev. Proc. 2020–44, several commenters recommended that the Final Regulations accommodate the fallback provisions published by the ARRC and ISDA. For example, one commenter recommended that the Final Regulations provide that a modification to incorporate the ARRC's or ISDA's fallback provisions or fallback provisions substantially similar to the ARRC's or ISDA's fallback provisions is not an exchange of property under section 1001. Rev. Proc. 2020–44 and its incorporation into the definition of covered modification in the Final Regulations address these comments.

2. Integrated Transactions and Hedging Transactions

Section 1.1001–6(c) of the Proposed Regulations generally provides that the modification of a contract to replace an IBOR-based rate with a qualified rate is not treated as legging out of a transaction integrated under § 1.1275–6, § 1.988–5(a), or § 1.148–4(h), provided that the components of the transaction continue to qualify for integration after the modification. That section also generally provides that the modification of a contract to replace an IBOR-based rate with a qualified rate is not treated as a disposition or termination of either leg of a hedging transaction under § 1.446–4(e)(6). One commenter stated that, because § 1.446–4 refers to § 1.1221–2(b) for the definition of ''hedging transaction'' and because a hedging transaction and the hedged item must be identified as provided in § 1.1221–2(f), the inclusion in the Proposed Regulations of a rule for § 1.446–4 may justify a negative inference that a similar rule is required to avoid reidentification under § 1.1221–2(f). The Treasury Department and the IRS have concluded that § 1.1001–6(b)(1) of the Final Regulations, which provides that a covered modification of either a hedging transaction or the hedged item is not treated as an exchange of property for other property differing materially in kind or in extent for purposes of § 1.1001–1(a), is sufficient to ensure that neither the hedging transaction nor the hedged item, as modified by the covered modification, needs to be reidentified under § 1.1221–2(f).

The same commenter noted that § 1.1001–6(c) of the Proposed Regulations does not include modifications to add or amend fallback provisions and recommended that the Final Regulations clarify whether the rules in that section apply to such modifications. The commenter further stated that, if a debt instrument and a hedge that reference the same ceasing IBOR are integrated under § 1.1275–6 and the parties' covered modifications of the two instruments result in the fallback provisions being slightly mismatched either in timing (that is, the fallbacks have slightly different triggers) or amount (that is, the fallback rates are slightly different), that mismatch of the fallback provisions could cause a leg out of the integrated transaction even before either fallback provision is triggered. The commenter recommended that such mismatched fallback provisions not cause a leg out of an integrated transaction under § 1.1275–6, § 1.988–5(a), or § 1.148–4(h). In response to these comments, § 1.1001–6(c) of the Final Regulations applies to a covered modification, which is generally defined to include the addition or amendment of fallback provisions. Also, § 1.1001–6(c)(2) of the Final Regulations generally provides that a covered modification that adds or amends fallback provisions is treated as not legging out of a transaction integrated under § 1.1275–6, § 1.988–5(a), or § 1.148–4(h). The Treasury Department and the IRS caution, however, that any mismatch in the fallback provisions of the components of a transaction integrated under § 1.1275–6, § 1.988–5(a), or § 1.148–4(h) may result in legging out when one or more of those fallback provisions are triggered. In that case, a taxpayer would first determine whether the rules in § 1.1001–6(c)(1) of the Final Regulations apply to any modification that results from the triggered fallback provisions.

Several commenters raised questions about the Proposed Regulations' requirement that, to avoid legging out under § 1.1275–6, § 1.988–5(a), or § 1.148–4(h), the integrated hedge must continue to qualify as a § 1.1275–6 hedge, a § 1.988–5(a) hedge, or a qualified hedge, respectively, after the modification. Two commenters asserted that certain minor mismatches between the modified terms of the components will inevitably arise (either because of minor differences in the modified terms or because the components are not modified at the same time) and that such mismatches may prevent the modified contracts from qualifying for continued integration under § 1.1001–6(c) of the Proposed Regulations. These commenters recommended that, if under the Final Regulations a modification is not treated as an exchange of property for purposes of section 1001, that modification also not be treated as legging out of an integrated transaction under § 1.1275–6 or § 1.988–5(a), regardless of whether the modified contracts would otherwise continue to qualify for integration. Alternatively, these commenters recommended that the Final Regulations provide a grace period during which the modified components of the integrated transaction do not have to meet the qualifications for integration. The Final Regulations adopt these commenters' alternative recommendation. Sections 1.1001–6(c)(1)(i), (ii), and (iv) of the

Final Regulations provide a grace period during which a covered modification of a component of a transaction integrated under § 1.1275–6, § 1.988–5(a), or § 1.148–4(h) does not result in legging out of that integrated transaction, notwithstanding any mismatch in timing or amount of payments that results from the covered modification during the grace period. The grace period lasts 90 days and starts on the date of the first covered modification of any component of the integrated transaction. If, however, the hedge component of the integrated transaction does not qualify as a § 1.1275–6 hedge, a § 1.988–5(a) hedge, or a qualified hedge under § 1.148–4(h), as appropriate, by the end of the grace period, the covered modification is a legging out as of the date of the covered modification.

These commenters also observed that taxpayers may enter into temporary hedges, such as basis swaps, to manage the economic risk posed by temporary mismatches between the terms of the components of a transaction integrated under § 1.1275–6 or § 1.988–5(a). The commenters recommended that the Final Regulations accommodate the temporary integration of these hedges. The Final Regulations adopt this comment and provide that temporary hedges entered into to mitigate the economic effect of such temporary mismatches may be integrated during the 90-day grace period without disruption to a transaction integrated under § 1.1275–6 or § 1.988–5(a).

One commenter offered several comments that are specific to the rules in the Proposed Regulations on integration of tax-advantaged bonds under § 1.148–4(h). This commenter recommended that the Final Regulations clarify that the rules in § 1.1001–6(c) for integration of tax-advantaged bonds apply to a qualified hedge that is super-integrated under § 1.148–4(h)(4). Section 1.148–4(h)(4) generally permits only negligible mismatches in timing and amount of payments on super-integrated hedges and bonds, and super-integration of taxable-index hedges, such as hedges based on IBORs, is even more strictly limited. Accordingly, the Treasury Department and the IRS do not adopt this comment, and the Final Regulations clarify that § 1.1001–6(c)(1)(iv) does not apply to hedges and bonds integrated under § 1.148–4(h)(4).

This commenter also requested that the Final Regulations provide that a one-time payment does not cause a hedge to fail to meet the requirements for qualification under § 1.148–4(h)(3)(iv)(C), as required by § 1.1001–6(c) of the Proposed Regulations. The nonperiodic nature of a one-time payment could prevent qualification under several of the requirements identified in § 1.148–4(h)(3)(iv)(C), such as the requirement that the contract contain no significant investment element and the requirement that the payments on the hedge correspond closely in time to the payments on the hedged bonds. The Treasury Department and the IRS have determined that, in each case, the obstacle to qualification can be eliminated by treating the qualified one-time payment as a series of periodic payments spread over time. Accordingly, § 1.1001–6(c)(1)(iv) of the Final Regulations provides that, solely for purposes of applying the qualification requirements identified in § 1.148–4(h)(3)(iv)(C), a qualified one-time payment on the hedge or the hedged bonds is allocated in a manner consistent with the way in which a termination payment on a variable yield issue is allocated under § 1.148–4(h)(3)(iv)(H) and the qualification requirements under § 1.148–4(h)(3)(iv)(C) are applied as if the qualified one-time payment were a series of periodic payments.

3. Fast-Pay Stock

Section 1.7701(l)–3 provides rules that prevent the avoidance of tax by persons participating in fast-pay arrangements. A fast-pay arrangement is defined in § 1.7701(l)–3(b)(1) as any arrangement in which a corporation has fast-pay stock outstanding for any part of its taxable year. Fast-pay stock is defined in § 1.7701(l)–3(b)(2)(i) as stock structured so that dividends (as defined in section 316) paid by the corporation with respect to the stock are economically (in whole or in part) a return of the holder's investment (as opposed to only a return on the holder's investment). Section 1.7701(l)–3(b)(2)(ii) provides that the determination of whether stock is fast-pay stock is based on all facts and circumstances. Stock is examined when it is issued to determine if it is fast-pay stock and, ''for stock that is not fast-pay stock when issued, when there is a significant modification in the terms of the stock or the related agreements or a significant change in the relevant facts and circumstances.'' Id.

One commenter stated that, in certain circumstances, a covered modification of preferred stock could cause the stock to satisfy the definition of fast-pay stock despite the fact that the parties modified the stock not for the purpose of avoiding tax, but rather for the purpose of addressing the discontinuation of an IBOR. Because stock is re-examined to determine if it is fast-pay stock upon the occurrence of either ''a significant modification in the terms of the stock or the related agreements'' or ''a significant change in the relevant facts and circumstances,'' the commenter recommended that the Final Regulations provide that a covered modification is neither a significant modification nor a significant change for this purpose.

The Treasury Department and the IRS have determined that such a rule would further the purpose of the Final Regulations to facilitate the transition away from IBORs that will be discontinued. In addition, the scope and operation of the recommended rule are generally consistent with the scope and operation of the rules in §§ 1.1001–6(b)(1) and (d) of the Final Regulations (treatment of covered modifications under section 1001 and under chapter 4, respectively). Accordingly, the Final Regulations adopt this comment and provide in § 1.1001–6(e) that a covered modification of stock is not a significant modification in the terms of the stock or the related agreements or a significant change in the relevant facts and circumstances for purposes of § 1.7701(l)–3(b)(2)(ii). Unlike §§ 1.1001–6(b)(1) and (d) of the Final Regulations, however, § 1.1001–6(e) of the Final Regulations further provides that, if a covered modification and a noncovered modification are made at the same time or as part of the same plan and the noncovered modification is a significant modification in the terms of the stock or the related agreements or a significant change in the relevant facts and circumstances, then § 1.7701(l)–3(b)(2)(ii) applies and all of the facts and circumstances, including the covered modification and the noncovered modification, are considered in determining whether the stock is fast-pay stock.

4. Investment Trusts Under § 301.7701–4(c)(1)

Under § 301.7701–4(c)(1), an investment trust is not classified as a trust if there is a power under the trust agreement to vary the investment of the certificate holders. One commenter recommended that a covered modification of the income-apportioning terms of an ownership interest be treated as not manifesting a power to vary the investment of certificate holders in a trust under § 301.7701–4(c)(1). The Final Regulations adopt this comment, providing in § 1.1001–6(f) that neither a covered modification of a contract held by an investment trust nor a covered modification of an ownership interest in the investment trust manifest a power to

vary the investment of the certificate holder for this purpose.

5. Rules Regarding Qualified One-Time Payments

The Proposed Regulations generally provide in § 1.1001–6(d) that the character and source of a one-time payment made by a given payor is the same as the source and character of a payment under the contract by that payor. For example, a one-time payment by a lessee on a lease is characterized as a payment of rent and sourced accordingly. The Treasury Department and the IRS received several comments requesting clarification on how this rule applies to certain financial contracts. Several commenters also requested clarification on the timing of tax items associated with a one-time payment. One commenter requested guidance on how a one-time payment is treated for purposes of the arbitrage investment restrictions and private use restrictions that apply to tax-advantaged bonds. The Treasury Department and the IRS are still considering how best to address these issues relating to qualified one-time payments. Until the Treasury Department and the IRS publish further guidance, taxpayers may continue to rely on the rule in § 1.1001–6(d) of the Proposed Regulations to determine source and character of a qualified one-time payment under the Final Regulations.

6. REMICs

Section 1.860G–1(e) of the Proposed Regulations provides special rules applicable to REMICs that have issued interests with an IBOR-based rate or that hold obligations with an IBOR-based rate. Section 1.860G–1(e)(4) of the Proposed Regulations provides certain rules addressing the treatment of reasonable costs incurred to effect a modification that qualifies for special treatment under § 1.1001–6(a)(1), (2), or (3) of the Proposed Regulations. One commenter noted that the governing documents for a REMIC may require tax opinions and rating agency confirmations in connection with the modifications contemplated in the Proposed Regulations and recommended that the Treasury Department and the IRS confirm that the costs of obtaining these materials are ''reasonable costs'' within the meaning of § 1.860G–1(e)(4) of the Proposed Regulations. Whether a cost is reasonable depends upon the facts and circumstances relating both to the nature of the cost and the amount of the cost. However, the Treasury Department and the IRS generally agree that the costs of obtaining tax opinions and rating agency confirmations required by the governing documents for a REMIC are reasonable in nature.

7. Interest Expense of a Foreign Corporation

The Proposed Regulations provide in § 1.882–5(d)(5)(ii)(B) that a foreign corporation that is a bank may elect to compute interest expense attributable to excess U.S.-connected liabilities using a yearly average of SOFR. One commenter stated that a yearly average of SOFR is not an equitable substitute for 30-day USD LIBOR, the rate that foreign banks are permitted to elect for this purpose under the existing regulations, because 30-day USD LIBOR is typically a higher rate than a yearly average of SOFR. This commenter recommended that, in lieu of SOFR, the Final Regulations either refer to a widely accepted interest rate benchmark that is more similar than SOFR to 30-day USD LIBOR or add a fixed adjustment spread to the yearly average of SOFR.

The Treasury Department and the IRS continue to study the appropriate rate to replace 30-day USD LIBOR for purposes of the published rate election under § 1.882–5(d)(5)(ii)(B). In evaluating the appropriate replacement rate, the Treasury Department and the IRS will continue to balance the administrative convenience of providing taxpayers an election to use the annual published rate with the need for a replacement rate that more accurately reflects the taxpayer's borrowing costs. In providing taxpayers with an election to use a published rate, the Treasury Department and the IRS must ensure that the replacement rate does not overstate the amount of interest expense allocable to income that is effectively connected with the conduct of a U.S. trade or business. Until final regulations are published that replace the 30-day USD LIBOR election provided in § 1.882–5(d)(5)(ii)(B), taxpayers may continue to apply either the general rule or the annual published rate election provided under § 1.882–5(d)(5)(ii) to calculate interest on excess U.S.-connected liabilities. Taxpayers may also continue to rely on the rule in § 1.882–5(d)(5)(ii)(B) of the Proposed Regulations and compute interest on excess U.S.-connected liabilities by computing a yearly average SOFR based on the rates published by the Federal Bank of New York for the taxable year. Although commenters provided some ideas on a rate that could be closer to a replacement for 30-day LIBOR (for example, a widely accepted interest rate benchmark or adding a fixed adjustment spread to the yearly average of SOFR), the Treasury Department and the IRS continue to request recommendations for a specific rate that would be an appropriate replacement to 30-day LIBOR for computing interest expense on excess U.S.-connected liabilities for purposes of § 1.882–5(d)(5)(ii)(B). The Treasury Department and the IRS anticipate issuing additional guidance addressing § 1.882–5(d)(5)(ii)(B) before 30-day USD LIBOR is discontinued in 2023.

8. Change of Accounting Method

One commenter asked the Treasury Department and the IRS to address whether changing from an IBOR-based discount rate to a discount rate based on a different interest rate benchmark for the purpose of valuing securities under the mark-to-market rules in section 475 is a change in method of accounting that requires the consent of the Secretary under section 446(e). The commenter noted that this change may occur either at the time when the relevant IBOR is discontinued or in advance of that time in anticipation of the IBOR's discontinuation. To facilitate an orderly transition in connection with the discontinuation of IBORs and to treat changes from an IBOR-based discount rate in a consistent manner, the Treasury Department and the IRS will not treat a change from a discount rate that is based on a discontinued IBOR (as defined in § 1.1001–6(h)(4) of the Final Regulations) to a discount rate that is a qualified rate for the purpose of valuing securities under the mark-to-market rules in section 475 as a change in method of accounting under section 446(e).

9. Applicability Dates

The Proposed Regulations under §§ 1.860G–1(e), 1.1001–6, and 1.1275–2(m) generally propose that the Final Regulations permit taxpayers to apply the Final Regulations retroactively, as authorized under section 7805(b)(7). However, the Proposed Regulations under § 1.1001–6 propose that the Final Regulations require as a condition of a taxpayer's retroactive application that all the taxpayer's related parties also apply § 1.1001–6 retroactively. One commenter requested that this requirement be more clearly stated, and the Final Regulations do so in § 1.1001–6(k).

Another commenter observed that sections 267(b) and 707(b)(1), under which relatedness is determined for purposes of the applicability dates in the Proposed Regulations, do not effectively address governmental entities or tax-exempt entities described in section 501(c)(3). This commenter recommended that relatedness be

determined for such entities under § 1.150–1(b) and (e). The Treasury Department and the IRS agree with this comment and adopt the commenter's recommendation in §§ 1.1001–6(k) and 1.1275–2(m)(5) of the Final Regulations.

Effect on Other Documents

Rev. Proc. 2020–44, 2020–45 I.R.B. 991, is amplified.

Special Analyses

I. Regulatory Planning and Review—Economic Analysis

Executive Orders 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including (i) potential economic, environmental, and public health and safety effects, (ii) potential distributive impacts, and (iii) equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

These final regulations have been designated as subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) (MOA) between the Treasury Department and the Office of Management and Budget (OMB) regarding review of tax regulations. The Office of Information and Regulatory Affairs has designated these final regulations as economically significant under section 1(c) of the MOA.

A. Background, Need for the Final Regulations, and Economic Analysis of Final Regulations

A very large volume of U.S. financial products and contracts include terms or conditions that reference LIBOR or, more generally, IBORs. Concern about manipulation and a decline in the volume of the funding from which LIBOR is calculated led to recommendations for the development of alternatives to LIBOR that would be based on transactions in a more robust underlying market. In addition, on July 27, 2017, the U.K. Financial Conduct Authority, the U.K. regulator tasked with overseeing LIBOR, announced that all currency and term variants of LIBOR, including USD LIBOR, may be phased out after 2021 and not be published after that timeframe. The administrator of LIBOR, the ICE Benchmark Administration, announced on March 5, 2021, that publication of overnight, one-month, three-month, six-month, and 12-month USD LIBOR will cease immediately following the LIBOR publication on June 30, 2023, and that publication of all other currency and tenor variants of LIBOR will cease immediately following the LIBOR publication on December 31, 2021.

The ARRC, a group of stakeholders affected by the cessation of the publication of USD LIBOR, was convened to identify an alternative rate and to facilitate voluntary adoption of that alternative rate. The ARRC recommended SOFR as a potential replacement for USD LIBOR. Essentially all financial products and contracts that currently contain conditions or legal provisions that rely on LIBOR and other IBORs are expected to transition to SOFR or similar alternatives in the next few years. This transition will involve changes in debt, derivatives, and other financial contracts to adopt SOFR or other alternative reference rates. The ARRC has estimated that the total exposure to USD LIBOR was close to $200 trillion in 2016, of which approximately 95 percent were in over-the-counter derivatives. ARRC further notes that USD LIBOR is also referenced in several trillion dollars of corporate loans, floating-rate mortgages, and similar financial products. In the absence of further tax guidance, the vast majority of expected changes in such contracts could lead to the recognition of gains (or losses) in these contracts for U.S. income tax purposes and to correspondingly potentially large tax liabilities for their holders. To address this issue, the final regulations provide that changes in debt instruments, derivative contracts, and other affected contracts to replace reference rates based on discontinued IBORs in a covered modification (both as defined in the final regulations) will not result in tax realization events under section 1001 and relevant regulations thereunder. For this purpose, a covered modification is generally the replacement of a discontinued IBOR with a qualified rate, provided that the replacement is not excluded under § 1.1001–6(j)(1) through (5) of these final regulations (the excluded modifications). The excluded modifications ensure that a covered modification includes only modifications to the cash flows of an IBOR-referencing contract intended to address the replacement of the IBOR-based rate in the contract and that modifications of contracts in a manner that is intended to change the amount or timing of contractual cash flows for other reasons or purposes remain subject to the general rules in section 1001 and the regulations thereunder. The final regulations also provide corresponding guidance on hedging transactions and derivatives to the effect that taxpayers may modify the components of hedged or integrated transactions to replace discontinued IBORs in a covered modification without affecting the tax treatment of the hedges or underlying transactions.

In the absence of these final regulations, parties to contracts affected by the cessation of the publication of LIBOR would either suffer tax consequences to the extent that a change to the contract results in a tax realization event under section 1001 or attempt to find alternative contracts that avoid such a tax realization event, which may be difficult as a commercial matter. Both such options would be both costly and highly disruptive to U.S. financial markets. A large number of contracts may end up being breached, which may lead to bankruptcies or other legal proceedings. The types of actions that contract holders might take in the absence of these final regulations are difficult to predict because such an event is outside recent experience in U.S. financial markets. This financial disruption would be particularly unproductive because the economic characteristics of the financial products and contracts under the new rates would be essentially unchanged. Thus, there is no underlying economic rationale for a tax realization event.

The Treasury Department and the IRS project that these final regulations would avoid this costly and unproductive disruption. The Treasury Department and the IRS further project that these final regulations, by implementing the regulatory provisions requested by ARRC and taxpayers, will help facilitate the economy's adaptation to the cessation of LIBOR in a least-cost manner.

II. Regulatory Flexibility Act

It is hereby certified that the Final 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).

As discussed elsewhere in this preamble, the administrator of all currency and tenor variants of LIBOR has announced that publication of overnight, one-month, three-month, six-month, and 12-month USD LIBOR will cease on June 30, 2023, and that publication of all other currency and tenor variants of LIBOR will cease on December 31, 2021. Many contracts, including financial contracts such as debt instruments and derivative contracts, refer to LIBOR or another IBOR to determine the parties' rights

and obligations under the contract. When parties to IBOR-referencing contracts modify those contracts in anticipation of the discontinuation of the referenced IBOR, that modification can be a tax realization event, giving rise to gain, loss, income, or deduction. That modification can also cause other unintended tax consequences.

The number of small entities potentially affected by the Final Regulations is unknown but could be substantial because entities of all sizes are parties to contracts that reference a discontinued IBOR. Although a substantial number of small entities is potentially affected by the Final Regulations, the Treasury Department and the IRS have concluded that the Final Regulations will not have a significant economic impact on a substantial number of small entities. This is because the purpose and effect of the Final Regulations is to minimize the economic impact of the transition away from LIBOR and other discontinued IBORs by preventing many of the tax consequences that might otherwise flow when taxpayers modify IBOR-referencing contracts in anticipation of the cessation of a discontinued IBOR. Furthermore, the Final Regulations do not impose a collection of information on any taxpayers, including small entities. Accordingly, the Final Regulations will not have a significant economic impact on a substantial number of small entities.

III. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. The Final Regulations do not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

IV. Executive Order 13132: Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. The Final Regulations do not have federalism implications and do not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

V. Congressional Review Act

The Administrator of the Office of Information and Regulatory Affairs of the OMB has determined that this Treasury decision is a major rule for purposes of the Congressional Review Act (5 U.S.C. 801 *et seq.*) (''CRA''). Under section 801(3) of the CRA, a major rule takes effect 60 days after the rule is published in the **Federal Register**. Accordingly, the Treasury Department and IRS are adopting the Final Regulations with the delayed effective date generally prescribed under the Congressional Review Act.

Drafting Information

The principal authors of these final regulations are Caitlin Holzem and Spence Hanemann of the Office of Associate Chief Counsel (Financial Institutions and Products). However, other personnel from the Treasury Department and the IRS participated in their development.

Availability of IRS Documents

The revenue procedure cited in this preamble is published in the Internal Revenue Bulletin (or Cumulative Bulletin) and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *https://www.irs.gov.*

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 301 are amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by revising the entry for § 1.860G–1 and adding an entry in numerical order for § 1.1001–6 to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.860G–1 also issued under 26 U.S.C. 860G(a)(1)(B), (d)(2)(E), and (e).

* * * * *

Section 1.1001–6 also issued under 26 U.S.C. 148(i), 26 U.S.C. 988(d), 26 U.S.C. 1275(d), and 26 U.S.C. 7701(l).

* * * * *

■ **Par. 2.** Section 1.860A–0 is amended by adding entries for § 1.860A–1(b)(6) and (7) and § 1.860G–1(e) to read as follows:

§ 1.860A–0 Outline of REMIC provisions.

* * * * *

§ 1.860A1–1 Effective dates and transition rules.

* * * * *

(b) * * *

(6) Exceptions for certain modified obligations.

(7) Exceptions for certain modifications of obligations that refer to certain interbank offered rates.

* * * * *

§ 1.860G1 1 Definition of regular and residual interests.

* * * * *

(e) Transition from certain interbank offered rates.

(1) In general.

(2) Change in reference rate for a regular interest after the startup day.

(3) Contingencies of rate on a regular interest.

(4) Reasonable expenses incurred to make covered modifications.

* * * * *

■ **Par. 3.** Section 1.860A–1 is amended by adding paragraph (b)(7) to read as follows:

§ 1.860A1 –1 Effective dates and transition rules.

* * * * *

(b) * * *

(7) *Exceptions for certain modifications of obligations that refer to certain interbank offered rates*—(i) Paragraphs (e)(2) and (4) of § 1.860G–1 apply with respect to a covered modification that occurs on or after March 7, 2022. However, paragraphs (e)(2) and (4) of § 1.860G–1 may be applied with respect to a covered modification that occurs before March 7, 2022. See section 7805(b)(7).

(ii) Paragraph (e)(3) of § 1.860G–1 applies to a regular interest in a REMIC issued on or after March 7, 2022. However, paragraph (e)(3) of § 1.860G–1 may be applied to a regular interest in a REMIC issued before March 7, 2022. See section 7805(b)(7).

■ **Par. 4.** Section 1.860G–1 is amended by:

■ 1. Removing ''paragraph (b)(3)'' in paragraph (a)(5) and adding in its place ''paragraphs (b)(3) and (e)(4)''.
■ 2. Adding paragraph (e).
The addition reads as follows:

§ 1.860G1–1 Definition of regular and residual interests.

* * * * *

(e) *Transition from certain interbank offered rates*—(1) *In general.* This paragraph (e) provides rules relating to the modification of the terms of a regular interest in a REMIC or the terms of an asset held by a REMIC as part of the transition away from the London Interbank Offered Rate and certain other interbank offered rates. For purposes of this paragraph (e), *covered modification* and *discontinued IBOR* have the meanings provided in § 1.1001–6(h)(1) and (4), respectively. See § 1.1001–6 for additional rules that may apply to an interest in a REMIC that provides for a rate referencing a discontinued IBOR.

(2) *Change in reference rate for a regular interest after the startup day.* A covered modification of a regular interest in a REMIC that occurs after the startup day is disregarded in determining whether the modified regular interest has fixed terms on the startup day under paragraph (a)(4) of this section.

(3) *Contingencies of rate on a regular interest.* An interest in a REMIC does not fail to qualify as a regular interest solely because it is subject to a contingency whereby a rate that references a discontinued IBOR and is a variable rate permitted under paragraph (a)(3) of this section may change to a fixed rate or a different variable rate permitted under paragraph (a)(3) of this section in anticipation of the discontinued IBOR becoming unavailable or unreliable.

(4) *Reasonable expenses incurred to make covered modifications.* An interest in a REMIC does not fail to qualify as a regular interest solely because it is subject to a contingency whereby the amount of payments of principal or interest (or other similar amounts) with respect to the interest in the REMIC is reduced by reasonable costs incurred to effect a covered modification. In addition, payment by a party other than the REMIC of reasonable costs incurred to effect a covered modification is not a contribution to the REMIC for purposes of section 860G(d).

■ **Par. 5.** Section 1.1001–6 is added to read as follows:

§ 1.10011–6 Transition from certain interbank offered rates.

(a) *In general.* This section provides rules relating to the modification of the terms of a contract as part of the transition away from the London Interbank Offered Rate and certain other interbank offered rates. In general, paragraphs (b) through (g) of this section provide the operative rules for a covered modification. Paragraph (h) of this section defines certain terms that are used in these operative rules, such as *covered modification, qualified rate, discontinued IBOR, associated modification,* and *qualified one-time payment.* Paragraph (j) of this section describes certain modifications that are not covered modifications and provides examples that illustrate the operation of the rules in paragraph (j) of this section. For rules regarding original issue discount on certain debt instruments that provide for a rate referencing a discontinued IBOR, see § 1.1275–2(m). For rules regarding certain interests in a REMIC that provide for a rate referencing a discontinued IBOR, see § 1.860G–1(e).

(b) *Treatment under section 1001*—(1) *Covered modifications.* A covered modification of a contract is not treated as the exchange of property for other property differing materially in kind or in extent for purposes of § 1.1001–1(a). For example, if the terms of a debt instrument that pays interest at a rate referencing the U.S.-dollar London Interbank Offered Rate (USD LIBOR) are modified to provide that the debt instrument pays interest at a qualified rate referencing the Secured Overnight Financing Rate published by the Federal Reserve Bank of New York (SOFR) and the modification is not described in paragraph (j) of this section, the modification is not treated as the exchange of property for other property differing materially in kind or in extent for purposes of § 1.1001–1(a).

(2) *Contemporaneous noncovered modifications.* If a covered modification is made at the same time as a noncovered modification, § 1.1001–1(a) or § 1.1001–3, as appropriate, applies to determine whether the noncovered modification results in the exchange of property for other property differing materially in kind or in extent. In applying § 1.1001–1(a) or § 1.1001–3 for this purpose, the covered modification is treated as part of the terms of the contract prior to the noncovered modification. For example, if the parties to a debt instrument modify the interest rate in a manner that is a covered modification and contemporaneously extend the final maturity date of the debt instrument, which is a noncovered modification, only the extension of the final maturity date is analyzed under § 1.1001–3 and, for purposes of that analysis, the modified interest rate is treated as a term of the instrument prior to the extension of the final maturity date.

(c) *Effect of a covered modification on integrated transactions and hedging transactions*—(1) *In general.* Except as otherwise provided in paragraph (c)(2) of this section, the rules in paragraphs (c)(1)(i) through (iv) of this section determine the effect of a covered modification on an integrated transaction under § 1.1275–6, a qualified hedging transaction under § 1.988–5(a), a hedging transaction under § 1.446–4, or a qualified hedging transaction under § 1.148–4(h).

(i) A covered modification of one or more contracts that are part of an integrated transaction under § 1.1275–6 is treated as not legging out of the integrated transaction, provided that, no later than the end of the 90-day period beginning on the date of the first covered modification of any such contract, the financial instrument that results from any such covered modifications satisfies the requirements to be a § 1.1275–6 hedge (as defined in § 1.1275–6(b)(2)) with respect to the qualifying debt instrument that results from any such covered modification. If a taxpayer enters into a financial instrument intended to mitigate the economic effect of a temporary mismatch of the legs of the integrated transaction during that 90-day period (a *§ 1.1275–6 interim hedge*), the integration of the § 1.1275–6 interim hedge with the other components of the integrated transaction during the 90-day period is treated as not legging into a new integrated transaction and the termination of the § 1.1275–6 interim hedge before the end of the 90-day period is treated as not legging out of the existing integrated transaction.

(ii) A covered modification of one or more contracts that are part of a qualified hedging transaction under § 1.988–5(a) is treated as not legging out of the qualified hedging transaction, provided that, no later than the end of the 90-day period beginning on the date of the first covered modification of any such contract, the financial instrument or series or combination of financial instruments that results from any such covered modifications satisfies the requirements to be a § 1.988–5(a) hedge (as defined in § 1.988–5(a)(4)) with respect to the qualifying debt instrument that results from any such covered modification. If a taxpayer enters into a financial instrument intended to mitigate the economic effect of a temporary mismatch of the legs of the qualified hedging transaction during that 90-day period (a *§ 1.988–5(a) interim hedge*), the integration of the

§ 1.988–5(a) interim hedge with the other components of the qualified hedging transaction during the 90-day period is treated as not legging into a new qualified hedging transaction and the termination of the § 1.988–5(a) interim hedge before the end of the 90-day period is treated as not legging out of the existing qualified hedging transaction.

(iii) A covered modification of one leg of a transaction subject to the hedge accounting rules in § 1.446–4 is not treated as a disposition or termination (within the meaning of § 1.446–4(e)(6)) of either leg of the transaction.

(iv) A covered modification of a qualified hedge or of the tax-advantaged bonds with which the qualified hedge is integrated under § 1.148–4(h)(1) is treated as not terminating the qualified hedge under § 1.148–4(h)(3)(iv)(B), provided that, no later than the end of the 90-day period beginning on the date of the first covered modification of either the qualified hedge or the hedged bonds, the qualified hedge that results from any such covered modification satisfies the requirements to be a qualified hedge (determined by applying the special rules for certain modifications of qualified hedges under § 1.148–4(h)(3)(iv)(C)) with respect to the hedged bonds that result from any such covered modification. Solely for purposes of determining whether the qualified hedge that results from a covered modification satisfies the requirements to be a qualified hedge with respect to the hedged bonds that result from any such covered modification in the preceding sentence, a qualified one-time payment with respect to the hedge or the hedged bonds (or both) is allocated in a manner consistent with the allocation of a termination payment for a variable yield issue under § 1.148–4(h)(3)(iv)(H) and treated as a series of periodic payments. This paragraph (c)(1)(iv) does not apply if, prior to any covered modifications, the qualified hedge and the tax-advantaged bond are integrated under § 1.148–4(h)(4).

(2) *Fallback rates.* If a covered modification of a contract that is part of an integrated transaction under § 1.1275–6 is described in paragraph (h)(1)(ii) or (iii) of this section, that covered modification is treated as not legging out of the integrated transaction. If a covered modification of a contract that is part of a qualified hedging transaction under § 1.988–5(a) is described in paragraph (h)(1)(ii) or (iii) of this section, that covered modification is treated as not legging out of the qualified hedging transaction. If a covered modification of a qualified hedge or of the tax-advantaged bonds with which the qualified hedge is integrated under § 1.148–4(h) is described in paragraph (h)(1)(ii) or (iii) of this section, that covered modification is treated as not terminating the qualified hedge under § 1.148–4(h)(3)(iv)(B).

(d) *Coordination with provision for existing obligations under chapter 4.* A modification of a contract is not a material modification of that contract for purposes of § 1.1471–2(b)(2)(iv) to the extent the modification is a covered modification. See paragraph (b)(2) of this section for rules that apply for purposes of § 1.1471–2(b)(2)(iv) when a modification to a contract includes both a covered modification and a contemporaneous noncovered modification.

(e) *Coordination with fast-pay stock rules.* A covered modification of stock is not a significant modification in the terms of the stock or the related agreements or a significant change in the relevant facts and circumstances for purposes of § 1.7701(l)–3(b)(2)(ii). If a covered modification is made at the same time as, or as part of a plan that includes, a noncovered modification and the noncovered modification is a significant modification in the terms of the stock or the related agreements or a significant change in the relevant facts and circumstances, then § 1.7701(l)–3(b)(2)(ii) applies to determine whether the stock is fast-pay stock, taking into account all the facts and circumstances (including both the covered and noncovered modification).

(f) *Coordination with rules for investment trusts.* A covered modification of a contract held by an investment trust does not manifest a power to vary the investment of the certificate holders for purposes of § 301.7701–4(c)(1) of this chapter. Further, a covered modification of an ownership interest in an investment trust does not manifest a power to vary the investment of the certificate holder for purposes of § 301.7701–4(c)(1) of this chapter.

(g) [Reserved]

(h) *Definitions*—(1) *Covered modification.* A *covered modification* is a modification or portion of a modification of the terms of a contract that is described in one or more of paragraphs (h)(1)(i) through (iii) of this section and that is not described in any of paragraphs (j)(1) through (5) of this section. Any modification of the terms of a contract described in section 4.02 of Rev. Proc. 2020–44, 2020–45 I.R.B. 991, or described in other guidance published in the Internal Revenue Bulletin that supplements the list of modifications described in section 4.02 of Rev. Proc. 2020–44 or the definitions on which that section relies (see § 601.601(d)(2)(ii)(a) of this chapter) is treated as a covered modification. For purposes of this section, a modification of the terms of a contract includes any modification of the terms of the contract, regardless of the form of the modification (for example, a modification may be an exchange of one contract for another, an amendment to the existing contract, or a modification accomplished indirectly through one or more transactions with third parties) and regardless of whether the modification is evidenced by an express agreement (oral or written), conduct of the parties, or otherwise. For purposes of this section, a contract includes but is not limited to a debt instrument, a derivative contract, stock, an insurance contract, and a lease agreement.

(i) The terms of the contract are modified to replace an operative rate that references a discontinued IBOR with a qualified rate, to add an obligation for one party to make a qualified one-time payment (if any), and to make associated modifications (if any).

(ii) The terms of the contract are modified to include a qualified rate as a fallback to an operative rate that references a discontinued IBOR and to make associated modifications (if any).

(iii) The terms of the contract are modified to replace a fallback rate that references a discontinued IBOR with a qualified rate and to make associated modifications (if any).

(2) *Noncovered modification.* A *noncovered modification* is any modification or portion of a modification of the terms of a contract that is not a covered modification.

(3) *Qualified rate*—(i) *In general.* A *qualified rate* is any of the rates described in paragraph (h)(3)(ii) of this section, provided that the interest rate benchmark to which the rate refers and the discontinued IBOR identified in paragraph (h)(1)(i), (ii), or (iii) of this section are based on transactions conducted in the same currency or are otherwise reasonably expected to measure contemporaneous variations in the cost of newly borrowed funds in the same currency. For purposes of paragraphs (h)(1)(ii) and (iii) of this section, a single qualified rate may be comprised of one or more fallback rates (for example, a waterfall of fallback rates). Paragraph (h)(3)(iii) of this section provides additional rules for determining whether one or more fallback rates constitute a qualified rate, and paragraph (h)(3)(iv) of this section

provides examples illustrating the operation of those rules.

(ii) *Rates.* The following rates are described in this paragraph (h)(3)(ii):

(A) A qualified floating rate, as defined in § 1.1275–5(b), but without regard to the limitations on multiples set forth in § 1.1275–5(b) (examples of qualified floating rates generally include SOFR, the Sterling Overnight Index Average, the Tokyo Overnight Average Rate, the Swiss Average Rate Overnight, and the euro short-term rate administered by the European Central Bank);

(B) An alternative, substitute, or successor rate selected, endorsed, or recommended by the central bank, reserve bank, monetary authority, or similar institution (including any committee or working group thereof) as a replacement for a discontinued IBOR or its local currency equivalent in that jurisdiction;

(C) A rate selected, endorsed, or recommended by the Alternative Reference Rates Committee as a replacement for USD LIBOR, provided that the Federal Reserve Bank of New York is an ex officio member of the Alternative Reference Rates Committee at the time of the selection, endorsement, or recommendation;

(D) A rate that is determined by reference to a rate described in paragraph (h)(3)(ii)(A), (B), or (C) of this section, including a rate determined by adding or subtracting a specified number of basis points to or from the rate or by multiplying the rate by a specified number; and

(E) A rate identified for purposes of this section as a qualified rate in guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(a) of this chapter).

(iii) *Rules for fallback rates*—(A) *Multiple fallback rates.* If the rate being tested as a qualified rate is comprised of more than one fallback rate, the rate is a qualified rate only if each individual fallback rate separately satisfies the requirements to be a qualified rate.

(B) *Indeterminable fallback rate.* Except as provided in paragraph (h)(3)(iii)(C) of this section, if it is not possible to determine at the time of the modification being tested as a covered modification whether a fallback rate satisfies the requirements set forth in the first sentence of paragraph (h)(3)(i) of this section (for example, the calculation agent will determine the fallback rate at the time that the fallback rate is triggered based on factors that are not guaranteed to produce a rate described in paragraph (h)(3)(ii) of this section), the fallback rate is treated as not satisfying the requirements to be a qualified rate.

(C) *Fallback rate is a remote contingency.* If the likelihood that any value will ever be determined under the contract by reference to a fallback rate is remote (determined at the time of the modification being tested as a covered modification), that fallback rate is treated as satisfying the requirements to be a qualified rate.

(iv) *Examples.* The following examples illustrate the application of the rules in paragraphs (h)(3)(i) through (iii) of this section to qualified rates comprised of one or more fallback rates.

(A) *Example 1: Addition of a single fallback rate*—(*1*) *Facts.* B is the issuer and L is the holder of a debt instrument that pays interest semiannually in U.S. dollars at a rate of six-month USD LIBOR and that contains no fallback provisions to address the pending discontinuation of six-month USD LIBOR. On July 1, 2022, B and L modify the debt instrument to add such fallback provisions (the *new fallbacks*). The new fallbacks provide that, upon the discontinuation of six-month USD LIBOR, six-month USD LIBOR will be replaced by a fallback rate equal to CME Group's forward-looking SOFR term rate of a six-month tenor (*six-month CME Term SOFR*) plus a fixed spread that will be determined at the time of six-month USD LIBOR's discontinuation. Six-month USD LIBOR will be discontinued on June 30, 2023.

(*2*) *Analysis.* The fallback rate is a qualified floating rate and is, therefore, described in paragraph (h)(3)(ii)(A) of this section. Moreover, because both six-month USD LIBOR and six-month CME Term SOFR are based on transactions conducted in U.S. dollars, the fallback rate satisfies the currency requirement in paragraph (h)(3)(i) of this section. As further provided in paragraph (h)(3)(i) of this section, B and L must also apply the rules in paragraph (h)(3)(iii)(A), (B), and (C) of this section to determine if the fallback rate is a qualified rate. Because the rate being tested as a qualified rate (*i.e.,* the fallback rate) is comprised of only one fallback rate, paragraph (h)(3)(iii)(A) of this section has no effect. As discussed elsewhere in this paragraph (h)(3)(iv)(A)(*2*), it is evident at the time of the fallback rate's addition that the fallback rate satisfies the requirements set forth in the first sentence of paragraph (h)(3)(i) of this section, so paragraph (h)(3)(iii)(B) of this section has no effect. Because it appears likely at the time of the modification that the fallback rate will be used to determine interest on the debt instrument, paragraph (h)(3)(iii)(C) of this section has no effect. In summary, the fallback rate is described in paragraph (h)(3)(ii)(A) of this section and satisfies the currency requirement in paragraph (h)(3)(i) of this section, and none of the rules in paragraph (h)(3)(iii) of this section affect the analysis. Therefore, the fallback rate is a qualified rate.

(B) *Example 2: Addition of a single indeterminable fallback rate*—(*1*) *Facts.* The facts are the same as in paragraph (h)(3)(iv)(A)(*1*) of this section (*Example 1*), except that the new fallbacks provide that, upon the discontinuation of six-month USD LIBOR, B will select a replacement for six-month USD LIBOR based on the industry standard at the time of selection.

(*2*) *Analysis.* As provided in paragraph (h)(3)(i) of this section, B and L must apply the rule in paragraph (h)(3)(iii)(B) of this section to determine whether the fallback rate is a qualified rate. Because it is not possible to determine at the time of the fallback rate's addition in 2022 whether the fallback rate (*i.e.,* the replacement rate that B will select in 2023) satisfies the requirements set forth in the first sentence of paragraph (h)(3)(i) of this section, the fallback rate is treated as not satisfying the requirements to be a qualified rate under paragraph (h)(3)(iii)(B) of this section. Therefore, the fallback rate is not a qualified rate.

(C) *Example 3: Addition of a fallback waterfall that is a qualified rate*—(*1*) *Facts.* The facts are the same as in paragraph (h)(3)(iv)(A)(*1*) of this section (*Example 1*), except that the new fallbacks provide for a fallback waterfall. The first tier of the fallback waterfall provides that, upon the discontinuation of six-month USD LIBOR, six-month USD LIBOR will be replaced by a fallback rate equal to six-month CME Term SOFR plus a fixed spread that will be determined at the time of six-month USD LIBOR's discontinuation. The second tier of the fallback waterfall provides that, upon the discontinuation of six-month CME Term SOFR, B will select a replacement for the fallback rate in the first tier of the fallback waterfall based on the industry standard at the time of selection. At the time of the fallback waterfall's addition, the likelihood that six-month CME Term SOFR will be discontinued is remote.

(*2*) *Analysis of the fallback waterfall.* As provided in paragraph (h)(3)(i) of this section, B and L must apply the rules in paragraphs (h)(3)(iii)(A), (B) and (C) of this section to determine whether the fallback waterfall is a qualified rate. Under paragraph (h)(3)(iii)(A) of this section, because the rate being tested as a qualified rate (*i.e.,* the fallback waterfall) is comprised of more than one

fallback rate, the fallback waterfall is a qualified rate only if each individual fallback rate (*i.e.,* fallback rates in the first and second tiers of the fallback waterfall) separately satisfies the requirements to be a qualified rate. As concluded in paragraphs (h)(3)(iv)(C)(*3*) and (*4*) of this section, the fallback rates in the first and second tiers of the fallback waterfall separately satisfy the requirements to be a qualified rate. Therefore, the fallback waterfall is a qualified rate.

(*3*) *Analysis of the first tier of the fallback waterfall.* Because the fallback rate in the first tier of the fallback waterfall is the same as the fallback rate in paragraph (h)(3)(iv)(A)(*1*) of this section (*Example 1*), the analysis of the fallback rate in the first tier of the fallback waterfall is the same as the analysis of the fallback rate in paragraph (h)(3)(iv)(A)(*2*) of this section (*Example 1*). Accordingly, the fallback rate in the first tier of the fallback waterfall separately satisfies the requirements to be a qualified rate.

(*4*) *Analysis of the second tier of the fallback waterfall.* The fallback rate in the second tier of the fallback waterfall is the same as the fallback rate in paragraph (h)(3)(iv)(B)(*1*) of this section (*Example 2*). However, unlike the fallback rate in paragraph (h)(3)(iv)(B)(*1*) of this section (*Example 2*), the likelihood that the amount of interest on the debt instrument will ever be determined by reference to the fallback rate in the second tier of the fallback waterfall is remote. Accordingly, under paragraph (h)(3)(iii)(C) of this section, the fallback rate in the second tier of the fallback waterfall is treated as satisfying the requirements to be a qualified rate.

(D) *Example 4: Addition of a fallback waterfall that is not a qualified rate*—(*1*) *Facts.* The facts are the same as in paragraph (h)(3)(iv)(A)(*1*) of this section (*Example 1*), except that the new fallbacks provide for a fallback waterfall. The first tier of the fallback waterfall provides that, upon the discontinuation of six-month USD LIBOR, six-month USD LIBOR will be replaced by a stated fallback rate (*Fallback Rate X*). Fallback Rate X, which is equal to an interest rate benchmark (*Benchmark X*) plus a fixed spread, satisfies the requirements set forth in the first sentence of paragraph (h)(3)(i) of this section. The second tier of the fallback waterfall provides that, upon the discontinuation of Benchmark X, B will select a replacement for Fallback Rate X based on the industry standard at the time of selection. At the time of the fallback waterfall's addition, the likelihood that Benchmark X will be discontinued is not remote.

(*2*) *Analysis of the fallback waterfall.* As provided in paragraph (h)(3)(i) of this section, B and L must apply the rules in paragraphs (h)(3)(iii)(A), (B) and (C) of this section to determine whether the fallback waterfall is a qualified rate. Under paragraph (h)(3)(iii)(A) of this section, because the rate being tested as a qualified rate (*i.e.,* the fallback waterfall) is comprised of more than one fallback rate, the fallback waterfall is a qualified rate only if each individual fallback rate (*i.e.,* the fallback rates in the first and second tiers of the fallback waterfall) separately satisfies the requirements to be a qualified rate. As concluded in paragraph (h)(3)(iv)(D)(*3*) of this section, the fallback rate in the second tier of the fallback waterfall is treated as not satisfying the requirements to be a qualified rate. Therefore, the fallback waterfall is not a qualified rate.

(*3*) *Analysis of the second tier of the fallback waterfall.* As provided in paragraphs (h)(3)(i) and (h)(3)(iii)(A) of this section, B and L must apply the rules in paragraphs (h)(3)(iii)(B) and (C) of this section to determine whether the fallback rate in the second tier of the fallback waterfall is a qualified rate. Because the likelihood that Benchmark X will be discontinued is not remote, paragraph (h)(3)(iii)(C) of this section has no effect on the analysis of the fallback rate in the second tier of the fallback waterfall. Under paragraph (h)(3)(iii)(B) of this section, because it is not possible to determine at the time of the fallback waterfall's addition in 2022 whether the fallback rate in the second tier of the fallback waterfall (*i.e.,* the replacement rate that B will select in 2023) satisfies the requirements set forth in the first sentence of paragraph (h)(3)(i) of this section, the fallback rate in the second tier of the fallback waterfall is treated as not satisfying the requirements to be a qualified rate.

(4) *Discontinued IBOR.* A *discontinued IBOR* is any interbank offered rate described in paragraph (h)(4)(i) or (ii) of this section but only during the period beginning on the date of the announcement described in paragraph (h)(4)(i) or (ii) of this section and ending on the date that is one year after the date on which the administrator of the interbank offered rate ceases to provide the interbank offered rate.

(i) The administrator of the interbank offered rate announces that the administrator has ceased or will cease to provide the interbank offered rate permanently or indefinitely, and no successor administrator is expected as of the time of the announcement to continue to provide the interbank offered rate; or

(ii) The regulatory supervisor for the administrator of the interbank offered rate, the central bank for the currency of the interbank offered rate, an insolvency official with jurisdiction over the administrator for the interbank offered rate, a resolution authority with jurisdiction over the administrator for the interbank offered rate, a court, or an entity with similar insolvency or resolution authority over the administrator for the interbank offered rate announces that the administrator of the interbank offered rate has ceased or will cease to provide the interbank offered rate permanently or indefinitely, and no successor administrator is expected as of the time of the announcement to continue to provide the interbank offered rate.

(5) *Associated modification.* An *associated modification* is a modification of the technical, administrative, or operational terms of a contract that is reasonably necessary to adopt or to implement the modifications described in paragraph (h)(1)(i), (ii), or (iii) of this section other than associated modifications. An associated modification also includes an incidental cash payment intended to compensate a counterparty for small valuation differences resulting from a modification of the administrative terms of a contract, such as the valuation differences resulting from a change in observation period. Examples of associated modifications include a change to the definition of interest period or a change to the timing and frequency of determining rates and making payments of interest (for example, delaying payment dates on a debt instrument by two days to allow sufficient time to compute and pay interest at a qualified rate computed in arrears).

(6) *Qualified one-time payment.* A *qualified one-time payment* is a single cash payment that is intended to compensate the other party or parties for all or part of the basis difference between the discontinued IBOR identified in paragraph (h)(1)(i), (ii), or (iii) of this section and the interest rate benchmark to which the qualified rate refers.

(i) [Reserved]

(j) *Modifications excluded from the definition of covered modification.* A modification or portion of a modification described in any of paragraphs (j)(1) through (5) of this section is excluded from the definition of covered modification in paragraph (h)(1) of this section and therefore is a noncovered modification.

(1) The terms of the contract are modified to change the amount or timing of contractual cash flows and that change is intended to induce one or more parties to perform any act necessary to consent to a modification to the contract described in paragraph (h)(1)(i), (ii), or (iii) of this section. See paragraph (j)(6)(iii) of this section (*Example 3*).

(2) The terms of the contract are modified to change the amount or timing of contractual cash flows and that change is intended to compensate one or more parties for a modification to the contract not described in paragraph (h)(1)(i), (ii), or (iii) of this section. See paragraph (j)(6)(v) of this section (*Example 5*).

(3) The terms of the contract are modified to change the amount or timing of contractual cash flows and that change is either a concession granted to a party to the contract because that party is experiencing financial difficulty or a concession secured by a party to the contract to account for the credit deterioration of another party to the contract. See paragraph (j)(6)(vi) of this section (*Example 6*).

(4) The terms of the contract are modified to change the amount or timing of contractual cash flows and that change is intended to compensate one or more parties for a change in rights or obligations that are not derived from the contract being modified. See paragraph (j)(6)(vii) of this section (*Example 7*). If each contract in a given portfolio of contracts has the same parties, those parties modify more than one contract in the portfolio (each such contract is a *modified portfolio contract*), and those modifications provide for a single, aggregate qualified one-time payment with respect to all modified portfolio contracts, then the portion of the qualified one-time payment allocable to any one modified portfolio contract is treated for purposes of this paragraph (j)(4) as not intended to compensate for a change in rights or obligations derived from any other modified portfolio contract.

(5) The terms of the contract are modified to change the amount or timing of contractual cash flows and the modification is identified for purposes of this paragraph (j)(5) in guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(a) of this chapter) as having a principal purpose of achieving a result that is unreasonable in light of the purpose of this section.

(6) *Examples.* The following examples illustrate the operation of the rules in paragraphs (j)(1) through (4) of this section.

(i) *Example 1: Covered modification*—(A) *Facts.* B is the issuer and L is the holder of a debt instrument that pays interest semiannually at a rate of six-month USD LIBOR plus 100 basis points. On July 1, 2022, B and L modify the debt instrument to replace that original rate with CME Group's forward-looking SOFR term rate of a six-month tenor (*six-month CME Term SOFR*) plus an adjustment spread of 42.826 basis points plus 100 basis points (the whole modification is the *LIBOR replacement modification with basis adjustment spread*). B and L chose the adjustment spread of 42.826 basis points because that is the adjustment spread used or recommended by the International Swaps and Derivatives Association and the Alternative Reference Rates Committee for similar substitutions or replacements of six-month USD LIBOR with a tenor-adjusted variant of SOFR.

(B) *Analysis.* The parties have modified the terms of the debt instrument to replace a rate referencing a discontinued IBOR (*i.e.,* six-month USD LIBOR plus 100 basis points) with a qualified rate (*i.e.,* six-month CME Term SOFR plus 142.826 basis points). The LIBOR replacement modification with basis adjustment spread is described in paragraph (h)(1)(i) of this section and not described in any of paragraphs (j)(1) through (5) of this section. Therefore, the LIBOR replacement modification with basis adjustment spread is a covered modification of the debt instrument.

(ii) *Example 2: Covered modification with qualified one-time payment*—(A) *Facts.* The facts are the same as in paragraph (j)(6)(i)(A) of this section (*Example 1*), except that, instead of the LIBOR replacement modification with basis adjustment spread, B and L modify the debt instrument by replacing the original rate of six-month USD LIBOR plus 100 basis points with six-month CME Term SOFR plus 100 basis points and by obligating B to make a cash payment to L equal to the present value of the adjustment spread of 42.826 basis points with respect to the debt instrument (this payment is the *basis adjustment payment,* and the whole modification is the *LIBOR replacement modification with basis adjustment payment*).

(B) *Analysis.* The parties have modified the terms of the debt instrument to replace a rate referencing a discontinued IBOR (*i.e.,* six-month USD LIBOR plus 100 basis points) with a qualified rate (*i.e.,* six-month CME Term SOFR plus 100 basis points) and have added an obligation for B to make the basis adjustment payment, which is a single cash payment that is intended to compensate L for the basis difference between the discontinued IBOR identified in paragraph (h)(1)(i) of this section (*i.e.,* six-month USD LIBOR) and the interest rate benchmark to which the qualified rate refers (*i.e.,* six-month CME Term SOFR). Accordingly, the basis adjustment payment is a qualified one-time payment as defined in paragraph (h)(6) of this section, and the LIBOR replacement modification with basis adjustment payment is described in paragraph (h)(1)(i) of this section. Because it is described in paragraph (h)(1)(i) of this section and not described in any of paragraphs (j)(1) through (5) of this section, the LIBOR replacement modification with basis adjustment payment is a covered modification of the debt instrument.

(iii) *Example 3: Inducement spread*—(A) *Facts.* The facts are the same as in paragraph (j)(6)(i)(A) of this section (*Example 1*), except that the debt instrument is part of a widely held issue of debt with identical terms. Under the trust indenture applicable to the debt instrument, if B proposes a modification of the terms of the debt and all holders of the debt consent to that modification, the terms of the debt are modified as B proposed. In accordance with the trust indenture, B proposes the LIBOR replacement modification with basis adjustment spread on January 1, 2022. To induce holders such as L to perform the acts necessary to consent to the LIBOR replacement modification with basis adjustment spread, B also proposes to increase the interest rate paid to each consenting holder by an additional spread of 10 basis points (the *inducement spread*). All holders, including L, consent to B's proposed modifications by June 1, 2022. On July 1, 2022, the debt instrument is modified to implement the LIBOR replacement modification with basis adjustment spread and to increase the interest rate by the inducement spread. Once all modifications are effective, the debt instrument pays interest at a rate of six-month CME Term SOFR plus 152.826 basis points.

(B) *Analysis.* As concluded in paragraph (j)(6)(i)(B) of this section (*Example 1*), the portion of these modifications that implements the LIBOR replacement modification with basis adjustment spread is a covered modification of L's debt instrument. However, the portion of these modifications that increases the interest rate by the inducement spread changes the amount of cash flows on L's debt instrument, and that change is intended to induce L to perform the acts

necessary to consent to a modification to the debt instrument described in paragraph (h)(1)(i) of this section (*i.e.,* the LIBOR replacement modification with basis adjustment spread). Therefore, the portion of the modification that increases the interest rate by the inducement spread is described in paragraph (j)(1) of this section and, consequently, is a noncovered modification of L's debt instrument. See paragraph (b)(2) of this section for the treatment of a contemporaneous noncovered modification.

(iv) *Example 4: Consent fee*—(A) *Facts.* The facts are the same as in paragraph (j)(6)(iii)(A) of this section (*Example 3*), except that, instead of proposing to increase the interest rate paid to each consenting holder by the inducement spread, B proposes to make a cash payment to each consenting holder (the *consent fee*) at the time of the modification. Thus, when the proposed modification occurs on July 1, 2022, B pays all holders, including L, the consent fee. Once all modifications are effective, the debt instrument pays interest at a rate of six-month CME Term SOFR plus 142.826 basis points.

(B) *Analysis.* As concluded in paragraph (j)(6)(i)(B) of this section (*Example 1*), the LIBOR replacement modification with basis adjustment spread is a covered modification of L's debt instrument. However, B's obligation to pay the consent fee is also a modification of L's debt instrument but is not a covered modification because it is not described in paragraph (h)(1)(i) of this section. In particular, B's obligation to pay the consent fee is not an associated modification because it is not a modification of the technical, administrative, or operational terms of L's debt instrument and is not intended to compensate for valuation differences resulting from a modification of the administrative terms of L's contract. Nor is the consent fee a qualified one-time payment because it is not intended to compensate L for any part of the basis difference between the discontinued IBOR identified in paragraph (h)(1)(i) of this section (*i.e.,* six-month USD LIBOR) and the interest rate benchmark to which the qualified rate refers (*i.e.,* six-month CME Term SOFR). See paragraph (b)(2) of this section for the treatment of a contemporaneous noncovered modification.

(v) *Example 5: Compensation for a modification to a customary financial covenant*—(A) *Facts.* The facts are the same as in paragraph (j)(6)(i)(A) of this section (*Example 1*), except that, at the same time as and for reasons unrelated to the LIBOR replacement modification with basis adjustment spread, B and L also modify customary financial covenants in the debt instrument in a manner that benefits B. In exchange for the modification of customary financial covenants, B agrees to add another 30 basis points to the rate such that, once all modifications are effective, the debt instrument pays interest at a rate of six-month CME Term SOFR plus 172.826 basis points.

(B) *Analysis.* As concluded in paragraph (j)(6)(i)(B) of this section (*Example 1*), the portion of these modifications that implements the LIBOR replacement modification with basis adjustment spread is a covered modification of the debt instrument. However, the portion of these modifications that modifies customary financial covenants is not related to the replacement of LIBOR and, therefore, is not described in any of paragraphs (h)(1)(i), (ii), or (iii) of this section and, therefore, is a noncovered modification of the debt instrument. Moreover, the portion of these modifications that adds 30 basis points to the rate changes the amount of cash flows on the debt instrument, and the parties intend that change to compensate L for a modification to the debt instrument not described in paragraph (h)(1)(i), (ii), or (iii) of this section (*i.e.,* the modification of customary financial covenants). Therefore, the portion of these modifications that adds those 30 basis points to the rate is described in paragraph (j)(2) of this section and, consequently, is a noncovered modification of the debt instrument. See paragraph (b)(2) of this section for the treatment of a contemporaneous noncovered modification.

(vi) *Example 6: Workout of distressed debt*—(A) *Facts.* The facts are the same as in paragraph (j)(6)(i)(A) of this section (*Example 1*), except that B's financial condition has deteriorated since the issue date of the debt instrument and, to decrease the risk of B's default or bankruptcy, L agrees to subtract 50 basis points from the rate such that, once all modifications are effective, the debt instrument pays interest at a rate of six-month CME Term SOFR plus 92.826 basis points.

(B) *Analysis.* As concluded in paragraph (j)(6)(i)(B) of this section (*Example 1*), the portion of these modifications that implements the LIBOR replacement modification with basis adjustment spread is a covered modification of the debt instrument. However, the portion of these modifications that subtracts 50 basis points from the rate changes the amount of cash flows on the debt instrument, and that change is a concession granted to B because B is experiencing financial difficulty. Therefore, the portion of these modifications that subtracts those 50 basis points from the rate is described in paragraph (j)(3) of this section and, consequently, is a noncovered modification of the debt instrument. See paragraph (b)(2) of this section for the treatment of a contemporaneous noncovered modification.

(vii) *Example 7: Change in rights or obligations not derived from the modified contract*—(A) *Facts.* B is the issuer and L is the holder of a debt instrument (*Debt X*) with respect to which the facts are the same as in paragraph (j)(6)(i)(A) of this section (*Example 1*). In addition, B and L are the issuer and holder, respectively, of a second debt instrument (*Debt Y*). At the same time that the LIBOR replacement modification with basis adjustment spread occurs with respect to Debt X, B and L also modify customary financial covenants in Debt Y in a manner that benefits B. In exchange for the modification of customary financial covenants in Debt Y, B agrees to add another 30 basis points to the rate on Debt X such that, once all modifications are effective, Debt X pays interest at a rate of six-month CME Term SOFR plus 172.826 basis points.

(B) *Analysis.* As concluded in paragraph (j)(6)(i)(B) of this section (*Example 1*), the portion of these modifications that implements the LIBOR replacement modification with basis adjustment spread is a covered modification of Debt X. However, the portion of these modifications that adds 30 basis points to the rate on Debt X changes the amount of cash flows on Debt X, and the parties intend that change to compensate L for a change in rights or obligations that are not derived from Debt X (*i.e.,* the modification of customary financial covenants in Debt Y). Therefore, the portion of these modifications that adds those 30 basis points to the rate on Debt X is described in paragraph (j)(4) of this section and, consequently, is a noncovered modification of Debt X. See paragraph (b)(2) of this section for the treatment of a contemporaneous noncovered modification.

(k) *Applicability date.* This section applies to a modification of the terms of a contract that occurs on or after March 7, 2022. A taxpayer may choose to apply this section to modifications of the terms of contracts that occur before March 7, 2022, provided that the taxpayer and all related parties (within the meaning of section 267(b) or section 707(b)(1) or within the meaning of § 1.150–1(b) for a taxpayer that is a State

or local governmental unit (as defined in § 1.103–1(a)) or a 501(c)(3) organization (as defined in section 150(a)(4))) apply this section to all modifications of the terms of contracts that occur before that date. See section 7805(b)(7).

■ **Par. 6.** Section 1.1271–0 is amended by adding entries for § 1.1275–2(m) to read as follows:

§ 1.12711–0 Original issue discount; effective date; table of contents.

* * * * *

§ 1.12751–2 Special rules relating to debt instruments.

* * * * *

(m) Transition from certain interbank offered rates.

(1) In general.

(2) Single qualified floating rate.

(3) Remote contingency.

(4) Change in circumstances.

(5) Applicability date.

* * * * *

■ **Par. 7.** Section 1.1275–2 is amended by adding paragraph (m) to read as follows:

§ 1.12751 –2 Special rules relating to debt instruments.

* * * * *

(m) *Transition from certain interbank offered rates*—(1) *In general.* This paragraph (m) applies to a variable rate debt instrument (as defined in § 1.1275–5(a)) that provides both for a qualified floating rate that references a discontinued IBOR and for a methodology to change that rate referencing a discontinued IBOR to a different rate in anticipation of the discontinued IBOR becoming unavailable or unreliable. For purposes of this paragraph (m), *discontinued IBOR* has the meaning provided in § 1.1001–6(h)(4). See § 1.1001–6 for additional rules that may apply to a debt instrument that provides for a rate referencing a discontinued IBOR.

(2) *Single qualified floating rate.* If a debt instrument is described in paragraph (m)(1) of this section, the rate referencing a discontinued IBOR and the different rate are treated as a single qualified floating rate for purposes of § 1.1275–5.

(3) *Remote contingency.* If a debt instrument is described in paragraph (m)(1) of this section, the possibility that the discontinued IBOR will become unavailable or unreliable is treated as a remote contingency for purposes of paragraph (h) of this section.

(4) *Change in circumstances.* If a debt instrument is described in paragraph (m)(1) of this section, the fact that the discontinued IBOR has become unavailable or unreliable is not treated as a change in circumstances for purposes of paragraph (h)(6) of this section.

(5) *Applicability date.* Paragraph (m) of this section applies to debt instruments issued on or after March 7, 2022. A taxpayer may choose to apply paragraph (m) of this section to debt instruments issued before March 7, 2022, provided that the taxpayer and all related parties (within the meaning of section 267(b) or section 707(b)(1) or within the meaning of § 1.150–1(b) for a taxpayer that is a State or local governmental unit (as defined in § 1.103–1(a)) or a 501(c)(3) organization (as defined in section 150(a)(4))) apply paragraph (m) of this section to all debt instruments issued before that date. See section 7805(b)(7).

■ **Par. 8.** Section 1.7701(l)–3 is amended by adding a sentence at the end of paragraph (b)(2)(ii) to read as follows:

§ 1.77011 (l)–3 Recharacterizing financing arrangements involving fast-pay stock.

* * * * *

(b) * * *

(2) * * *

(ii) * * * See § 1.1001–6(e) for additional rules that may apply to stock that provides for a rate referencing a discontinued IBOR, as defined in § 1.1001–6(h)(4).

* * * * *

PART 301—PROCEDURE AND ADMINISTRATION

■ **Par. 9.** The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 10.** Section 301.7701–4 is amended by adding a sentence at the end of paragraph (c)(1) to read as follows:

§ 301.7701301–4 Trusts.

* * * * *

(c) * * *

(1) * * * See § 1.1001–6(f) of this chapter for additional rules that may apply to an investment trust that holds one or more contracts that provide for a rate referencing a discontinued IBOR, as defined in § 1.1001–6(h)(4) of this chapter, and for additional rules that may apply to an investment trust with one or more ownership interests that reference a discontinued IBOR.

* * * * *

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

Approved: December 19, 2021.

Lily Batchelder,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2021–28452 Filed 12–30–21; 4:15 pm]

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DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Part 478

[Docket No. ATF 24P; AG Order No. 5304–2021]

RIN 1140–AA10

Secure Gun Storage and Definition of ''Antique Firearm''

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice is amending the regulations of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (''ATF'') to codify into regulation certain provisions of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999. This rule amends ATF's regulations to account for the existing statutory requirement that applicants for Federal firearms dealer licenses certify that secure gun storage or safety devices will be available at any place where firearms are sold under the license to nonlicensed individuals. This certification is already included in the Application for Federal Firearms License, ATF Form 7/7CR (''Form 7/7CR''). The regulation also requires applicants for manufacturer or importer licenses to complete the certification if the licensee will have premises where firearms are sold to nonlicensees. Moreover, the regulation requires that the secure gun storage or safety devices be compatible with the firearms offered for sale by the licensee. Finally, it conforms the regulatory definitions of certain terms to the statutory language, including the definition of ''antique firearm,'' which is amended to include certain modern muzzle loading firearms.

DATES: This rule is effective February 3, 2022.

FOR FURTHER INFORMATION CONTACT: Vivian Chu, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Avenue NE, Washington, DC 20226; telephone: (202) 648–7070.

SUPPLEMENTARY INFORMATION:

I. Background

On October 21, 1998, Public Law 105–277 (112 Stat. 2681), the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 (''the Act''), was enacted. Among other things, the Act amended the Gun Control Act of 1968, Public Law 90–618 (82 Stat. 1213) (''GCA'') (codified as amended at 18 U.S.C. chapter 44). Some of the GCA amendments made by the Act are as follows: [1]

(1) Secure Gun Storage. The Act amended section 923(d)(1) of title 18, United States Code, to require that, with certain exceptions, applicants for Federal firearms dealer licenses certify the availability of secure gun storage or safety devices at any place where firearms are sold under the license to nonlicensees. 18 U.S.C. 923(d)(1)(G). The certification requirement does not apply where a secure gun storage or safety device is temporarily unavailable because of theft, casualty loss, consumer sales, backorders from a manufacturer, or any other similar reason beyond the control of the licensee. *Id.*

In addition, the Act amended 18 U.S.C. 923(e) to provide that the Attorney General may revoke, after notice and opportunity for hearing, the license of any Federal firearms licensee that fails to have secure gun storage or safety devices available at any place where firearms are sold under the license to nonlicensees, subject to the same exceptions noted above.

The Act defined the term ''secure gun storage or safety device'' in 18 U.S.C. 921(a)(34) to mean: (1) A device that, when installed on a firearm, is designed to prevent the firearm from being operated without first deactivating the device; (2) a device incorporated into the design of the firearm that is designed to prevent the operation of the firearm by anyone not having access to the device; or (3) a safe, gun safe, gun case, lock box, or other device that is designed to be or can be used to store a firearm and that is designed to be unlocked only by means of a key, a combination, or other similar means.

The provisions of the Act relating to secure gun storage became effective April 19, 1999.

(2) Definition of Antique Firearm. The Act amended the definition of ''antique firearm'' in the GCA to include certain modern muzzle loading firearms. Specifically, section 115 of the Act amended the definition of ''antique firearm'' in 18 U.S.C. 921(a)(16) to include a weapon that is a muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol; that is designed to use black powder or a black powder substitute; and that cannot use fixed ammunition. The term expressly does not include any weapon that incorporates a firearm frame or receiver; any firearm converted into a muzzle loading weapon; or any muzzle loading weapon that can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof. 18 U.S.C. 921(a)(16)(C).

The provisions of the Act relating to antique firearms became effective upon the date of enactment, October 21, 1998.

(3) Miscellaneous Amendments. Prior to amendment by the Act, the term ''rifle'' was defined in the GCA to mean ''a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.'' 18 U.S.C. 921(a)(7) (1994). The Act amended the definition of ''rifle'' by replacing the words ''the explosive in a fixed metallic cartridge'' with ''an explosive.'' *See* 18 U.S.C. 921(a)(7) (2018).

Additionally, prior to amendment by the Act, the term ''shotgun'' was defined in the GCA to mean ''a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.'' 18 U.S.C. 921(a)(5) (1994). The Act amended the definition of ''shotgun'' by replacing the words ''the explosive in a fixed shotgun shell'' with ''an explosive.'' *See* 18 U.S.C. 921(a)(5) (2018).

The provisions of the Act relating to the miscellaneous amendments also became effective upon the date of enactment, October 21, 1998.

II. Proposed Rule

On May 26, 2016, the Department of Justice (''the Department'') published in the **Federal Register** a notice of proposed rulemaking (''NPRM'') to codify into regulation certain provisions of the Act. Commerce in Firearms and Explosives; Secure Gun Storage, Amended Definition of Antique Firearm, and Miscellaneous Amendments, 81 FR 33448 (May 26, 2016). The rule proposed amending ATF's regulations to account for the existing statutory requirement that applicants for Federal firearms dealer licenses certify that secure gun storage or safety devices will be available at any place where firearms are sold under the license to nonlicensed individuals. This certification is already included in ATF Form 7/7CR. The NPRM also proposed requiring applicants for Federal firearms manufacturer or importer licenses to complete the certification if the licensee will have premises where firearms are sold to nonlicensees.

Next, the Department proposed to amend 27 CFR 478.11 by adding a definition for the term ''secure gun storage or safety device'' that tracks the language in the statute, as well as a new section 27 CFR 478.104 that specifies the terms of the certification requirement. Moreover, the proposed regulation required that the secure gun storage or safety device be compatible with the firearms offered for sale by the licensee. 81 FR at 33449. Therefore, applicants under the proposed rule would be required to certify the availability of compatible secure gun storage or safety devices at any place where firearms were sold under the license to nonlicensees.

The NPRM proposed applying the certification requirement to applicants for Federal firearms importer or manufacturer licenses if the licensee has

[1] The Child Safety Lock Act of 2005 (''CSLA''), enacted as part of the Protection of Lawful Commerce in Arms Act, Public Law 109–92 (119 Stat. 2095), amended the GCA by adding a new subsection, 18 U.S.C. 922(z). This subsection requires licensed importers, manufacturers, and dealers to provide secure gun storage or safety devices whenever they sell, deliver, or transfer any handgun to a nonlicensed person. *See* 18 U.S.C. 922(z)(1). The CSLA was implemented primarily in a final rule issued shortly before the NPRM was issued for this rule. *See* Federal Firearms License Proceedings—Hearings, 81 FR 32,230 (May 23, 2016) (amending 27 CFR 478.73, which provides that a notice of suspension or revocation of a license, or the imposition of a civil penalty, may be issued whenever the ATF Director has reason to believe that any licensee has violated § 922(z)(1) by selling, delivering, or transferring any handgun to any person other than a licensee, unless the transferee was provided with a secure gun storage or safety device for that handgun). Although the requirements of the CSLA and the regulation at issue in this rulemaking are in some respects similar, the two requirements are distinct: The CSLA requires that licensed importers, manufacturers, and dealers actually provide a secure gun storage or safety device to any nonlicensee that receives a handgun, whereas the regulation at issue in this rulemaking applies more broadly to the sale of ''firearms'' (not just handguns) to nonlicensees, but requires only that secure gun storage or safety devices be made available (not actually provided).

premises where firearms are sold to nonlicensees. Federal regulations provide that a licensed importer or a licensed manufacturer may engage in business on the licensed premises as a dealer in the same type of firearms authorized by the license to be imported or manufactured. 27 CFR 478.41(b). Accordingly, under the proposed rule, an applicant for a Federal firearms importer or manufacturer license that engaged in business on the licensed premises as a dealer of firearms to nonlicensees was required to complete the certification.

One provision of the Act provides that, ''[n]otwithstanding any other provision of law, evidence regarding compliance or noncompliance [with the secure gun storage or safety device requirement] shall not be admissible as evidence in any proceeding of any court, agency, board, or other entity.'' Public Law 105–277, sec. 119, reprinted in 18 U.S.C. 923 note. In the proposed rule, ATF explained that this section applies to civil liability actions against dealers and other similar actions, and not to proceedings associated with license denials or revocations (or appeals in Federal court from decisions in such proceedings) involving noncompliance with the secure gun storage or safety device requirement of the GCA. 81 FR at 33449. The proposed rule amended 27 CFR 478.73 to clarify that a notice of revocation of a Federal firearms license may be issued whenever the ATF Director has reason to believe that a licensee fails to have secure gun storage or safety devices available at any place in which firearms are sold under the license to persons who are not licensees (except in any case in which a secure gun storage or safety device is temporarily unavailable because of theft, casualty loss, consumer sales, backorders from a manufacturer, or any other similar reason beyond the control of the licensee). *Id.* at 33453.

Finally, the Department proposed to amend 27 CFR 478.11 to reflect the definitions of the terms ''antique firearm,'' ''rifle,'' and ''shotgun'' set forth in the Act. *Id.*

Comments on the notice of proposed rulemaking were to be submitted to ATF on or before August 24, 2016.

III. Comment Analysis and Department Response

In response to the NPRM, with respect to an industry that includes approximately 59,909 federally licensed firearms dealers (including pawnbrokers), 12,673 licensed firearms manufacturers, and 1,054 licensed firearms importers, ATF received only four comments. This small number of responses indicates that a broad majority of the firearms industry accepts codification of behavior that has been statutorily required for more than 20 years.

A. Comments on Impact on Manufacturers and Importers

1. Comments Received

One commenter argued that the proposed rule imposes the certification requirement on all manufacturers and importers that sell firearms to the public, despite the fact that the statute requires only that dealers in firearms meet the certification requirement. Further, according to the commenter, forcing manufacturers and importers to have secure gun storage available and perhaps even to ''use'' such secure gun storage could create a burdensome and expensive requirement. Requiring firearms, many of which might not even be finished, to be stored under lock and key every night would, in the opinion of the commenter, be difficult, time consuming, and cost-prohibitive. Therefore, according to the commenter, the proposed rule violated Federal law by creating new requirements for licensees.

2. Department Response

The Department disagrees with the comment that ATF does not have the statutory authority to require licensed manufacturers and importers to certify that secure gun storage or safety devices will be available at any place in which firearms are sold to nonlicensees. Under 18 U.S.C. 923(a), the license application must be in such form and contain the information necessary to determine eligibility for licensing as the Attorney General may prescribe by regulation. Similarly, under 18 U.S.C. 926(a), the Attorney General has the authority to promulgate any rules that are necessary to implement the provisions of the GCA. ''Because § 926 authorizes the [Attorney General] to promulgate those regulations which are 'necessary,' it almost inevitably confers some measure of discretion to determine what regulations are in fact 'necessary.' '' *Nat'l Rifle Ass'n* v. *Brady,* 914 F.2d 475, 479 (4th Cir. 1990).

Although the language of section 923(d)(1)(G) refers only to applications for license as a dealer, section 923(e), as amended by the Act, more broadly provides that the Attorney General may, after notice and an opportunity for a hearing, ''revoke *any* license issued under this section if *the holder of such license* . . . fails to have secure gun storage or safety devices available at any place in which firearms are sold under the license to persons who are not licensees.'' (Emphasis added.) Section 923(e) thus applies to all licensees that sell firearms to nonlicensees—not just dealer licensees. Hence, because licensed manufacturers and importers may sell their firearms directly to nonlicensees, *see* 27 CFR 478.41(b), ATF has the authority to revoke the licenses of manufacturers or importers if they fail to have secure gun storage or safety devices available for retail transactions. Requiring manufacturers and importers to certify that secure gun storage or safety devices will be available at any place in which firearms are sold to nonlicensees helps ensure that manufacturers and importers are aware of the implicit requirement in section 923(e) that these licensees must make such storage or devices available. This certification has been required of all license applicants except collectors on ATF Form 7/7CR (5300.12/5310.16) for years.

Finally, neither the NPRM nor the final rule requires manufacturers or importers to use secure gun storage or safety devices on their inventory; rather, they need only make such storage or devices available.

B. Comments on Compatibility of Devices

1. Comments Received

One commenter noted that 18 U.S.C. 923 does not explicitly require that secure gun storage or safety devices maintained by Federal firearms dealers be compatible or even be used, only that they be available; therefore, according to the commenter, the proposed rule cannot require it. Further, the commenter noted that ATF has no authority to revoke the license of a dealer that does not lock up its firearms.

2. Department Response

The commenter misinterpreted the proposed rule's application. The proposed rule did not, as the commenter suggested, require federally licensed dealers to use compatible devices on their inventory, nor did the rule require them to lock up and store their firearms inventory. Rather, the NPRM proposed implementing 18 U.S.C. 923(d)(1)(G) by requiring applicants for dealer licenses, or those licensed manufacturers and importers that will also deal firearms to nonlicensed individuals as permitted in 27 CFR 478.41(b), to certify only that compatible secure gun storage or safety devices are available at any place where firearms are sold under the license to nonlicensed individuals.

The Department believes the compatibility language in the rule is

consistent with the text of the statute because it clarifies that the secure gun storage or safety devices made available must be compatible with the firearms offered for sale by the licensee.

Courts have explained that ''the administration and enforcement of a statute call upon the agency charged with its execution to interpret it.'' *Continental Airlines, Inc.* v. *Dep't of Transportation,* 843 F.2d 1444, 1449 (D.C. Cir. 1988). When a court is called upon to review an agency's construction of a statute it administers, the court looks to the framework set forth in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). The first step of *Chevron* review is to ask ''whether Congress has directly spoken to the precise question at issue.'' *Id.* 842. ''If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.'' *Id.* at 842–43 (footnote omitted). Although the Act defines ''secure gun storage or safety device,'' that definition does not specify whether or with which sorts of firearms the secure gun storage and safety devices must be compatible. The Department believes that this rule comports with the best reading of the statute and permissibly clarifies that such storage and devices must be compatible with the firearms sold at the licensed premises. This specification in the regulation resolves any ambiguity in the statute and fulfills its purpose because customers purchasing firearms should be able to leave the premises with a secure gun storage or safety device that is compatible with the type of firearm they purchased. A contrary rule, under which licensees could comply with the statute by making available exclusively devices that are incompatible with the firearms they sell, would unreasonably thwart Congress's evident purpose in the Act. *See City of Chicago* v. *U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms,* 423 F.3d 777, 781 (7th Cir. 2005) (statutes should not be read in a way that ''would thwart Congress' intention'').

C. Comments on Noncompliance Evidence in License Denial or Revocation Procedures

1. Comments Received

In the NPRM, ATF referenced a provision in the Act that states that ''evidence regarding compliance or noncompliance [with the secure gun storage or safety device requirement] shall not be admissible as evidence in any proceeding of any court, agency, board, or other entity.'' *See* Public Law 105–277, sec. 119. ATF explained that, based on basic tenets of statutory construction, it reads the evidentiary limitation as applying only ''to civil liability actions against dealers and other similar actions, and not to proceedings associated with license denials or revocations (or appeals in Federal court from decisions in such proceedings) involving noncompliance with the secure gun storage or safety device requirement'' of the Act. 81 FR at 33449.

Three commenters asserted that this provision of the Act prohibits the use of a dealer's compliance or noncompliance with the secure gun storage or safety device requirement in any administrative proceedings to deny or revoke a Federal firearms license. Two commenters also argued that ATF's interpretation substitutes its judgment for that of Congress, and, by effectively amending legislation, violates the ''Separation of Powers Doctrine.'' These commenters stated that ATF does not have the power to change or ignore statutes. They argued that words have meaning, and that ATF cannot construe statutes to permit something the plain text prohibits or create an exception for ATF's administrative hearings where one does not exist in the law.

2. Department Response

The Department respectfully disagrees. There are at least two canons of statutory interpretation that inform the Department's reading of the evidence provision the commenters relied on. The first relevant canon provides that, ''[w]henever a power is given by statute, everything necessary to make it effectual or requisite to attain the end is implied.'' *Luis* v. *United States,* 136 S. Ct. 1093, 1097 (2016) (Thomas, J., concurring) (quoting 1 J. Kent, Commentaries on American Law 464 (13th ed. 1884)). The second relevant canon provides that a ''court will not merely look to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law.'' *Stafford* v. *Briggs,* 444 U.S. 527, 535 (1980) (quoting *Brown* v. *Duchesne,* 19 How. 183, 194 (1857)). The evidence provision cannot be read in isolation. Rather, it must be read within the context of the rest of the statute, including the specific grant of authority for the Attorney General to revoke the license of a licensee that does not comply with the Act. Moreover, the Act specifically provides that none of its amendments ''shall be construed . . . as creating a cause of action against any firearms dealer or any other person for any civil liability.'' 18 U.S.C. 923 note. That prohibition on civil liability implies that Congress expected compliance with the secure gun storage or safety device requirement to be enforced not by private individuals in civil actions, but by the Attorney General in administrative proceedings, in accordance with the specific authority granted to the Attorney General to do so in 18 U.S.C. 923(e). The Attorney General could not fulfill this role if, as asserted by the commenters, evidence of noncompliance could not be used in administrative proceedings related to that noncompliance, thus indicating that the evidence provision in the Act does not apply to administrative proceedings regarding compliance with the secure gun storage or safety device requirement. *Cf. United States* v. *Tohono O'Odham Nation,* 563 U.S. 307, 315 (2011) (''Courts should not render statutes nugatory through construction.'').

The Department's interpretation of the evidence provision is further supported by the legislative history. The secure gun storage provisions that were enacted were initially sponsored by Senator Larry Craig as part of S.10, the Violent and Repeat Juvenile Offender Act of 1997, for which a Senate report was produced by the Senate Committee on the Judiciary.[2] The Committee's report stated that ''[t]he penalty for willful violation . . . is revocation of the dealer's license, *after notice and opportunity for hearing is given* pursuant to current law.'' [3] Thus, the Committee evidently expected that noncompliance with the secure gun storage and safety device provisions would be enforced through administrative proceedings, including a hearing. It would accordingly be nonsensical to bar the Attorney General from using evidence of such noncompliance in the same proceedings. Congress, in other words, would not have written the specific amendments giving the Attorney General the ability to revoke or deny a license based on noncompliance if

[2] S. Rep. No. 105–108, at 108 (1997).

[3] *Id.* (emphasis added).

evidence of noncompliance could not be considered at the hearing ATF is required to conduct under the law. Accordingly—in light of the context in which the evidence provision appears, the legislative history underlying the secure gun storage or safety device requirement, and the authority granted in section 923(e)—the Department's position that the evidence provision does not apply to ATF's enforcement hearings or actions is the best interpretation of the law, and is certainly a permissible interpretation of the provision. *See Chevron,* 467 U.S. at 843.

Furthermore, Congress expressly authorized the Attorney General to deny or revoke a license if the licensee or applicant fails to have or certify that it has secure gun storage or safety devices available at any place in which firearms are sold under the license to persons who are not licensees (with the same exceptions noted above). 18 U.S.C. 923(d), (e). To exercise this authority, the Attorney General is required to provide notice to an applicant or licensee and, upon request of the aggrieved party, is authorized to conduct an administrative hearing to make a final determination. 18 U.S.C. 923(e), (f); 27 CFR 771.40–44. The agency's final decision is appealable to a Federal court. 18 U.S.C. 923(f)(3). ATF [4] can also institute criminal proceedings against a licensee for violations of the GCA or the regulations. 18 U.S.C. 923(f)(4). The express statutory grant of authority in section 923 to deny or revoke a license based on evidence of noncompliance supersedes the general language the commenters relied on. *See RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank,* 566 U.S. 639, 645 (2012) (citing *HCSC-Laundry* v. *United States,* 450 U.S. 1, 6 (1981) (per curiam), for the proposition that the specific governs the general, ''particularly when the two [statutes] are interrelated and closely positioned, both in fact being parts of [the same statutory scheme]''); *Busic* v. *United States,* 446 U.S. 398, 406 (1980).

D. Comments on Definitions of ''Rifle'' and ''Shotgun''

1. Comments Received

Comments relating to the definitions of ''rifle'' and ''shotgun'' stated that, to prevent confusion between a modern rifle or shotgun and a muzzleloader or antique firearm, and to preclude future Federal ''over reach'' to classify muzzle loading arms as rifles, the definitions should specifically exclude muzzle loading arms using black powder or black powder substitutes. Additionally, one commenter stated that ''explosive'' is not the correct word for the propellant in a modern firearm and suggested amending the term ''explosive'' in the definitions of ''rifle'' and ''shotgun'' to reference smokeless solid propellants that deflagrate rather than detonate, thereby clarifying that metallic cartridge firearms using smokeless propellants do not fall under the definitions of ''rifle'' or ''shotgun'' due to their lack of use of an explosive that detonates.

2. Department Response

The Department respectfully declines to revise the definitions of ''rifle'' and ''shotgun'' to refer to smokeless solid propellants, rather than an ''explosive,'' because doing so would not be consistent with the statutory definitions set forth in the Act. The current statutory definition for ''antique firearm'' excludes certain muzzle loading firearms using black powder or black powder substitutes from the definition of ''firearm,'' thus making the inclusion of additional language to exclude them unnecessary. This final rule updates the existing regulations to reflect the current language of the statute.

Further, the Department does not agree with the suggested clarification of the term ''explosive'' in the definitions of ''rifle'' and ''shotgun.'' The use of the phrase ''by action of an explosive'' within the definitions of ''rifle'' and ''shotgun'' is appropriate, as it is descriptive of a process and not a classification of the propellant powder. The provisions of the Act relating to antique firearms and definitions of the terms ''rifle'' and ''shotgun'' became effective on the day of enactment, October 21, 1998. This final rule updates the existing regulations to reflect the current language of the statute.

IV. Final Rule

This final rule implements the amendments to the regulations in 27 CFR part 478 that were specified in the NPRM published on May 26, 2016 (81 FR 33448) without change.

V. Statutory and Executive Order Review

A. Executive Orders 12866 and 13563

Executive Order 12866 (Regulatory Planning and Review) directs agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of maintaining flexibility.

The Office of Management and Budget (''OMB'') has determined that, although this final rule is not economically significant, it is a ''significant regulatory action'' under section 3(f)(4) of Executive Order 12866 because this final rule raises novel legal or policy issues arising out of legal mandates. Accordingly, the rule has been reviewed by OMB.

This rule requires that Federal firearms licensees (''FFLs'') make available secure gun storage or safety devices to non-FFLs that purchase firearms. Furthermore, this rule requires that all FFLs must certify that they have secure gun storage or safety devices available if they sell firearms to non-FFLs. This section describes the affected population, costs, and benefits for this rule. In determining the costs and benefits of this rule, ATF has followed OMB guidance for conducting regulatory analyses. *See* OMB, Memorandum to the Heads of Executive Agencies and Establishments, *Re: Regulatory Analysis,* Circular A–4 (Sept. 17, 2003) (''Circular A–4''). According to that guidance, regulations such as this one that largely restate self-enforcing statutory requirements should be analyzed against a baseline that pre-dates the enactment of the relevant statute. Thus, although ATF has implemented and enforced the Act in the years since its passage even in the absence of the regulation at issue in this rulemaking, the costs and benefits of doing so have been attributed to this regulation for the purpose of this analysis.

Table 1 provides the summary of the expected effects that this rule will have on the public. For more details regarding this analysis, please refer to the standalone regulatory analysis (''RA'') located on the docket.

[4] The Attorney General is responsible for enforcing the GCA, as amended. This responsibility includes the authority to promulgate regulations necessary to enforce the provisions of the GCA. *See* 18 U.S.C. 926(a). The Attorney General has delegated the responsibility for administering and enforcing the GCA to the ATF Director, subject to the direction of the Attorney General and Deputy Attorney General. *See* 28 CFR 0.130(a)(1)–(2).

TABLE 1—SUMMARY OF AFFECTED POPULATION, COSTS, AND BENEFITS

Category	Final rule
Applicability	• All FFLs. • Type 1 FFL—Dealer in firearms other than destructive devices. • Type 2 FFL—Pawnbroker in firearms other than destructive devices.
Affected Population	• 130,525 FFLs. • 52,795 Type 1 FFLs. • 7,114 Type 2 FFLs.
Total Costs to Industry, Public, and Government (7% Discount Rate)	$853,187 at 7% annualized.
Savings (7% Discount Rate)	N/A.
Benefits (7% Discount Rate)	N/A.
Benefits non-monetized	• Inhibits unauthorized access to privately owned firearms by individuals such as children, who might suffer accidental injuries. • Inhibits access to privately owned firearms by criminals, who might use them for illicit activities.

1. Need for Federal Regulation

Agencies take regulatory action for various reasons. One reason is to carry out Congress's policy decisions, as expressed in statutes. Here, this rulemaking aims to comply with the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 relating to secure gun storage. Another reason underpinning regulatory action is the failure of the market to compensate for negative externalities caused by commercial activity. A negative externality can be the byproduct of a transaction between two parties that is not accounted for in the transaction. This final rule addresses a negative externality. The negative externality of the sale of firearms is that the firearms might not be stored properly and could be accessed by children who could cause accidents with the firearms or accessed by criminals who would use them for illicit activities. This rule provides nonlicensed firearm owners with the option to have devices that enable them to store their firearms so as to inhibit children or criminals from accessing their firearms.

2. Affected Population

This rulemaking affects two populations. The first population is the number of FFLs required to certify on Form 7/7CR that secure gun storage or safety devices will be available at any place in which firearms are sold under the license to persons who are not licensees. The second population is the number of FFLs that need to acquire secure gun storage or safety devices to make available at their place of business.

Entities directly affected by the requirement to certify the availability of secure gun storage or safety devices are all FFLs. Although this rule primarily affects FFLs that sell firearms to nonlicensed persons, this rule affects all FFLs in that all FFL applicants must indicate on the Form 7/7CR application whether the applicants have gun storage or safety devices available for nonlicensees or whether this requirement is not applicable because they are seeking a Type 3 license for collectors.

Because the Act was enacted shortly before 1999, and because ATF has required certification since 1999, ATF estimated the affected population to be all FFLs from 1999 to present. However, FFLs have to certify the availability of secure gun storage or safety devices only when they apply as new FFLs or every three years when they renew their Federal firearms license. Tables 2 and 3 show the numbers of new applications and renewals by FFL type and year. For more information on the methodology used to determine the numbers of new FFLs by Type, please refer to the standalone RA.

TABLE 2—NEW AND RENEWAL APPLICATIONS OF TYPE 1, 2, 3, 6, AND 7 FEDERAL FIREARMS LICENSEES

Year	01—Dealer in firearms	02—Pawnbroker in firearms	03—Collector of curios and relics	06—Manufacturer of ammunition for firearms	07—Manufacturer of firearms
1999	24,977	3,516	19,919	787	574
2000	24,829	3,583	19,919	777	652
2001	24,788	3,572	19,919	757	715
2002	24,660	3,615	19,919	727	800
2003	24,553	3,639	19,919	723	874
2004	24,547	3,579	19,919	711	938
2005	24,494	3,553	19,919	683	1,034
2006	24,406	3,503	19,919	679	1,143
2007	24,266	3,434	19,919	690	1,315
2008	24,148	3,345	19,919	708	1,482
2009	23,763	3,337	19,919	759	1,782
2010	23,284	3,368	19,919	859	2,097
2011	20,956	3,046	22,338	816	2,343
2012	21,259	3,105	21,622	855	3,104
2013	22,274	3,221	13,134	966	3,748
2014	22,049	3,235	6,767	1,033	3,966
2015	20,876	3,029	18,671	967	3,901
2016	22,104	3,146	19,322	957	4,317
2017	21,896	3,043	18,876	873	4,622
2018	20,479	2,799	17,643	776	4,603
2019	20,034	2,726	17,478	709	4,848

TABLE 2—NEW AND RENEWAL APPLICATIONS OF TYPE 1, 2, 3, 6, AND 7 FEDERAL FIREARMS LICENSEES—Continued

Year	01—Dealer in firearms	02—Pawnbroker in firearms	03—Collector of curios and relics	06—Manufacturer of ammunition for firearms	07—Manufacturer of firearms
2020	22,710	3,060	20,150	777	6,076

* **Note:** Numbers may not add for Type 1 FFLs due to adjustments to ensure the numbers of applications in Tables 2 and 3 match total FFLs in this table.

TABLE 3—NEW AND RENEWAL APPLICATIONS OF TYPE 8, 9, 10, AND 11 FEDERAL FIREARMS LICENSEES

Year	08—Importer of firearms	09—Dealer in destructive devices	10—Manufacturer of destructive devices	11—Importer of destructive devices	Total new applications and renewals
1999	265	4	44	26	50,112
2000	275	4	46	26	50,111
2001	283	5	45	28	50,112
2002	303	7	52	31	50,114
2003	307	7	56	35	50,113
2004	315	7	60	37	50,113
2005	317	7	66	40	50,113
2006	327	8	81	47	50,113
2007	338	11	86	52	50,111
2008	344	15	94	57	50,112
2009	365	17	107	64	50,113
2010	375	20	119	71	50,112
2011	349	18	112	69	50,047
2012	355	22	109	71	50,502
2013	411	24	113	76	43,967
2014	451	26	114	80	37,721
2015	428	25	117	82	48,096
2016	429	27	130	86	50,518
2017	430	30	138	90	49,998
2018	413	36	138	88	46,975
2019	413	48	146	94	46,496
2020	489	55	182	116	53,615

* **Note:** Numbers may not add for Type 1 FFLs due to adjustments to ensure the number of applications in Tables 2 and 3 match total FFLs in this table.

The second population directly affected by this rule primarily consists of Type 1 and 2 FFLs that sell firearms to the public. These FFLs must acquire secure gun storage or safety devices to be made available to firearm purchasers in their place of business. Based on the year the Act was enacted, ATF assumed that all Type 1 and 2 FFLs in 1999 had to acquire secure gun storage or safety devices to make available to any potential nonlicensee customers. From 2000 onwards, only new FFLs would need to acquire some form of gun storage or safety devices to make available to their customers. Although this rule affects all FFLs that sell firearms to nonlicensed individuals, no cost was attributed to Type 9, 10, and 11 licensees because they primarily deal, manufacture, and import destructive devices used by domestic and foreign governments rather than selling firearms at the retail level to nonlicensed individuals. Similarly, although Type 7 and 8 licensees are manufacturers and importers that may sell firearms to nonlicensed persons, most of these licensees, even prior to enactment of the Act, have voluntarily included secure gun storage or safety devices for their firearms, and hence would not have needed to separately acquire such storage or devices to make them available to nonlicensees.[5] Of those Type 7 and 8 FFLs that do not provide secure gun storage or safety devices, ATF assumed these licensees primarily sell firearms wholesale to Type 1 FFLs and do not sell to nonlicensed persons.

Based on congressional testimony and subject matter experts' (''SMEs'') experience, most firearm manufacturers now include locks with new purchases of firearms, and, as noted above, have been doing so since before the enactment of the Act.[6] ATF, however, is not certain of the exact date when manufacturers and importers began voluntarily providing locks and, in the interest of not underestimating the costs attributable to this rule, ATF assumed that all Type 1 FFLs in 1999 would need to acquire secure gun storage or safety devices to make available to their customers. ATF then estimated that, as manufacturers and importers continued to provide locks with their firearms, and as this practice became more common, a decreasing number of FFLs needed to acquire secure gun storage or safety devices each year until year 2003. After 2003, ATF maintained a constant rate of 20 percent of FFLs that do not receive safety devices with the firearms they sell to account for any manufacturers and importers that, even today, do not provide safety devices with their firearms. In addition, Type 2 FFLs are pawnshops that acquire previously owned firearms. ATF does not know

[5] *See Hearing before the Subcomm. on the Constitution of the S. Comm. on the Judiciary,* 117th Cong. (2021), 2021 WL 2138600 (discussing the success of Project ChildSafe, through which ''manufacturers have voluntarily included a locking device in every box sold since the late 1980's'' (testimony of Joseph Bartozzi, President and CEO, National Shooting Sports Foundation)); S. Rep. No. 105–108, at 201–02 (''The arguments raised against safety locks ring hollow, especially in light of the recent announcement by eight[] of the Nation's largest handgun manufacturers that they will voluntarily comply with the heart of Senator Kohl's amendment by packaging a child safety lock with every handgun they sell.'').

[6] *See supra* note 5.

whether the firearms acquired by Type 2 FFLs have secure locks or not. Therefore, ATF assumed that all new Type 2 FFLs need to acquire secure gun storage or safety devices to satisfy the requirements of the Act.

Because Type 2 FFLs primarily deal with secondhand firearms and not new purchases, ATF assumed that, in 1999, all Type 2 FFLs acquired secure gun storage or safety devices and, from 2000 onward, only new Type 2 FFLs needed to acquire a means of securing firearms. Therefore, ATF assumed that pawnbrokers from 2000 to 2020 consisted only of new Type 2 FFLs.

Table 4 provides the estimated number of Type 1 and 2 FFLs that needed to acquire secure gun storage or safety devices and make them available at their place of business for potential nonlicensed customers. For more detailed information on obtaining the population of FFLs needing to acquire secure gun storage or safety devices to make available, please refer to the standalone RA.

TABLE 4—FFL TYPES 1 AND 2 THAT NEEDED TO PURCHASE SECURE GUN STORAGE OR SAFETY DEVICES

Year	New type 1 FFL	Rate of FFLs that do not receive locks from manufacturers (%)	Type 1 FFL	Type 2 FFL needing
1999	71,290	100	71,290	10,035
2000	8,677	80	6,942	1,252
2001	8,663	60	5,198	1,248
2002	8,618	40	3,447	1,263
2003	8,581	20	1,716	1,272
2004	8,579	20	1,716	1,251
2005	8,560	20	1,712	1,242
2006	8,529	20	1,706	1,224
2007	8,481	20	1,696	1,200
2008	8,439	20	1,688	1,169
2009	8,305	20	1,661	1,166
2010	8,137	20	1,627	1,177
2011	7,768	20	1,554	854
2012	9,034	20	1,807	971
2013	10,177	20	2,035	1,063
2014	7,874	20	1,575	823
2015	7,088	20	1,418	730
2016	7,552	20	1,510	762
2017	6,599	20	1,320	645
2018	6,314	20	1,263	603
2019	5,667	20	1,133	532
2020	*8,442*	20	1,688	772

3. Costs

This analysis considers the rule's direct (or industry) costs, indirect costs, and government costs. Industry costs are the costs to FFLs that need to certify the availability of secure gun storage or safety devices and the costs to FFLs that need to acquire secure gun storage or safety devices to make available to the public. Indirect costs are those costs associated with organizations and manufacturers providing gun locks or safety devices. Government costs are enforcement costs to ensure that the affected FFLs have been and are continuing to comply with the statute.

In determining direct, industry costs, ATF used the average wage rate associated with certain job titles listed on Form 7/7CR by FFL type. ATF used a loaded wage rate of 1.42 to include fringe benefits such as insurance as part of the overall compensation.[7] Because FFLs are segmented by industry type, ATF used a sample from each industry type to determine an average wage rate by each FFL type. For FFLs completing Form 7CR, ATF assigned a leisure wage rate of $16.52 because FFLs that complete Form 7CR are Type 3 FFLs—*i.e.,* collectors who do not apply for a license as part of an occupation.[8] Although Type 3 FFL collectors are not required to make available secure gun storage or safety devices, they are still required to answer the question about availability on Form 7CR by marking ''N/A.'' Therefore, costs for that action were counted as an industry cost of this rule. For more information on the wages used for each sample, please refer the standalone RA. Table 5 provides the average loaded wage rate by FFL type.

TABLE 5—AVERAGE LOADED WAGE RATE BY FFL TYPE

Types 1 and 2	$82.06
Type 3	16.52
Type 6	58.91
Type 7	62.93
Type 8	76.13
Type 9	103.44
Type 10	87.86
Type 11	109.30

[7] Bureau of Labor Statistics, Series Report, *https://data.bls.gov/cgi-bin/srgate.* Data was generated for 2020 using series CMU2010000000000D, CMU2010000000000P and CMU2020000000000D, CMU2020000000000P. Average total compensation was $35.87. Average cost per hour worked was $25.18. Loaded wage rate 1.42 = $35.87/$25.18.

[8] As explained more fully in the accompanying RA, the leisure wage rate was estimated using the calculation described in the Department of Transportation's guidance on the valuation of travel time. *See* Dep't of Transportation, Revised Departmental Guidance on Valuation of Travel Time in Economic Analysis 19 (Sept. 27, 2016), *https://www.transportation.gov/sites/dot.gov/files/docs/2016%20Revised%20Value%20of%20Travel%20Time%20Guidance.pdf.*

The time needed for an FFL to certify on Form 7/7CR that it has secure gun storage or safety devices (or to mark ''N/A'') was estimated at 0.1 minute (0.0017 hours). ATF started with the average loaded wage rate by type of license, multiplied the wage rate by the estimated number of new and renewal FFLs per type from Tables 2 and 3, and multiplied that result by the hour burden to determine the annual cost to certify. Tables 6 and 7 provide the annual costs to certify by FFL type from 1999 to the present.

TABLE 6—COST TO CERTIFY BY FFL TYPES 1, 2, 3, 6, 7, AND 8

Year	Types 1 and 2	Type 3	Type 6	Type 7	Type 8
1999	$3,897	$548	$77	$60	$34
2000	3,886	548	76	68	35
2001	3,879	548	74	75	36
2002	3,867	548	71	84	38
2003	3,856	548	71	92	39
2004	3,847	548	70	98	40
2005	3,836	548	67	108	40
2006	3,817	548	67	120	41
2007	3,788	548	68	138	43
2008	3,760	548	70	155	44
2009	3,706	548	75	187	46
2010	3,645	548	84	220	48
2011	3,283	615	80	246	44
2012	3,332	595	84	326	45
2013	3,487	362	95	393	52
2014	3,458	186	101	416	57
2015	3,269	514	95	409	54
2016	3,453	532	94	453	54
2017	3,411	520	86	485	55
2018	3,184	486	76	483	52
2019	3,113	481	70	508	52
2020	3,524	555	76	637	62

TABLE 7—COST TO CERTIFY BY FFL TYPES 9, 10, AND 11

Year	Type 9	Type 10	Type 11	Total
1999	$1	$6	$5	$4,564
2000	1	7	5	4,562
2001	1	7	5	4,561
2002	1	8	6	4,560
2003	1	8	6	4,558
2004	1	9	7	4,556
2005	1	10	7	4,554
2006	1	12	9	4,551
2007	2	13	9	4,545
2008	3	14	10	4,540
2009	3	16	12	4,529
2010	3	17	13	4,515
2011	3	16	13	4,300
2012	4	16	13	4,415
2013	4	17	14	4,423
2014	4	17	15	4,255
2015	4	17	15	4,378
2016	5	19	16	4,626
2017	5	20	16	4,597
2018	6	20	16	4,323
2019	8	21	17	4,271
2020	9	27	21	4,912

For purposes of this analysis, ATF estimated that Type 1 and 2 FFLs that must comply with the Act would have purchased at least two safety devices at an average price of $7.39 per safety device and tape ($2.36) to notate the owner of the gun. Combined, the average price to make available secure gun storage or safety devices for customers is $17.14 per store. For sources of costs to make available secure gun storage or safety devices, refer to section 3.1.2 of the standalone RA.

For an annual direct, industry cost of certifying and making available secure gun storage or safety devices, refer to Table 8. That table provides the annual cost of certifying and making available secure gun storage or safety devices from 1999 to 2020.

TABLE 8—YEAR BY YEAR DIRECT, INDUSTRY COST

Year	Undiscounted industry costs	Discounted cost	
		7%	3%
1999	$1,398,539	$6,196,088	$2,679,745
2000	147,582	611,072	274,546
2001	117,089	453,096	211,475
2002	86,808	313,942	152,218
2003	56,753	191,821	96,618
2004	56,368	178,057	93,168
2005	56,157	165,784	90,115
2006	55,727	153,753	86,821
2007	55,132	142,161	83,393
2008	54,445	131,204	79,954
2009	53,922	121,442	76,879
2010	53,517	112,645	74,080
2011	45,572	89,646	61,244
2012	52,034	95,663	67,893
2013	57,778	99,274	73,192
2014	45,742	73,451	56,256
2015	41,188	61,813	49,181
2016	43,561	61,097	50,499
2017	38,282	50,179	43,086
2018	36,298	44,466	39,664
2019	32,817	37,572	34,815
2020	47,075	50,370	48,487
Total	2,632,384	9,434,596	4,523,330
Annualized		852,942	283,827

In addition to direct, industry costs for Type 1 and 2 FFLs to make available secure gun storage or safety devices, the government incurred costs to enforce secure gun storage and safety device requirements on FFLs. Based on ATF's database, ATF found two violations in 2019 and six violations in 2020, making the average number of violations four. Based on input from SMEs, ATF determined that Industry Operations Investigators (''IOI'') undertaking inspections related to the secure gun storage and safety device requirement range from a GS–9 to GS–13, making the average IOI a GS–10, step 5. The hourly wage rate for a GS–10, step 5 is $27.56.[9] In order to account for fringe benefits, ATF attributed a load rate of 1.41, making the loaded, hourly wage rate for an IOI $38.86.[10] [11] The SMEs estimated that it would take an average of 20 minutes (0.33 hours) to have a conversation with the FFL in question and compile a report or warning regarding the violation, making the government cost $26 in 2019 and $78 in 2020. Because ATF does not have any information regarding inspections for previous years, ATF used the average of four violations per year as the government cost for enforcement between the years 1999 and 2018. The average cost of enforcement was estimated to be $52.

ATF accounts for indirect costs of this rule although they are not considered part of the total cost of the rule. Other organizations, such as Project ChildSafe, provide gun locks free to the public, which ends up being a savings for the populations affected by this rule. Because these costs are voluntarily incurred, they are considered indirect costs. Based on information provided by Project ChildSafe, which primarily obtains its funding through other sources, this organization has provided approximately 38 million gun locks to the public and provides approximately 1.8 million gun lock kits annually.[12] Furthermore, Project ChildSafe estimates that manufacturers have included approximately 70 million locks with a purchase of a firearm, which they estimate is valued at $140 million.[13] These are indirect costs that ATF does not consider as part of the total costs of this final rule.

Other indirect costs include firearm manufacturers who voluntarily include safety devices with each purchase of a new firearm. While manufacturers are not required to provide gun locks with their firearms due to this rule, it is possible that manufacturers have incorporated the cost of these gun locks into the final purchasing price of the firearm and is therefore already accounted for. It is for these reasons that ATF does not consider these indirect costs as costs attributed to this rule.

ATF accounted for the direct, industry costs of this rule along with the government enforcement costs attributed to this rule. Table 9 provides the total costs for this rule.

[9] Office of Personnel Management, SALARY TABLE 2021–GS (Jan. 2021), *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2021/GS_h.pdf.*

[10] Federal benefits account for 41 percent of total compensation. Congressional Budget Office, Comparing the Compensation of Federal and Private-Sector Employees, 2011 to 2015, at 14 (Apr. 2017), *https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/52637-federalprivatepay.pdf.*

[11] $38.86 loaded wage rate = $27.56 hourly wage rate * 1.41 load rate.

[12] Project ChildSafe, Project ChildSafe by the Numbers, *https://www.projectchildsafe.org/sites/default/files/NSSF_PCS_Infographic_PCSByTheNumbers_Jan2019_0.pdf* (last accessed Dec. 17, 2021).

[13] *Id.*

TABLE 9—TOTAL DIRECT, INDUSTRY AND GOVERNMENT COSTS OF THIS RULE

Year	Undiscounted total costs	Discounted cost	
		7%	3%
1999	$1,398,590	$6,196,318	$2,679,844
2000	147,634	611,287	274,642
2001	117,140	453,296	211,569
2002	86,859	314,130	152,309
2003	56,805	191,996	96,706
2004	56,420	178,221	93,254
2005	56,209	165,937	90,198
2006	55,779	153,896	86,902
2007	55,184	142,294	83,471
2008	54,497	131,329	80,030
2009	53,973	121,558	76,953
2010	53,569	112,754	74,152
2011	45,623	89,748	61,314
2012	52,086	95,758	67,960
2013	57,830	99,363	73,257
2014	45,793	73,534	56,320
2015	41,240	61,890	49,243
2016	43,613	61,170	50,559
2017	38,333	50,247	43,145
2018	36,350	44,530	39,720
2019	32,843	37,602	34,843
2020	47,153	50,454	48,567
Total	2,633,524	9,437,311	4,524,959
Annualized	.....	853,187	283,929

Overall, ATF estimated that, in accordance with the standards for regulatory analysis described in OMB Circular A–4, the total cost attributable to this rule from 1999 to 2020 was $2.6 million undiscounted, or annualized at $853,187 and $283,929 at 7 percent and 3 percent, respectively.

4. Benefits

The benefit of this rule is making available secure gun storage or safety devices for owners of firearms who otherwise do not have such storage or safety devices available to them. Making secure gun storage or safety devices available inhibits unauthorized access to privately owned firearms for individuals such as children, who might accidently discharge them, and inhibits access by criminals, who might use them for illicit activities.

B. Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132 (Federalism), the Attorney General has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

C. Executive Order 12988

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Civil Justice Reform).

D. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601–12, the Attorney General certifies that this final rule will not have a significant economic impact on a substantial number of small entities. The Department has considered whether this final rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of fewer than 50,000.

ATF has determined that, in order for the costs associated with this rule to impact a small entity's revenue by even one percent, the entity would need to make $1,728 or less in annual revenue. For the costs to have a 10 percent effect on revenue, a small entity would need to make $173 or less in revenue. ATF has determined that it is unlikely that a small entity would make such minimal amounts in revenue and continue to operate. Therefore, the Attorney General certifies under 5 U.S.C. 605(b) that this final rule would not have a significant economic impact on a substantial number of small entities.

E. Unfunded Mandates Reform Act of 1995

This rule will not result in the aggregate expenditure by State, local, and Tribal governments, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

F. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (''PRA''), 44 U.S.C. 3501–21, agencies are required to submit for OMB review and approval any reporting requirements inherent in a rule. The collection of information contained in this final rule is a collection of information that has been reviewed and approved by OMB in accordance with the requirements of the PRA, and it has been assigned an OMB Control Number.

Title: Application for Federal Firearms License—ATF Form 7 (5310.12)/7CR (5310.16).

OMB Control Number: 1140–0018.

Summary of the Collection of Information: This collection of information is used by the public when applying for a Federal firearms license

(''FFL''); this form is used to apply for all FFL types.

Need for Information: The information requested on the form is used to determine the eligibility of the applicant to obtain an FFL, and the identity and eligibility of Responsible Persons.

Proposed Use of Information: The information contained will be used to determine the applicant's eligibility to receive a license.

Description of the Respondents: All Federal firearms licensees.

Number of Respondents: 47,088.

Frequency of Response: Once every 3 years.

Burden of Response: For this rule, 0.0017 hours. Total 1 hour.

Estimate of Total Annual Burden: For this rule, 80 hours. Total burden 47,088 hours.

G. Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. 801–08, OMB's Office of Information and Regulatory Affairs designated this rule as not a ''major rule,'' as defined by 5 U.S.C. 804(2). This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Disclosure

Copies of this rule and the comments received in response to the proposed rule will be available for public inspection through the Federal eRulemaking portal, *www.regulations.gov* (search for RIN 1140–AA10), or by appointment during normal business hours at the ATF Reading Room, Room 1E–062, 99 New York Avenue NE, Washington, DC 20226; telephone: (202) 648–8740.

List of Subjects in 27 CFR Part 478

Administrative practice and procedure, Arms and munitions, Exports, Freight, Imports, Intergovernmental relations, Law enforcement officers, Military personnel, Penalties, Reporting and recordkeeping requirements, Research, Seizures and forfeitures, Transportation.

Authority and Issuance

Accordingly, for the reasons discussed in the preamble, 27 CFR part 478 is amended as follows:

PART 478—COMMERCE IN FIREARMS AND AMMUNITION

■ 1. The authority citation for part 478 is revised to read as follows:

Authority: 5 U.S.C. 552(a); 18 U.S.C. 847, 921–931; 44 U.S.C. 3504(h).

■ 2. Amend § 478.11 as follows:

■ a. Revise the definition of ''Antique firearm'';

■ b. Remove the words ''the explosive in a fixed metallic cartridge'' in the definition of ''Rifle'' and add in their place ''an explosive'';

■ c, Add a definition for ''Secure gun storage or safety device'' in alphabetical order; and

■ d. Remove the words ''the explosive in a fixed shotgun shell'' in the definition of ''Shotgun'' and add in their place ''an explosive''.

The revision and addition read as follows:

§ 478.11 Meaning of terms.

* * * * *

Antique firearm. (1) Any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898;

(2) Any replica of any firearm described in paragraph (a) of this definition if such replica:

(i) Is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition; or

(ii) Uses rimfire or conventional centerfire fixed ammunition that is no longer manufactured in the United States and that is not readily available in the ordinary channels of commercial trade; or

(3) Any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol that is designed to use black powder, or a black powder substitute, and that cannot use fixed ammunition. For purposes of this paragraph (3), the term ''antique firearm'' does not include any weapon that incorporates a firearm frame or receiver, any firearm that is converted into a muzzle loading weapon, or any muzzle loading weapon that can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

* * * * *

Secure gun storage or safety device. (1) A device that, when installed on a firearm, is designed to prevent the firearm from being operated without first deactivating the device;

(2) A device incorporated into the design of the firearm that is designed to prevent the operation of the firearm by anyone not having access to the device; or

(3) A safe, gun safe, gun case, lock box, or other device that is designed to be or can be used to store a firearm and that is designed to be unlocked only by means of a key, a combination, or other similar means.

* * * * *

■ 3. Amend § 478.73 by adding a sentence after the first sentence in paragraph (a) to read as follows:

§ 478.73 Notice of revocation, suspension, or imposition of civil fine.

(a) * * * In addition, a notice of revocation of the license, on ATF Form 4500, may be issued whenever the Director has reason to believe that a licensee fails to have secure gun storage or safety devices available at any place in which firearms are sold under the license to persons who are not licensees (except in any case in which a secure gun storage or safety device is temporarily unavailable because of theft, casualty loss, consumer sales, backorders from a manufacturer, or any other similar reason beyond the control of the licensee). * * *

* * * * *

■ 4. Add § 478.104 to subpart F to read as follows:

§ 478.104 Secure gun storage or safety device.

(a) Any person who applies to be a licensed firearms dealer must certify on ATF Form 7 (5310.12), Application for Federal Firearms License, that compatible secure gun storage or safety devices will be available at any place where firearms are sold under the license to nonlicensed individuals (subject to the exception that in any case in which a secure gun storage or safety device is temporarily unavailable because of theft, casualty, loss, consumer sales, backorders from a manufacturer, or any other similar reason beyond the control of the licensee, the dealer shall not be considered in violation of the requirement to make available such a device).

(b) Any person who applies to be a licensed firearms importer or a licensed manufacturer and will be engaged in business on the licensed premises as a dealer in the same type of firearms authorized by the license to be imported or manufactured must make the certification required under paragraph (a) of this section.

(c) Each licensee described in this section must have compatible secure gun storage or safety devices available at any place in which firearms are sold under the license to persons who are not licensees. However, such licensee shall

not be considered to be in violation of this requirement if a secure gun storage or safety device is temporarily unavailable because of theft, casualty loss, consumer sales, backorders from a manufacturer, or any other similar reason beyond the control of the licensee.

Dated: December 23, 2021.

Merrick B. Garland,

Attorney General.

[FR Doc. 2021–28398 Filed 1–3–22; 8:45 am]

BILLING CODE 4410–FY–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–R01–RCRA–2020–0175; FRL 8892–01–R1]

Massachusetts: Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: Massachusetts has applied to the United States Environmental Protection Agency (EPA) for final authorization of revisions to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA), as amended. The EPA has reviewed Massachusetts' application, and has determined that these revisions satisfy all requirements needed to qualify for final authorization. Therefore, we are taking direct final action to authorize the State's changes. In the ''Proposed Rules'' section of this issue of the **Federal Register,** the EPA is also publishing a separate document that serves as the proposal to authorize these revisions. Unless the EPA receives written comments that oppose this authorization during the comment period, the decision to authorize Massachusetts' revisions to its hazardous waste program will take effect.

DATES: This final authorization is effective on March 7, 2022, unless the EPA receives adverse written comments by February 3, 2022. If the EPA receives any such comment, the EPA will publish a timely withdrawal of this direct final rule in the **Federal Register** and inform the public that this authorization will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–RCRA–2020–0175, at *https://www.regulations.gov/.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *www.regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Sara Kinslow, RCRA Waste Management, UST, and Pesticides Section; Land, Chemicals, and Redevelopment Division; U.S. EPA Region 1, 5 Post Office Square, Suite 100 (Mail code 07–1), Boston, MA 02109–3912; phone: 617–918–1648; email: *kinslow.sara@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. Why are revisions to State programs necessary?

States that have received final authorization from the EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal program. As the Federal program changes, states must change their programs and ask the EPA to authorize the changes. Changes to state programs may be necessary when Federal or state statutory or regulatory authority is modified or when certain other changes occur. Most commonly, states must change their programs because of changes to the EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 268, 270, 273, and 279.

New Federal requirements and prohibitions imposed by Federal regulations that the EPA promulgates pursuant to the Hazardous and Solid Waste Amendments of 1984 (HSWA) take effect in authorized states at the same time that they take effect in unauthorized states. Thus, the EPA will implement those requirements and prohibitions in Massachusetts, including the issuance of new permits implementing those requirements, until Massachusetts is granted authorization to do so.

B. What decisions has the EPA made in this rule?

On August 13, 2021, Massachusetts submitted a complete program revision application seeking authorization of revisions to its hazardous waste program. The EPA concludes that Massachusetts' application to revise its authorized program meets all of the statutory and regulatory requirements established by RCRA, as set forth in RCRA Section 3006(b), 42 U.S.C 6926(b), and 40 CFR part 271. Therefore, the EPA grants final authorization to Massachusetts to operate its hazardous waste program with the revisions described in its authorization application, and as listed below in Section G of this document.

The Massachusetts Department of Environmental Protection (MassDEP) has responsibility for permitting treatment, storage, and disposal facilities within its borders and for carrying out the aspects of the RCRA program described in its application, subject to the limitations of HSWA, as discussed above.

C. What is the effect of today's authorization decision?

This decision serves to authorize Massachusetts for the revisions to its authorized hazardous waste program described in its authorization application. These changes will become part of the authorized State hazardous waste program and will therefore be Federally enforceable. Massachusetts will continue to have primary enforcement authority and responsibility for its State hazardous waste program. The EPA would maintain its authorities under RCRA sections 3007, 3008, 3013, and 7003, including its authority to:

- Conduct inspections, and require monitoring, tests, analyses and reports;
- Enforce RCRA requirements, including authorized State program requirements, and suspend or revoke permits; and
- Take enforcement actions regardless of whether the State has taken its own actions.

This action will not impose additional requirements on the regulated community because the regulations for which the EPA is authorizing Massachusetts are already effective under state law and are not changed by today's action.

D. Why wasn't there a proposed rule before today's rule?

Along with this direct final rule, the EPA is publishing a separate document in the ''Proposed Rules'' section of today's **Federal Register** that serves as the proposal to authorize Massachusetts' program revisions. The EPA did not publish a proposal before today's rule because the EPA views this as a routine program change and does not expect comments that oppose this approval. The EPA is providing an opportunity for public comment now, as described in Section E of this document.

E. What happens if the EPA receives comments that oppose this action?

If the EPA receives comments that oppose this authorization, the EPA will withdraw today's direct final rule by publishing a document in the **Federal Register** before the rule becomes effective. The EPA will base any further decision on the authorization of Massachusetts' program revisions on the proposal mentioned in the previous section, after considering all comments received during the comment period. The EPA will then address all such comments in a later final rule. You may not have another opportunity to comment. If you want to comment on this authorization, you must do so at this time.

If the EPA receives comments that oppose only the authorization of a particular revision to Massachusetts' hazardous waste program, the EPA will withdraw that part of this rule, but the authorization of the program revisions that the comments do not oppose will become effective on the date specified above. The **Federal Register** withdrawal document will specify which part of the authorization will become effective, and which part is being withdrawn.

F. What has Massachusetts previously been authorized for?

The Commonwealth of Massachusetts initially received final authorization effective February 7, 1985 (50 FR 3344, January 24, 1985) to implement its base hazardous waste management program. The EPA granted authorization for revisions to Massachusetts' regulatory program on the following dates: September 30, 1998, effective November 30, 1998 (63 FR 52180); October 12, 1999, effective immediately (64 FR 55153); March 12, 2004, effective immediately (69 FR 11801); January 31, 2008, effective March 31, 2008 (73 FR 5753); and June 23, 2010, effective August 23, 2010 (75 FR 35660). Additionally, on November 15, 2000, the EPA granted interim authorization for Massachusetts to regulate Cathode Ray Tubes under the Toxicity Characteristics rule through January 1, 2003, effective immediately (65 FR 68915). This interim authorization was subsequently extended to run through January 1, 2006 (67 FR 66338, October 31, 2002) which was then further extended until January 1, 2011 (70 FR 69900, November 18, 2005).

G. What revisions is the EPA proposing with this proposed action?

1. State-Initiated Revisions

On August 13, 2021, Massachusetts submitted a final complete program revision application, seeking authorization of additional revisions to its program in accordance with 40 CFR 271.21. Massachusetts seeks authority to administer the Federal requirements that are listed in Table 1 below, including certain waste listings that were promulgated under HSWA authority. This table lists Massachusetts' analogous requirements that are being recognized as no less stringent than the analogous Federal requirements.

Massachusetts' regulatory references are to Title 310 of Code of Massachusetts Regulations (CMR), Chapter 30, as amended effective November 15, 2019. Massachusetts' statutory authority for its hazardous waste program is based on the Massachusetts Hazardous Waste Management Act of 1979 (Massachusetts General Laws Chapter 21C).

The EPA proposes to determine, subject to public review and comment, that Massachusetts' hazardous waste program revisions are equivalent to, consistent with, and no less stringent than the Federal program, and therefore satisfy all of the requirements necessary to qualify for final authorization. Therefore, the EPA is proposing to authorize Massachusetts for the following program revisions:

TABLE 1—MASSACHUSETTS' ANALOGS TO THE FEDERAL REQUIREMENTS

Federal requirement	**Federal Register** page and date	Analogous State authority
Checklist (CL) 82: Wood Preserving Listings.	55 FR 50450; December 6, 1990	Title 310 Code of Massachusetts Regulations (310 CMR) 30.131, 30.160, 30.162, and 30.099(6)(n). (More stringent provisions: 30.010 and 30.200).
CL 92: Wood Preserving Listings; Technical Corrections.	56 FR 30192; July 1, 1991	310 CMR 30.099(6)(n). (More stringent provisions: 30.010 and 30.200).
CL 110: Coke By-Product Listings ..	57 FR 37284; August 18, 1992	310 CMR 30.132 and 30.160. (More stringent provisions: 30.104(2)(b) and 30.200).
CL 120: Wood Preserving; Amendments to Listings and Technical Requirements.	57 FR 61492; December 24, 1992	310 CMR 30.131 and 30.099(6)(n). (More stringent provisions: 30.010).
CL 140: Carbamate Production Listings.	60 FR 7824; February 9, 1995 as amended April 17, 1995 (60 FR 19165) and May 12, 1995 (60 FR 25619).	310 CMR 30.132, 30.133, 30.136, 30.160, and 30.162. (More stringent provisions: 30.102(2)(c)2 and 30.102(2)(d)).
CL 169: Petroleum Refining Process Listings.	63 FR 42110; August 6, 1998, as amended October 9, 1998 (63 FR 54356).	310 CMR 30.102(2)(c)2.b.ii, 30.131, 30.132, and 30.160. (More stringent provisions: 30.102(2)(d), 30.200, and 30.250).
CL 189: Chlorinated Aliphatics Production Listings.	65 FR 67067; November 8, 2000	310 CMR 30.132 and 30.160.
CL 195: Inorganic Chemical Manufacturing Listings.	66 FR 58257; November 20, 2001, as amended April 9, 2002 (67 FR 17119).	310 CMR 30.132 and 30.160. (More stringent provisions: 30.102(2)(d)).
CL 209: Universal Waste Rule; Provisions for Mercury Containing Equipment.	70 FR 45508; August 5, 2005	310 CMR 30.010, 30.099(1), 30.143(2), 30.501(2), 30.750(3)(d), 30.801(14), 30.1001(1), 30.1010, 30.1020(3) and (4), 30.1034(3) and (4), 30.1043(2), and 30.1044(3) and (4).
CL 215: Cathode Ray Tube Exclusion.	71 FR 42927; July 28, 2006	310 CMR 30.010, 30.104(3)(h), and 30.202(5)(g). (More stringent provisions: 30.104(3)(h)1.a and 30.104(3)(h)2.b.iii).

TABLE 1—MASSACHUSETTS' ANALOGS TO THE FEDERAL REQUIREMENTS—Continued

Federal requirement	**Federal Register** page and date	Analogous State authority
CL 220: Academic Laboratories Generator Standards.	73 FR 72911; December 1, 2008	310 CMR 30.010, 30.351(2)(b), and 30.354. (More stringent provisions: 30.354(3)(d) and (e), 30.354(6)(a)1.d and e, 30.354(9), and 30.354(10)(d)).
CL 226: Corrections to the Academic Laboratories Generator Standards.	75 FR 79304; December 20, 2010	310 CMR 30.010 and 30.354.
CL 229: Conditional Exclusions for Solvent Contaminated Wipes.	78 FR 46447; July 31, 2013	310 CMR 30.010 and 30.104(3).
CL 232: Revisions to the Export Provisions of the Cathode Ray Tube Rule.	79 FR 36220; June 26, 2014	310 CMR 30.010, 30.104(3)(h), and 30.202(5)(g).

Massachusetts has already received authorization for some of the checklists in Table 1 to the extent that they contain provisions related to the Land Disposal Restrictions (LDR) program. Regulated entities in Massachusetts that generate these HSWA wastes must comply with the State LDR requirements for these wastes.

2. EPA-Initiated Revisions

The EPA is also clarifying, subject to public review and comment, the scope of Massachusetts' authorized program by explicitly identifying rule checklists which pertain to provisions that have long been part of Massachusetts' authorized program, but which were inadvertently omitted from past authorizations. These checklists include:

- CL 2: Permit Rules: Settlement Agreement (48 FR 39611, September 1, 1983);
- CL 6: Permit Rules: Settlement Agreement (49 FR 17716, April 24, 1984);
- CL 17H: HSWA Codification Rule: Double Liners (50 FR 28702, July 15, 1985);
- CL 17I: HSWA Codification Rule: Ground-water Monitoring (50 FR 28702, July 15, 1985);
- CL 17P: HSWA Codification Rule: Interim Status (50 FR 28702, July 15, 1985);
- CL 17Q: HSWA Codification Rule: Research and Development Permits (50 FR 28702, July 15, 1985);
- CL 30: Biennial Report Correction (51 FR 28556, August 8, 1986);
- CL 36: Closure/Post-closure Care for Interim Status Surface Impoundments (52 FR 8704, March 19, 1987);
- CL 38: Amendments to Part B Information Requirements for Land Disposal Facilities (52 FR 23447, June 22, 1987 as amended September 9, 1987 at 52 FR 33936);
- CL 54: Permit Modification for Hazardous Waste Management Facilities (53 FR 37912, September 28, 1988 as amended October 24, 1988 at 53 FR 41649);
- CL 55: Statistical Methods for Evaluating Groundwater Monitoring Data from Hazardous Waste Facilities (53 FR 39720, October 11, 1988); and
- CL 61: Changes to Interim Status Facilities for Hazardous Waste Management Permits; Modification of Hazardous Waste Management Permits; Procedures for Post-Closure Permitting (54 FR 9596, March 7, 1989).

In the process of seeking authorization for revisions to the State authorized program, Massachusetts has not always used individual rule checklists to demonstrate the equivalency of its State regulations to the Federal program. In addition, Massachusetts has sometimes pursued authorization for only some provisions of an individual rule checklist. As a result, past authorization **Federal Register** notices may have inadvertently omitted some rule checklists/provisions included in the EPA's authorization decision for State program revisions. The EPA is correcting these omissions with this authorization. The provisions in the checklists cited above continue to be part of Massachusetts' authorized program.

Finally, there are several Federal rules that have been vacated, withdrawn, or superseded. As a result, authorization of these rules may be moot. However, for purposes of completeness, these rule checklists are included, below, with an explanation as to the rule's status in Massachusetts. These checklists include:

- CL 153: Conditionally Exempt Small Quantity Generator Disposal Options (61 FR 34252, July 1, 1996)—As the preamble to this rule discussed, the EPA believes that States which do not allow the disposal of wastes generated by CESQGs into Subtitle D landfills under their existing authorized Subtitle C program would not be required to revise their programs and obtain authorization for this rule, as they would continue to be more stringent. The EPA encouraged states to inform their regional office that for this final rule, they are not required to submit a revision application. Massachusetts does not allow wastes generated by CESQGs to be disposed in Subtitle D landfills. Note that these federal provisions were subsequently superseded by the Hazardous Waste Generator Improvements Rule (81 FR 85732, November 28, 2016).
- CL 199: Vacatur of Mineral Processing Spent Materials Being Reclaimed (67 FR 11251, March 13, 2002)—This rule vacated certain provisions from CL 167D: Mineral Processing Secondary Materials Exclusion (63 FR 28556; May 26, 1998). Massachusetts did not adopt the underlying provisions from CL 167D.
- CL 216: Exclusion of Oil-Bearing Secondary Materials Processed in a Gasification System to Produce Synthetic Gas (73 FR 57, January 2, 2008), CL 221: Expansion of RCRA Comparable Fuel Exclusion (73 FR 77954, December 19, 2008), CL 224: Withdrawal of the Emission Comparable Fuel Exclusion (75 FR 33712, June 15, 2010), and CL 234: Vacatur of the Comparable Fuels Rule and the Gasification Rule (80 FR 18777, April 8, 2015)—CLs 216, 221, and 224 have been vacated. CL 234 implements the vacatur of these provisions. Massachusetts did not adopt the exclusions contained in CLs 216, 221, or 224.

Massachusetts' authorized program continues to be equivalent to and no less stringent than the Federal program without having to make any conforming changes pursuant to these rule checklists, as explained above.

H. Where are the revised State rules different from the Federal rules?

1. Massachusetts Requirements That Are Broader in Scope

Massachusetts' hazardous waste program contains certain provisions that are broader than the scope of the Federal program. These broader in

scope provisions are not part of the program the EPA is proposing to authorize. The EPA cannot enforce requirements that are broader in scope, although compliance with such provisions is required by State law. Examples of broader in scope provisions of Massachusetts' program include, but are not limited to, the following:

(a) In 1996, the EPA vacated the K156, K157, and K158 waste listings to the extent that they encompass wastes generated from the manufacture of 3-iodo-2-popynyl n-butylcarbamate (IPBC). 310 CMR 30.132 does not exclude such wastes from coverage under Massachusetts' analogous listings. State-only wastes such as K156, K157, and K158 wastes from the manufacture of IPBC make Massachusetts' universe of regulated hazardous waste larger than the EPA's and, therefore, broader in scope.

2. Massachusetts Requirements That Are More Stringent Than the Federal Program

Massachusetts' hazardous waste program contains several provisions that are more stringent than the Federal RCRA program. More stringent provisions are part of a Federally authorized program and are, therefore, Federally-enforceable. Under this action, the EPA would authorize every provision in Massachusetts' program that is more stringent. Every provision of the proposed program revision that is more stringent is noted in Table 1. They include, but are not limited to, the following:

(a) The EPA conditionally excludes certain listed wastes that are reclaimed, reused, or otherwise recycled from the definition of solid waste. In 40 CFR 261.4(a)(9), (10), and (19), the EPA conditionally excludes any spent wood preserving solutions and wastewaters that are reclaimed and reused, wastes from coke by-product processes that are destined for recycling, and spent caustic solutions generated by refineries that are used as feedstock, respectively. Massachusetts has not adopted these exclusions for recycled listed wastes. Instead, 310 CMR 30.104(2)(b) excludes recyclable material that is reclaimed in compliance with the requirements of 310 CMR 30.200 from hazardous waste regulation. The provisions of 310 CMR 30.200, which include but are not limited to obtaining a permit and managing recyclable material in compliance with that permit, are more stringent than the conditions set forth by the EPA at 40 CFR 261.4(a).

(b) At 40 CFR 261.4(a)(12) and (18) and 261.6(a)(3)(iii) and (iv), the EPA conditionally excludes certain recovered oil and oil-bearing hazardous secondary materials that are to be refined, re-refined, or burned as fuels from regulation as hazardous waste. Certain oil-bearing recyclable materials are subject to 40 CFR 279 standards for used oil management. Massachusetts has not adopted the EPA's used oil requirements, nor the EPA's exclusions for management of oil-bearing recyclable materials. Instead, such waste is subject to 310 CMR 30.200 and specifically the waste oil management standards in 310 CMR 30.250, which are more stringent than 40 CFR 279.

(c) In the definition of ''drip pad'' at 310 CMR 30.010, Massachusetts explicitly restricts use of drip pads to treatment, storage, and disposal facilities that are in interim status. Massachusetts does not permit generators or licensed treatment, storage, and disposal facilities to use drip pads to convey treated wood drippage, precipitation, and/or surface water run-off from an associated collection system.

(d) If wood preserving plants cease or do not initiate use of chlorophenolic preservatives, the EPA allows wastes from such processes to be exempt from the F032 listing once several cleaning, management, and documentation conditions have been met (40 CFR 261.35). Massachusetts has not adopted the conditions included in 40 CFR 261.35 and regulates all such waste as F032 listed hazardous waste.

(e) The EPA excludes mixtures of non-hazardous waste with certain listed hazardous wastes from the definition of hazardous waste if certain conditions are met. The types of mixtures and associated conditions for exclusion are listed in 40 CFR 261.3(a)(2)(iv). 310 CMR 30.102(2)(c) incorporates many of these mixtures and associated conditions for exclusion by reference. However, Massachusetts has not adopted 40 CFR 261.3(a)(2)(iv)(F) and (G), relating to mixtures of non-hazardous waste with wastewaters from the production or treatment of carbamates and carbamoyl oximes (namely, K156 and K157 listed wastes). Mixtures of non-hazardous wastes with K156 and/or K157 listed wastes must be managed as hazardous wastes in Massachusetts.

(f) The EPA conditionally excludes certain wastes generated from the treatment, storage or disposal of listed wastes from hazardous waste regulation. In 40 CFR 261.3(c)(2)(ii)(D), the EPA conditionally excludes biological treatment sludge from the treatment of K156 and K157 wastes. In 40 CFR 261.3(c)(2)(ii)(E), the EPA conditionally excludes catalyst inert support media separated from K171 and K172 wastes. In 40 CFR 261.4(b)(15), the EPA conditionally excludes leachate or gas condensate collected in landfills where certain inorganic chemical manufacturing wastes (namely, K169, K170, K171, K172, K174, K175, K176, K 177, K178, and K181) have been disposed. Massachusetts, at 310 CMR 30.102(d), regulates all waste generated from the treatment, storage, disposal, or use of a hazardous waste as hazardous waste, including any sludge, spill residue, ash emission control dust, and leachate.

(g) The Massachusetts provisions for used, broken cathode ray tubes (CRTs) and processed CRT glass undergoing recycling are more stringent than the Federal requirements in two regards. First, 310 CMR 30.104(3)(h)1.a requires that all used, broken CRTs be containerized, rather than providing an option to store used, broken CRTs in a building as provided at 40 CFR 261.39(a)(1). Second, at 310 CMR 30.104(3)(h)2.b.iii, Massachusetts requires companies that conduct CRT processing to submit a one-time notification to MassDEP prior to commencing CRT processing. The Federal CRT recycling provisions do not require such a notification.

(h) Several of Massachusetts' provisions at 310 CMR 30.354, alternative requirements for unwanted materials generated by academic laboratories, are more stringent than the Federal analogous requirements. First, teaching hospitals and nonprofit research institutes that are not owned by a college or university must keep their written formal affiliation agreements on file with the Director of Laboratories for as long as the laboratories are subject to alternative requirements (310 CMR 30.354(3)(d) and (e), respectively). The EPA does not specify where or with whom such affiliation agreements must be filed or maintained. Second, the container labeling requirements at 40 CFR 262.206(a)(2) do not require that date the unwanted material began accumulating and other information sufficient to allow trained professionals to identify the materials be affixed or attached to the container. Massachusetts does require this information be affixed or attached to the container, as described at 310 CMR 30.354(6)(a)1. Finally, although the Federal provisions have less stringent requirements for where and when Very Small Quantity Generators (VSQGs) must make hazardous waste determinations, as compared to Small and Large Quantity Generators (SQGs and LQGs, respectively), 310 CMR 30.354(10) requires VSQGs to comply with the

same standards as SQGs and LQGs when making a hazardous waste determination in the laboratory before the unwanted material is removed from the laboratory.

(i) Massachusetts has prohibited VSQGs from acquiring and utilizing drum-top crushers to crush mercury-containing lamps after the effective date of the revised regulations, unless they first obtain a license to treat hazardous waste. This requirement, at 310 CMR 30.353(10), is more stringent than the federal provisions, which do not restrict or require permits for treatment by VSQGs.

I. Who handles permits after the authorization takes effect?

Massachusetts will continue to issue permits covering all the provisions for which it is authorized and will administer the permits it issues. The EPA will continue to administer and enforce any RCRA and HSWA permits or portions of permits that the EPA issued prior to the effective date of this authorization in accordance with the signed Memorandum of Agreement, dated September 30, 2021, which is included with this program revision application. Until such time as formal transfer of the EPA permit responsibility to Massachusetts occurs and the EPA terminates its permit, the EPA and Massachusetts agree to coordinate the administration of permits in order to maintain consistency. The EPA will not issue any new permits or new portions of permits for the provisions listed in Section G after the effective date of this authorization. The EPA will continue to implement and issue permits for HSWA requirements for which Massachusetts is not yet authorized.

J. How would this action affect Indian Country (18 U.S.C. 115) in Massachusetts?

Massachusetts has not applied for and is not authorized to carry out its hazardous waste program in Indian country within the State, which includes the land of the Wampanoag tribe. Therefore, this action has no effect on Indian country. The EPA retains jurisdiction over Indian country and will continue to implement and administer the RCRA program on these lands.

K. What is codification and will the EPA codify Massachusetts' hazardous waste program as authorized in this rule?

Codification is the process of placing citations and references to the State's statutes and regulations that comprise the State's authorized hazardous waste program into the Code of Federal Regulations. The EPA does this by adding those citations and references to the authorized State rules in 40 CFR part 272. The EPA is not codifying the authorization of Massachusetts' revisions at this time. However, the EPA reserves the ability to amend 40 CFR part 272, subpart W for the authorization of Massachusetts' program at a later date.

L. Statutory and Executive Order Reviews

The Office of Management and Budget (OMB) has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). This action authorizes State requirements for the purpose of RCRA section 3006 and imposes no additional requirements beyond those imposed by State law. Therefore, this action is not subject to review by OMB. This action is not an Executive Order 13771 (82 FR 9339, February 3, 2017) regulatory action because actions such as today's authorization of Massachusetts' revised hazardous waste program under RCRA are exempted under Executive Order 12866. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this action authorizes pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538). For the same reason, this action also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely authorizes State requirements as part of the State RCRA hazardous waste program without altering the relationship or the distribution of power and responsibilities established by RCRA. This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks. This action is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

Under RCRA section 3006(b), the EPA grants a state's application for authorization as long as the state meets the criteria required by RCRA. It would thus be inconsistent with applicable law for the EPA, when it reviews a state authorization application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in taking this action, the EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. The EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of this action in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). ''Burden'' is defined at 5 CFR 1320.3(b). Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or

environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. Because this action authorizes pre-existing State rules which are at least equivalent to, and no less stringent than existing Federal requirements, and imposes no additional requirements beyond those imposed by State law, and there are no anticipated significant adverse human health or environmental effects, this rule is not subject to Executive Order 12898.

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Authority: This action is issued under the authority of Sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912(a), 6926, 6974(b).

Deb Szaro,

Acting Regional Administrator, U.S. EPA Region I.

[FR Doc. 2021–28333 Filed 1–3–22; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 414

[CMS–1738–F, CMS–1687–F, and CMS–5531–F]

RINs 0938–AU17, 0938–AT21, and 0938–AU32

Medicare Program; Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Policy Issues, and Level II of the Healthcare Common Procedure Coding System (HCPCS); DME Interim Pricing in the CARES Act; Durable Medical Equipment Fee Schedule Adjustments To Resume the Transitional 50/50 Blended Rates To Provide Relief in Rural Areas and Non-Contiguous Areas

Correction

In Rule document 2021–27763, appearing on pages 73860 through 73911, in the issue of Tuesday, December 28, 2021, make the following correction:

§ 414.210 General payment rules. [Corrected]

■ On page 73911, in the second column, in the twelfth line from the top, the text ''<AMDPAR>'' should read ''February 28, 2022''.

[FR Doc. C1–2021–27763 Filed 12–30–21; 4:15 pm]

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Proposed Rules

Federal Register
Vol. 87, No. 2
Tuesday, January 4, 2022

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.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 315, 432, and 752

RIN 3206–AO23

Probation on Initial Appointment to a Competitive Position, Performance-Based Reduction in Grade and Removal Actions and Adverse Actions

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing proposed regulations governing probation on initial appointment to a competitive position, performance-based reduction in grade and removal actions, and adverse actions. The proposed rule would rescind certain regulatory changes made effective on November 16, 2020 and implements new statutory requirements for procedural and appeal rights for dual status National Guard technicians for certain adverse actions. OPM believes the proposed revisions would support implementation of an Executive Order to empower agencies to rebuild the career Federal workforce and protect the civil service rights of their employees, while preserving appropriate mechanisms for pursuing personnel actions where warranted.

DATES: Comments must be received on or before February 3, 2022.

ADDRESSES: You may submit comments, identified by the docket number or Regulation Identifier Number (RIN) for this proposed rulemaking, via the Federal eRulemaking Portal: *https://www.regulations.gov.* Follow the instructions for sending comments.

Instructions: All submissions must include the agency name and docket number or RIN for this rulemaking. Please arrange and identify your comments on the regulatory text by subpart and section number; if your comments relate to the supplementary information, please refer to the heading and page number. All comments received will be posted without change, including any personal information provided. Please ensure your comments are submitted within the specified open comment period. Comments received after the close of comment period will be marked ''late,'' and OPM is not required to consider them in formulating a final decision. Before acting on this proposal, OPM will consider and respond to all comments within the scope of the regulations that we receive on or before the closing date for comments. Changes to this proposal may be made in light of the comments we receive.

FOR FURTHER INFORMATION CONTACT: Timothy Curry by email at *employeeaccountability@opm.gov* or by telephone at (202) 606–2930.

SUPPLEMENTARY INFORMATION: On October 16, 2020, the Office of Personnel Management (OPM) published a final rule governing probation on initial appointment to a competitive position, performance-based reduction in grade and removal actions, and adverse actions. 85 FR 65940 (Oct. 16, 2020). The final rule implemented a provision of Public Law 115–91 concerning the inclusion of appeals rights information in proposal notices for personnel actions, and amended the regulations in parts 315, 432, and 752 of title 5, Code of Federal Regulations to incorporate certain requirements of Executive Order (E.O.) 13839, other statutory changes, and technical revisions.

On January 22, 2021, President Biden issued E.O. 14003 on ''Protecting the Federal Workforce'' which, among other things, revoked E.O. 13839 and directed agencies to ''as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding, the actions'' implementing various E.O.s, including E.O. 13839, ''as appropriate and consistent with applicable law.'' E.O. 14003 states that ''[c]areer civil servants are the backbone of the Federal workforce, providing the expertise and experience necessary for the critical functioning of the Federal Government. It is the policy of the United States to protect, empower, and rebuild the career Federal workforce. It is also the policy of the United States to encourage employee organizing and collective bargaining. The Federal Government should serve as a model employer.''

After consideration and review, OPM has concluded that portions of the final rule which became effective on November 16, 2020, and which implemented certain requirements of E.O. 13839, are inconsistent with the current policy of the United States to protect, empower and rebuild the career Federal workforce as well as its current policy to encourage employee organizing and collective bargaining. Therefore, in accordance with E.O. 14003, OPM proposes to rescind portions of the final rule published at 85 FR 65940 (October 16, 2020). The elements of the final rule that OPM proposes to rescind are described in detail below, together with the policy explanation in each instance. OPM is proposing these regulations under its congressionally granted authority to regulate the parts that it proposes to revise in accordance with 5 U.S.C. 3321, 4305, 4315, 7504, 7514, and 7543, and subject to the notice-and-comment process set forth in the Administrative Procedure Act, and mindful of the President's expressed policy direction. Furthermore, pursuant to Public Law 114–328 (Dec. 23, 2016), OPM proposes to revise its regulations on coverage for performance-based actions and appealable adverse actions in accordance with statutory changes that extend title 5 rights to dual status National Guard technicians under certain conditions. Elements of the November 16, 2020, regulatory amendments that were due to statutory changes will remain in effect, such as procedures for disciplinary action against supervisors who retaliate against whistleblowers (5 U.S.C. 7515) and the inclusion of appeals rights information in proposal notices for adverse actions (Pub. L. 115–91, section 1097(b)(2)(A)).

OPM invites the public to comment on any aspect of the proposed changes, including whether members of the public believe that any matters proposed for rescission instead should be retained in OPM's regulations, consistent with OPM's statutory and regulatory authorities. Ultimately, the purpose of the revisions is to implement applicable statutory mandates and provide agencies the necessary tools and flexibility to address matters related to unacceptable performance and misconduct or other behavior contrary to the efficiency of the service by Federal employees when they arise,

consistent with the policies of E.O. 14003.

5 CFR Part 315, Subpart H—Probation on Initial Appointment to a Competitive Position

The regulations at subpart H of 5 CFR part 315 provide information regarding agency action during a probationary period. Under its authority at 5 U.S.C. 3321, OPM proposes to rescind its November 16, 2020, amendment to regulations at § 315.803(a) for two reasons. First, E.O. 14003 directs OPM to rescind any regulations effectuated by E.O. 13839, as appropriate and consistent with applicable law. Second, OPM has concluded that the amendment to the regulations at § 315.803(a) placed unnecessary requirements on agencies regarding how agencies addressed probationary period matters. OPM believes these requirements prevented agencies from implementing policies most suitable for each respective agency based on their unique circumstances. The November 2020 amendment requires agencies to notify supervisors at least three months prior to expiration of the probationary period that an employee's probationary period is ending, and then again one month prior to expiration of the probationary period, and to advise a supervisor to make an affirmative decision regarding the employee's fitness for continued employment or otherwise take appropriate action. While agencies are encouraged to notify supervisors that an employee's probationary period is ending, OPM believes the frequency and timing of notifications should be left up to the discretion of each agency.

OPM guidance has stated previously that the probationary period is the last and crucial step in the examination process. The probationary period is intended to give the agency an opportunity to assess, on the job, an employee's overall fitness and qualifications for continued employment and permit the termination, without chapter 75 procedures, of an employee whose performance or conduct does not meet acceptable standards to deliver on the mission. Thus, it provides an opportunity for supervisors to address problems expeditiously, with minimum burden to the agency, and avoid long-term problems inhibiting effective service to the American people. Employees may be terminated from employment during the probationary period for reasons including demonstrated inability to perform the duties of the position, lack of cooperativeness, or other unacceptable conduct or poor performance. As a matter of good administration, agencies should ensure that their practices make effective use of the probationary period. While OPM is proposing to rescind a government-wide requirement to notify supervisors when an employee's probationary period is ending, agencies would not be precluded from providing such notifications under their own authorities and are strongly encouraged to do so.

5 CFR Part 432—Performance-Based Reduction in Grade and Removal Actions

Part 432 applies to reduction in grade and removal of covered employees based on performance at the unacceptable level. Chapter 43 provides a straightforward, though not exclusive, process for agencies to use in taking action based on unacceptable performance.

Section 432.102 Coverage

Section 432.102 identifies actions and employees covered by this part. The proposed rule at § 432.102 updates coverage to align with the National Defense Authorization Act (NDAA) for Fiscal Year 2017, Public Law 114–328 (Dec. 23, 2016). Specifically, section 512(a)(1)(C) of the 2017 NDAA provides appeal rights under 5 U.S.C. 7511, 7512, and 7513 to dual status National Guard technicians for certain adverse actions. Section 512(c) repealed 5 U.S.C. 7511(b)(5), which excluded National Guard technicians from the definition of ''employee.''

The repeal of 5 U.S.C. 7511(b)(5) and the coverage of National Guard technicians under 5 U.S.C. 7511, 7512, and 7513 required that OPM review 5 U.S.C. 4303. Section 4303(e) provides that any employee who is a preference eligible, in the competitive service, or in the excepted service and covered by subchapter II of chapter 75, and who has been reduced in grade or removed under this section is entitled to appeal the action to the MSPB under section 7701.

Accordingly, MSPB appeal rights must be extended to National Guard technicians who are defined in section 4303(e). OPM proposes to revise paragraphs (b) and (f) of § 432.102 to reflect that certain performance-based actions against dual status National Guard technicians are no longer excluded. Specifically, OPM proposes to add as an exclusion an action against a technician in the National Guard concerning any activity under section 709(f)(4) of title 32, United States Code, except as provided by section 709(f)(5) of title 32, United States Code. In addition, the proposed rule removes the exclusion at § 432.102(f)(12): ''A technician in the National Guard described in 5 U.S.C. 8337(h)(1), employed under section 709(b) of title 32.'' The impact of the repeal of 5 U.S.C. 7511(b)(5) on adverse actions taken under chapter 75 will be further discussed below in the supplemental information for § 752.401.

Section 432.104 Addressing Unacceptable Performance

This section provides requirements in chapter 43 of title 5 of the United States Code for addressing unacceptable performance. While the regulatory amendments to part 432 made effective November 16, 2020, are within OPM's existing authority under 5 U.S.C. 4303 and 4305, E.O. 13839 was the catalyst for the changes. OPM proposes to amend the regulation at § 432.104 to remove the following language: ''The requirement described in 5 U.S.C. 4302(c)(5) refers only to that formal assistance provided during the period wherein an employee is provided with an opportunity to demonstrate acceptable performance, as referenced in 5 U.S.C. 4302(c)(6). The nature of assistance provided is in the sole and exclusive discretion of the agency. No additional performance assistance period or similar informal period shall be provided prior to or in addition to the opportunity period provided under this section.'' OPM will re-insert at § 432.104 a statement that was in the regulation prior to the November 2020 amendment: ''As part of the employee's opportunity to demonstrate acceptable performance, the agency shall offer assistance to the employee in improving unacceptable performance.''

OPM believes that the amendment to the regulations at § 432.104 placed unnecessary restrictions and limitations on agencies regarding decisions on when performance assistance is provided to employees. These restrictions and limitations removed previous flexibilities enjoyed by agencies in how to address performance issues with their employees under chapter 43. By placing these restrictions on agencies, OPM believes it was not supporting agencies and supervisors in determining the most effective assistance for struggling employees.

OPM proposes to revert to the language in § 432.104 prior to the November 2020 amendments regarding the agency's obligation to provide assistance to an employee who has demonstrated unacceptable performance. The proposed language restates the statutory requirement described in 5 U.S.C. 4302(c)(5) that agencies are obligated to provide

performance assistance during the opportunity period. OPM would emphasize that the employee has a right to a reasonable opportunity to improve, which includes assistance from the agency in improving unacceptable performance.

OPM encourages efficient use of chapter 43 procedures and effective delivery of agency mission while providing employees sufficient opportunity to demonstrate acceptable performance as required by law. Additionally, OPM advises agencies to act promptly and effectively to address and resolve poor performance. Supervisors should draw upon their skills and expertise to determine the most effective assistance for a struggling employee and work in concert with the technical advice received from their agency's human resources staff.

Section 432.105 Proposing and Taking Action Based on Unacceptable Performance

This section specifies the procedures for proposing and taking action based on unacceptable performance once an employee has been afforded an opportunity to demonstrate acceptable performance. The regulatory amendments to § 432.105(a)(1) that became effective November 16, 2020, were made for consistency with and promotion of the principles of E.O. 13839. For consistency with and promotion of the principles of E.O. 14003 and in accordance with its authority under 5 U.S.C. 4302, OPM proposes to revise the regulation at § 432.105(a)(1).

The proposed regulatory change to § 432.105(a)(1) removes the language: ''For the purposes of this section, the agency's obligation to provide assistance, under 5 U.S.C. 4302(c)(5), may be discharged through measures, such as supervisory assistance, taken prior to the beginning of the opportunity period in addition to measures taken during the opportunity period. The agency must take at least some measures to provide assistance during the opportunity period in order to both comply with section 4302(c)(5) and provide an opportunity to demonstrate acceptable performance under 4302(c)(6).''

OPM believes that the amendment to the regulations at § 432.105(a)(1) placed too much emphasis on supervisory assistance taken prior to the beginning of the opportunity period and placed too little emphasis on supervisory assistance taken during the opportunity period and could result in some agencies relying too much on supervisory assistance outside of the opportunity period to support any performance-based action taken against an employee.

Agencies are reminded that they must provide assistance during the opportunity period in accordance with section 5 U.S.C. 4302(c)(5). OPM has long encouraged agencies to act promptly to address performance concerns as soon as they arise. Supervisors should continually monitor performance, provide ongoing feedback, and assist employees who exhibit performance issues. Agencies should also remain mindful that third parties (for example, arbitrators and judges) place a strong emphasis on a supervisor's effort to assist the employee in improving his or her performance. Evidence that the supervisor engaged an employee in discussion, counseling, training, or the like prior to the opportunity period may assist the agency in developing a stronger case before a third party that the employee was given a reasonable opportunity to demonstrate acceptable performance before a performance-based action is taken.

The supplemental information supporting the regulatory changes issued pursuant to E.O. 13839, Probation on Initial Appointment to a Competitive Position, Performance-Based Reduction in Grade and Removal Action and Adverse Actions, 85 FR 65940 (October 16, 2020), and the subsequent revocation of E.O. 13839 and consequent rescission of some those regulations in this proposed rule, require clarification and reaffirmation of an agency's obligations with regard to actions based on unacceptable performance. Section 4302(c) states, in pertinent part, that, ''Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for . . . (5) assisting employees in improving unacceptable performance; and (6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.'' Section 4303(a) and (b)(1)(A) provides that ''an agency may reduce in grade or remove an employee for unacceptable performance'' subject to ''30 days advance written notice of the proposed action which identifies—(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and (ii) the critical elements of the employee's position involved in each instance of unacceptable performance.'' Although the statute is silent regarding an agency's determination in the first instance that an employee's performance is unacceptable, OPM's regulation is pellucid. Pursuant to its authority to promulgate regulations, OPM issued 5 CFR 432.104, which it now proposes to restore. That regulation states in pertinent part: ''At any time during the performance appraisal cycle that an employee's performance *is determined* to be unacceptable in one or more critical elements, the agency shall notify the employee of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position. The agency should also inform the employee that unless his or her performance in the critical element(s) improves to and is sustained at an acceptable level, the employee may be reduced in grade or removed. For each critical element in which the employee's performance is unacceptable, the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position.'' (Emphasis added). This language in 5 CFR 432.104 was unchanged in the final rule issued on October 16, 2020.

The comments summarized in the October 16, 2020, final rule, included concern that the amendment to 5 CFR 432.104 (which we are proposing to remove) might give some managers the ability to remove employees without factual evidence or deny them the ability to either counter the agency's assessment or correct it through a mandated improvement process. OPM responded to those concerns by saying, inter alia, that ''The amended rule does not relieve agencies of the responsibility to demonstrate that an employee was performing unacceptably—which per statute covers the period both prior to and during a formal opportunity period—before initiating an adverse action under chapter 43.'' 85 FR 65957 (Oct. 16, 2020). OPM's response was subsequently cited in *Santos* v. *Nat'l. Aeronautics and Space Admin.,* 990 F.3d 1355 (Fed. Cir. 2021), to support the court's implicit decision that an agency must prove by substantial evidence in a proceeding to challenge a performance-based removal that the employee was performing unacceptably prior to the opportunity period (*i.e.,* prior to being placed on a performance improvement plan) as a prerequisite to removing the employee for failing to demonstrate acceptable performance during the opportunity period. This is a

misreading of OPM's position. Accordingly, OPM takes this opportunity to make clear what OPM's position is so that OPM's failure to clarify its prior comments and address *Santos* when making changes to the same set of regulations will not be interpreted as OPM's endorsement of the *Santos* standard. OPM's reference to determining whether an employee is performing unacceptably concerns the requirement that an agency provide *notice* to an employee of unacceptable performance—before placing him on a PIP. OPM's comment in the supplemental information that the requirement to demonstrate that an employee was performing unacceptably ''covers'' the period prior to the opportunity period should not be read to mean that an agency must justify the decision to place an employee on a PIP. Rather, the comment refers to the statutory provision that allows, but does not require, an agency to rely on unacceptable performance within 1 year prior to the date of the proposal notice to justify the removal itself. *See* 5 U.S.C. 4303(c)(2).

Therefore, OPM wishes to clarify that the conclusion in *Santos* is contrary to OPM's comment in supplemental information on which *Santos* relies and OPM's interpretation of 5 U.S.C. 4302(c)(6). OPM does not agree that 5 U.S.C. 4302(c)(6) means that the agency must prove as part of its substantive case or as a required procedure that an employee performed unacceptably *before* he or she was placed on a PIP. Rather, the statute as interpreted by OPM's regulation at 5 CFR 432.104 provides that an agency may not take a performance-based adverse action against an employee whom the agency determined was performing unacceptably *unless* the agency first provides the employee with notice and an opportunity to improve, and the employee continues to perform unacceptably. The determination to be reviewed on appeal to the Board and its reviewing courts is the final determination of unacceptable performance following the PIP, not any interim determination leading to the PIP. This interpretation enables agencies to address performance issues early through the mechanism of a PIP without concern that the employees who ultimately are unable to demonstrate acceptable performance despite early and sustained assistance cannot be removed because the MSPB or a court might find that they were not performing unacceptably when the PIP began.

Section 432.105 addresses notice requirements when an agency proposes to take action based on an employee's unacceptable performance during or after the opportunity period once the employee has been afforded an opportunity to demonstrate acceptable performance. An agency must afford the employee a 30-day advance notice of the proposed action that identifies both the specific instances of unacceptable performance by the employee on which the proposed action is based and the critical element(s) of the employee's position involved in each instance of unacceptable performance. An agency may extend this advance notice period for a period not to exceed 30 days under regulations prescribed by the head of the agency. For the reasons listed in § 432.105(a)(4)(i)(B), an agency may further extend this advance notice period without OPM approval.

OPM proposes to revise the reason at § 432.105(a)(4)(i)(B)(6), which was derived from 5 U.S.C. 1208(b) because the statutory provision was repealed by section 3(a)(8) of Public Law 101–12, the Whistleblower Protection Act (WPA) of 1989. Section 1208(b) granted agencies the authority to extend the advance notice period for a performance-based action in order to comply with a stay ordered by a member of the Merit Systems Protection Board. Concurrent with the repeal of 5 U.S.C. 1208(b), the WPA established 5 U.S.C. 1214(b)(1)(A)(i), wherein the Office of Special Counsel is granted the authority to request any member of the Board to order a stay of any personnel action for 45 days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice. Further, under 5 U.S.C. 1214(b)(1)(B), the Board may extend the period of any stay granted under subparagraph (A) for any period which the Board considers appropriate. If the Board lacks a quorum, any remaining member of the Board may, upon request by the Special Counsel, extend the period of any stay granted under subparagraph (A). Therefore, OPM proposes to change the reason at subparagraph (B)(6) to read as follows: ''[t]o comply with a stay ordered by a member of the Merit Systems Protection Board under 5 U.S.C. 1214(b)(1)(A) or (B).''

Section 432.108 Settlement Agreements

Section 5 of E.O. 13839, established a requirement that an agency shall not agree to erase, remove, alter or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action. Such agreements have traditionally been referred to as ''clean record'' agreements. Consistent with the rescission of E.O. 13839 and pursuant to its authorities under 5 U.S.C. 2951 to maintain personnel records and under 5 U.S.C. 1103(a)(5) to execute, administer, and enforce the law governing the civil service, OPM proposes to rescind § 432.108, Settlement Agreements.

Due to continued objections raised since the publication of the November 16, 2020, final rule, OPM believes that the prohibition of clean record agreements hampers agencies' ability to resolve informal and formal complaints at an early stage and with minimal costs to the agency. Notably, stakeholders have stressed that the prohibition of clean record agreements limits resolution options; reduces the likelihood of parties reaching a mutually agreeable resolution of informal or formal complaints; potentially increases costly litigation and arbitration; and crowds the dockets of third-party investigators, mediators, and adjudicators such as the Merit Systems Protection Board (MSPB), Office of Special Counsel (OSC), and Equal Employment Opportunity Commission. While agencies may derive some value from having access to unaltered personnel records when making hiring decisions, OPM believes it should place greater weight on granting agencies a degree of flexibility to resolve individual workplace disputes. Therefore, OPM proposes to delete § 432.108. The clean record prohibition applied to actions taken under parts 432 and 752. Accordingly, the proposed rule would also rescind §§ 752.104, 752.203(h), 752.407 and 752.607. The removal of the prohibition on clean record agreements will allow agencies discretion to resolve informal and formal complaints and settle administrative challenges in a manner that balances the needs of the agency and fairness to the employee. In doing so, agencies should still adhere to the principles of promoting high standards of integrity and accountability within the Federal workforce. In addition, agencies are advised that, in any such agreement, they have an obligation to speak truthfully to Federal investigators performing future background investigations with respect to the employee and may not agree to

withhold information about the circumstances of an individual's departure from the agency.

5 CFR Part 752—Adverse Actions

Subpart A—Discipline of Supervisors Based on Retaliation Against Whistleblowers

This subpart addresses mandatory procedures for addressing retaliation by supervisors for whistleblowing.

Section 752.101 Coverage

This section describes the adverse actions covered and defines key terms used throughout the subchapter. Section 752.101 includes a definition for the term ''business day.'' The requirement for taking an action within a proscribed number of business days was derived solely from Section 2(f) of E.O. 13839. With the rescission of E.O. 13839 and given that there is no other use for the definition of ''business day'' in subpart A, OPM proposes to revise the regulation at § 752.101(b) to remove the definition of ''Business day''.

Section 752.103 Procedures

This section establishes the procedures to be utilized for actions taken under this subpart. With the rescission of E.O. 13839 and pursuant to its congressionally granted authority to regulate chapter 75 adverse actions, OPM proposes to rescind the requirement at § 752.103(d)(3) that an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee's opportunity to respond under paragraph (d)(1) of this section. The 15-day requirement was derived solely from Section 2(f) of E.O. 13839. Although it is good practice for agency deciding officials to resolve proposed removals promptly, some actions present multiple issues, conflicting evidence, or other complications that warrant full and fair consideration over a longer period of time, and careful crafting of the final decision. Accordingly, it is not in the Government's best interests to force decisions to be completed on an arbitrary timetable that may not allow for the deciding official to prepare a thoughtful, well-reasoned decision document.

Section 752.104 Settlement Agreements

The language in this section establishes the same requirements that are detailed in § 432.108, Settlement agreements. OPM proposes to remove this requirement. Please see the discussion at § 432.108 regarding the proposed rescission of OPM requirements related to settlement agreements.

Subpart B—Regulatory Requirements for Suspensions for 14 Days or Less

This subpart addresses the procedural requirements for suspensions of 14 days or less for covered employees.

Section 752.202 Standard for Action and Penalty Determination

This section sets forth the standard for action applicable under this subpart and the penalty determination provisions that must be adhered to when taking suspensions for 14 days or less. Consistent with the rescission of E.O. 13839, under its congressionally granted authority to regulate part 752, OPM proposes to amend the regulation at § 752.202 to revise the section heading to ''Standard for Action'' and rescind paragraphs (c) through (f). These paragraphs address the use of progressive discipline; appropriate comparators as the agency evaluates a potential disciplinary action; consideration of, among other factors, an employee's disciplinary record and past work record; and the requirement that a suspension should not be a substitute for removal in circumstances in which removal would be appropriate. Specifically, paragraphs (c) through (f) state:

''(c) An agency is not required to use progressive discipline under this subpart. The penalty for an instance of misconduct should be tailored to the facts and circumstances. In making a determination regarding the appropriate penalty for an instance of misconduct, an agency shall adhere to the standard of proposing and imposing a penalty that is within the bounds of tolerable reasonableness. Within the agency, a proposed penalty is in the sole and exclusive discretion of a proposing official, and a penalty decision is in the sole and exclusive discretion of the deciding official. Penalty decisions are subject to appellate or other review procedures prescribed in law.

(d) Employees should be treated equitably. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time. An agency should consider appropriate comparators as the agency evaluates a potential disciplinary action. Appropriate comparators to be considered are primarily individuals in the same work unit, with the same supervisor, who engaged in the same or similar misconduct. Proposing and deciding officials are not bound by previous decisions in earlier similar cases, but should, as they deem appropriate, consider such decisions consonant with their own managerial authority and responsibilities and independent judgment. For example, a supervisor is not bound by his or her predecessor whenever there is similar conduct. A minor indiscretion for one supervisor based on a particular set of facts can amount to a more serious offense under a different supervisor. Nevertheless, they should be able to articulate why a more or less severe penalty is appropriate.

(e) Among other relevant factors, agencies should consider an employee's disciplinary record and past work record, including all applicable prior misconduct, when taking an action under this subpart.

(f) A suspension should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or demoted before a proposing official may propose removal, except as may be appropriate under applicable facts.''

Given the revocation of E.O. 13839, and under its congressionally granted authority to regulate part 752, OPM proposes to rescind §§ 752.202(c), 752.202(d), 752.202(e) and 752.202(f). Though the penalty determination guidelines of these subsections, as discussed below, reflect established principles, OPM believes that it is unnecessary to enshrine the guidelines in regulation, thus providing agencies maximum flexibility.

In § 752.202(c), OPM made clear that an agency is not required to use progressive discipline under this subpart. As we have previously said regarding progressive discipline and tables of penalties, each action stands on its own footing and demands careful consideration of facts, circumstances, context, and nuance. OPM reminds agencies to calibrate discipline to the unique facts and circumstances of each case, which is consistent with the flexibility afforded agencies under the ''efficiency of the service'' standard for imposing discipline contained in the Civil Service Reform Act. Proposing and deciding officials should consult with the agency counsel and the agency's human resources office to determine the most appropriate penalty.

Further, in § 752.202(d), OPM adopted the test articulated by the Court of Appeals for the Federal Circuit in *Miskill* v. *Social Security Administration,* 863 F.3d 1379 (Fed. Cir. 2017). We clarified that appropriate comparators are primarily individuals in the same work unit, with the same

supervisor, who engaged in the same or similar misconduct. The adoption of the *Miskill* test reinforced the key principle that each case stands on its own factual and contextual footing. However, OPM believes that agencies can be sufficiently guided by *Miskill* and other applicable case law without a regulatory amendment.

In § 752.202(e), OPM adopted formally by regulation the standard applied by MSPB in *Douglas* v. *Veterans Administration,* 5 M.S.P.R. 280 (1981) to removals, suspensions, and demotions, including suspensions of fewer than 15 days. Specifically, OPM adopted the requirement that agencies should propose and impose a penalty that is within the bounds of tolerable reasonableness. However, OPM believes that it is unnecessary to regulate a principle that is already embedded deeply in Federal civil-service law, thereby allowing greater flexibility for agencies. *Douglas* provides an adequate and useful template for arriving at reasonable penalty determinations. *Douglas* requires that, among other relevant factors, an agency should consider an employee's disciplinary record and past work record, including all prior misconduct, when taking an action under this subpart. Many agencies apply this standard not only to those actions taken under 5 U.S.C. 7513 but also to those taken under 5 U.S.C. 7503 as well.

In § 752.202(f), OPM stated that suspension should not be a substitute for removal in circumstances in which removal would be appropriate. This is a straightforward principle that OPM believes agencies can apply without regulation. It is vital that supervisors use independent judgment, take appropriate steps in gathering facts, and conduct a thorough analysis to decide the appropriate penalty. If a penalty is disproportionate to the alleged violation or is unreasonable, it is subject to being reduced or reversed even when the charges are sustained. While OPM proposes to remove § 752.202(f) and defer to agency management in selecting an appropriate penalty, OPM reminds agencies that imposing a suspension when removal is appropriate may adversely impact employee morale and productivity and hamper the agency's ability to achieve its mission and promote effective stewardship.

Because of the revocation of E.O. 13839, and in light of OPM's independent regulatory authority under chapter 75, we propose to remove the penalty selection guidelines at §§ 752.202(c) through (f). OPM reminds agencies that supervisors are responsible for ensuring that a disciplinary penalty is fair, reasonable, and appropriate to the facts and circumstances. In doing so, supervisors will address misconduct in a manner that has the greatest potential to avert harm to the efficiency of the service.

Section 752.203 Procedures

The language in this section discusses the requirements for a proposal notice issued under this subpart. The language in this section also establishes the same requirements that are detailed in § 432.108, Settlement agreements. OPM proposes to remove the requirement set forth in § 752.203(h). Please see the discussion at § 432.108 regarding the proposed rescission of OPM requirements related to settlement agreements.

Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

This subpart addresses the procedural requirements for removals, suspensions for more than 14 days, including indefinite suspensions, reductions in grade, reductions in pay, and furloughs of 30 days or less for covered employees.

Section 752.401 Coverage

This section discusses adverse actions and employees covered under this subpart. The National Defense Authorization Act (NDAA) for Fiscal Year 2017 added MSPB appeal rights for National Guard military technicians for certain adverse actions taken against them when they are not in a military pay status or when the issue does not involve fitness for duty in the reserve component. In § 752.401(b), OPM proposes to add an exclusion for an action taken against a technician in the National Guard as provided in section 709(f)(4) of title 32, United States Code.

In § 752.401(d), OPM proposes to remove from the list of employees excluded from coverage of this subpart ''a technician in the National Guard described in section 8337(h)(1) of title 5, United States Code, who is employed under section 709(a) of title 32, United States Code.'' OPM proposes to remove this because the NDAA of 2017 removed the exclusion from 5 U.S.C. 7511(b)(1) and this language was derived from section 7511(b)(1).

Section 752.402 Definitions

This section defines key terms used throughout the subchapter. Section 752.402 includes a definition for the term ''business day.'' The requirement for taking an action within a proscribed number of business days for this section was derived solely from Section 2(f) of E.O. 13839. With the rescission of E.O. 13839 and given that there is no other use for the definition of ''business day'' in subpart D, OPM proposes to revise the regulation at § 752.402 to remove the definition of ''Business day''.

Section 752.403 Standard for Action and Penalty Determination

As with the proposed rule changes for the regulatory amendments to § 752.202, the proposed regulatory change to § 752.403 revises the heading to ''Standard for Action'' and rescinds paragraphs (c) through (f).

Given the rescission of E.O. 13839 and under its congressionally granted authority to regulate part 752, as with §§ 752.202(c), 752.202(d), 752.202(e) and 752.202(f), OPM proposes to rescind §§ 752.403(c), 752.403(d),752.403(e), and 752.403(f). Please see the discussion at § 752.202.

Section 752.404 Procedures

Section 752.404(b) discusses the requirements for a notice of proposed action issued under this subpart. Specifically, the requirements in § 752.404(b)(1) include that, to the extent an agency, in its sole and exclusive discretion deems practicable, agencies should limit written notice of adverse actions taken under this subpart to the 30 days prescribed in 5 U.S.C. 7513(b)(1), as well as the requirement that any notice period greater than 30 days must be reported to OPM. The requirement was derived solely from Section 2(g) of E.O. 13839. In addition, we have come to the conclusion independently that there may be appropriate circumstances that warrant a notice period, and we no longer see a reason to burden agencies with a requirement to report to OPM every time they grant longer notice.

OPM proposes to remove the following language in § 752.404(b)(1): ''However, to the extent an agency in its sole and exclusive discretion deems practicable, agencies should limit a written notice of an adverse action to the 30 days prescribed in section 7513(b)(1) of title 5, United States Code. Advance notices of greater than 30 days must be reported to the Office of Personnel Management.''

Additionally, § 752.404(g) discusses the requirements for an agency decision issued under this subpart. Under its authority to regulate 5 CFR part 752, OPM proposes to rescind § 752.404(g)(3). The requirement of § 752.404(g)(3) was derived solely from Section 2(f) of E.O. 13839. Specifically, § 752.404(g)(3) includes language that, to the extent practicable, an agency

should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee's opportunity to respond. As discussed above with respect to section 752.103(d)(3) and the rescinding of the 15-day requirement to issue a decision on a proposal, although it is good practice for agency deciding officials to resolve proposed removals promptly, some actions present complications that warrant a longer period of time to achieve careful crafting of the final decision.

Notwithstanding these proposed changes to the notice and decision requirements, agencies are reminded that misconduct should be addressed as soon as possible in each case. Prompt action helps promote changed behavior whereas failure to act promptly can damage morale and productivity, and failure to remove employees who should be removed can do the same.

Section 752.407 Settlement Agreements

The language in this section establishes the same requirements that are detailed in 432.108, Settlement agreements. OPM proposes to remove this requirement. Please see the discussion at § 432.108 regarding the proposed rescission of OPM requirements related to settlement agreements.

Subpart F—Regulatory Requirements for Taking Adverse Actions Under the Senior Executive Service

This subpart addresses the procedural requirements for suspensions for more than 14 days and removals from the civil service as set for in 5 U.S.C. 7542.

Section 752.602 Definitions

This section defines key terms used throughout the subchapter. Section 752.602 includes a definition for the term ''business day.'' The requirement for taking an action within a proscribed number of business days for this section was derived solely from Section 2(f) of E.O. 13839. With the rescission of E.O. 13839 and given that there is no other use for ''business day'' in subpart F, OPM proposes to revise the regulation at § 752.402 to remove the definition of ''Business day''.

Section 752.603 Standard for Action and Penalty Determination

As with the proposed rule changes for the regulatory amendments to § 752.202 and § 752.403, the proposed regulatory change to § 752.603 revises the heading to ''Standard for Action'' and rescinds paragraphs (c) through (f). Please see the discussion at § 752.202.

Given the rescission of E.O. 13839 and under its congressionally granted authority to regulate part 752, as with §§ 752.202(c), 752.202(d), 752.202(e), and 752.202(f) and §§ 752.403(c), 752.403(d), 752.403(e), and 752.403(f), OPM proposes to rescind §§ 752.603(c), 752.603(d),752.603(e), and 752.603(f). See discussion above with respect to section 752.202.

Section 752.604 Procedures

This section discussed requirements for a notice of proposed action. Due to the revocation of E.O. 13839 and under its congressionally granted authority to regulate 5 CFR part 752, as with the rule changes proposed for § 752.103(d)(3) and § 752.404(b)(1), and for the same reasons, OPM proposes to rescind the language at § 752.604(b)(1) that requires to the extent an agency in its sole and exclusive discretion deems practicable, agencies should limit a written notice of an adverse action to the 30 days prescribed in section 7543(b)(1) of title 5, United States Code. As well, OPM proposes to remove the language in § 752.604(b)(1) that requires that advance notices of greater than 30 days must be reported to OPM. These requirements were derived solely from Section 2(g) of E.O. 13839.

OPM proposes to rescind § 752.604(g)(3), which requires agencies to issue decisions, to the extent practicable, within 15 business days of the conclusion of the employee's opportunity to respond under paragraph of this section. This requirement was derived solely from Section 2(f) of E.O. 13839. Thus, as with the discussion concerning the 15-day requirement for issuance of decisions in section 752.103(d)(3) and section 752.404(g), while recognizing it is good practice for agency deciding officials to resolve proposed removals promptly, some actions present complexities that necessitate a longer period of time to prepare the final decision.

Section 752.607 Settlement Agreements

The language in this section establishes the same requirements that are detailed in § 432.108, Settlement agreements. OPM proposes to remove this requirement. Please see the discussion at § 432.108 regarding the proposed rescission of OPM requirements related to settlement agreements.

Expected Impact of This Proposed Rule

OPM is issuing this proposed rule to implement requirements of E.O. 14003 and new statutory requirements for procedural and appeal rights for dual status National Guard technicians for certain adverse actions. E.O. 14003 requires OPM to rescind portions of the OPM final rule published at 85 FR 65940 which implemented certain requirements of E.O. 13839. In addition, section 512(a)(1)(C) of the 2017 NDAA provides appeal rights under 5 U.S.C. 7511, 7512, and 7513 to dual status National Guard technicians for certain adverse actions.

OPM believes that portions of the final rule which became effective on November 16, 2020, and which implemented certain requirements of E.O. 13839, are inconsistent with the current policy of the United States to protect, empower and rebuild the career Federal workforce as well as its current policy to encourage employee organizing and collective bargaining. The proposed revisions implement applicable statutory mandates and provide agencies the necessary tools and flexibility to address matters related to unacceptable performance and misconduct or other behavior contrary to the efficiency of the service by Federal employees when they arise, consistent with the policies of E.O. 14003.

Given that the November 16, 2020, regulations OPM proposes to rescind were in effect only for a brief period before E.O. 14003 was issued on January 22, 2021, agencies had limited opportunity to implement changes under the regulations. With the issuance of E.O. 14003, OPM discontinued collecting agency data on performance-based actions, adverse actions, and settlement agreements as was required by Section 5 of E.O. 13839. OPM does not otherwise collect agency data about the matters covered by the November 2020 regulatory amendments that OPM proposes to rescind (namely, the timing and frequency of probationary period expiration notifications; the timing and nature of performance assistance for employees who have demonstrated unacceptable performance; penalty determination guidelines; advance notice and decision notice timeframes for adverse action; and settlement agreements). For these reasons, OPM has virtually no data on the extent to which adverse actions were pursued under the regulations proposed for rescission here. This proposed rule will relieve agencies of the administrative burden of implementing the November 2020 regulatory amendments to the extent that agencies did not already have such policies and practices in place. Out of an abundance of caution, we clarify that OPM still is requiring that agencies submit to it arbitration awards taken under 5 U.S.C. 4303 or 5

U.S.C. 7512 of title 5 so that OPM can efficiently carry out its authority under 5 U.S.C. 7703(d) to seek judicial review of any arbitration award that the Director of OPM determines is erroneous and would have a substantial impact on civil service law, rule, or regulation affecting personnel management that will have a substantial impact on a civil service law, rule, regulation, or policy directive.

Costs

This proposed rule will affect the operations of over 80 Federal agencies—ranging from cabinet-level departments to small independent agencies. Regarding implementation of E.O. 14003 requirements, we estimate that this proposed rule will require individuals employed by these agencies to revise and rescind policies and procedures to implement certain portions the OPM final rule published at 85 FR 65940 to the extent agencies have not already done so. Section 3(e) of E.O. 14003 directs heads of agencies whose practices were covered by E.O. 13839 to review and identify existing agency actions related to or arising from E.O. 13839 and ''as soon as practicable, suspend, revise, or publish for notice and comment proposed rules suspending, revising, or rescinding, the actions identified in the review'' described in Section 3(e). On March 5, 2021, OPM issued ''Guidance for Implementation of Executive Order 14003—Protecting the Federal Workforce'' to heads of agencies. In this guidance, OPM advised that ''agencies should not delay in implementing the requirements of Section 3(e) of E.O. 14003 as it relates to any changes to agency policies made as a result of OPM's regulations.'' Therefore, some agencies may not need to make any updates to agency policies as a result of this revised OPM rule. For the purpose of this cost analysis, the assumed average salary rate of Federal employees performing this work will be the rate in 2021 for GS–14, step 5, from the Washington, DC, locality pay table ($138,66 annual locality rate and $66.54 hourly locality rate). We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $133.08 per hour.

In order to comply with the regulatory changes in this proposed rule, affected agencies will need to review the rule and update their policies and procedures. We estimate that, in the first year following publication of the final rule, this will require an average of 200 hours of work by employees with an average hourly cost of $133.08. This would result in estimated costs in that first year of implementation of about $26,616 per agency, and about $2,129,280 in total Governmentwide. We do not believe this proposed rule will substantially increase the ongoing administrative costs to agencies.

Regarding the portion of the proposed rule regarding appeal rights under 5 U.S.C. 7511, 7512, and 7513 for dual status National Guard technicians for certain adverse actions, this only impacts the Army National Guard and Air National Guard for dual status National Guard technicians that are covered by policies of the National Guard Bureau. Since this portion of the proposed rule reflects statutory changes in the 2017 NDAA which have been effective for several years, these statutory requirements should already be applied by the National Guard notwithstanding any regulatory changes by OPM. However, for the purpose of this cost analysis, the assumed average salary rate of Federal employees performing this work at the National Guard Bureau will be the rate in 2021 for GS–14, step 5, from the Washington, DC, locality pay table ($138,66 annual locality rate and $66.54 hourly locality rate). We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $133.08 per hour. In order to comply with the regulatory changes in this proposed rule, the affected agency will need to review the rule and update its policies and procedures. We estimate that, in the first year following publication of the final rule, this will require an average of 40 hours of work by employees with an average hourly cost of $133.08. This would result in estimated costs in that first year of implementation of about $5,323 for the impacted agency. We do not believe this proposed rule will substantially increase the ongoing administrative costs to the National Guard.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). In accordance with the provisions of Executive Order 12866, this proposed rule was reviewed by the Office of Management and Budget as a significant, but not economically significant rule.

Regulatory Flexibility Act

The Director of the Office of Personnel Management certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Civil Justice Reform

This regulation meets the applicable standard set forth in Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act or CRA) (5 U.S.C. 801 *et seq.*) requires rules to be submitted to Congress before taking effect. OPM will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this proposed rule before its effective date, as required by 5 U.S.C. 801. The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this proposed rule is not a major rule as defined by the CRA (5 U.S.C. 804). The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this proposed rule is not a major rule as defined by the CRA (5 U.S.C. 804).

Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521)

This regulatory action is not expected to impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in 5 CFR Parts 315, 432 and 752

Government employees.

Office of Personnel Management.

Stephen Hickman,

Federal Register Liaison.

Accordingly, for the reasons stated in the preamble, OPM proposes to amend 5 CFR parts 315, 432 and 752 as follows:

PART 315—CAREER AND CAREER-CONDITIONAL EMPLOYMENT

■ 1. Revise the authority citation for part 315 to read as follows:

Authority: 5 U.S.C. 1302, 2301, 2302, 3301, and 3302; E.O. 10577, 3 CFR, 1954–1958 Comp. p. 218, unless otherwise noted; and E.O. 13162. Secs. 315.601 and 315.609 also issued under 22 U.S.C. 3651 and 365. Secs. 315.602 and 315.604 also issued under 5 U.S.C. 1104. Sec. 315.603 also issued under 5 U.S.C. 8151. Sec. 315.605 also issued under E.O. 12034, 3 CFR, 1978 Comp. p.111. Sec. 315.606 also issued under E.O. 11219, 3 CFR, 1964–1965 Comp. p. 303. Sec. 315.607 also issued under 22 U.S.C. 2506. Sec. 315.608 also issued under E.O. 12721, 3 CFR, 1990 Comp. p. 293. Sec. 315.610 also issued under 5 U.S.C. 3304(c). Sec. 315.611 also issued under 5 U.S.C. 3304(f). Sec. 315.612 also issued under E.O. 13473. Sec. 315.708 also issued under E.O. 13318, 3 CFR, 2004 Comp. p. 265. Sec. 315.710 also issued under E.O. 12596, 3 CFR, 1987 Comp. p. 229. Subpart I also issued under 5 U.S.C. 3321, E.O. 12107, 3 CFR, 1978 Comp. p. 264.

Subpart H—Probation on Initial Appointment to a Competitive Position

■ 2. Revise § 315.803(a) to read as follows:

§ 315.803 Agency action during probationary period (general).

(a) The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his or her services during this period if the employee fails to demonstrate fully his or her qualifications for continued employment.

* * * * *

PART 432—PERFORMANCE BASED REDUCTION IN GRADE AND REMOVAL ACTIONS

■ 3. The authority for part 432 continues to read as follows:

Authority: 5 U.S.C. 4303, 4305.

■ 4. Amend § 432.102 by:

■ a. Revising paragraphs (b)(14) and (15);

■ b. Adding paragraph (b)(16);

■ c. Removing paragraph (f)(12); and

■ d. Redesignating (f)(13) and (14) as (f)(12) and (13).

The revisions and additions read as follows:

§ 432.102 Coverage.

* * * * *

(b) * * *

(14) A termination in accordance with terms specified as conditions of employment at the time the appointment was made;

(15) An involuntary retirement because of disability under part 831 of this chapter; and

(16) An action against a technician in the National Guard concerning any activity under section 709(f)(4) of title 32, United States Code, except as provided by section 709(f)(5) of title 32, United States Code.

* * * * *

■ 4. Revise § 432.104 to read as follows:

§ 432.104 Addressing unacceptable performance.

At any time during the performance appraisal cycle that an employee's performance is determined to be unacceptable in one or more critical elements, the agency shall notify the employee of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position. The agency should also inform the employee that unless his or her performance in the critical element(s) improves to and is sustained at an acceptable level, the employee may be reduced in grade or removed. For each critical element in which the employee's performance is unacceptable, the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position. As part of the employee's opportunity to demonstrate acceptable performance, the agency shall offer assistance to the employee in improving unacceptable performance.

■ 5. Amend § 432.105 by revising paragraphs (a)(1) and (a)(4)(i)(B)(6) to read as follows:

§ 432.105 Proposing and taking action based on unacceptable performance.

(a) * * *

(1) Once an employee has been afforded a reasonable opportunity to demonstrate acceptable performance pursuant to § 432.104, an agency may propose a reduction-in-grade or removal action if the employee's performance during or following the opportunity to demonstrate acceptable performance is unacceptable in one or more of the critical elements for which the employee was afforded an opportunity to demonstrate acceptable performance.

(4) * * *

(i) * * *

(B) * * *

(6) To comply with a stay ordered by a member of the Merit Systems Protection Board under 5 U.S.C. 1214(b)(1)(A) or (B).

* * * * *

§ 432.108 [Removed]

■ 6. Remove § 432.108.

PART 752—ADVERSE ACTIONS

■ 7. Revise the authority citation for part 752 to read as follows:

Authority: 5 U.S.C. 7504, 7514, and 7543, Pub. L. 115–91, and Pub. L. 114–328.

Subpart A—Discipline of Supervisors Based on Retaliation Against Whistleblowers

§ 752.101 [Amended]

■ 8. Amend § 752.101(b) by removing the definition for ''Business day''.

§ 752.103 [Amended]

■ 9. Amend § 752.103 by removing paragraph (d)(3).

§ 752.104 [Removed]

■ 10. Remove § 752.104.

Subpart B—Regulatory Requirements for Suspensions for 14 Days or Less

■ 11. Amend § 752.202 by revising the section heading and removing paragraphs (c) through (f) to read as follows:

§ 752.202 Standard for action.

* * * * *

§ 752.203 [Amended]

■ 12. Amend § 752.203 by removing paragraph (h).

Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

■ 13. Amend § 752.401 by:

■ a. Revising paragraphs (b)(15) and (16);

■ b. Adding paragraph (b)(17);

■ c. Removing paragraph (d)(5); and

■ d. Redesignating paragraphs (d)(6) through (13) as paragraphs (d)(5) through (12).

The revisions and additions read as follows:

§ 752.401 Coverage.

* * * * *

(b) * * *

(15) Reduction of an employee's rate of basic pay from a rate that is contrary

to law or regulation, including a reduction necessary to comply with the amendments made by Public Law 108–411, regarding pay-setting under the General Schedule and Federal Wage System and regulations implementing those amendments;

(16) An action taken under 5 U.S.C. 7515.; or

(17) An action taken against a technician in the National Guard concerning any activity under section 709(f)(4) of title 32, United States Code, except as provided by section 709(f)(5) of title 32, United States Code.

* * * * *

§ 752.402 [Amended]

■ 14. Amend § 752.402 by removing the definition for ''Business day''.

■ 15. Amend § 752.403 by revising the section heading and removing paragraphs (c) through (f) to read as follows:

§ 752.403 Standard for action.

* * * * *

■ 16. Amend § 752.404 by revising paragraph (b)(1), and removing paragraph (g)(3) to read as follows:

§ 752.404 Procedures.

* * * * *

(b) * * *

(1) An employee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. The notice must state the specific reason(s) for the proposed action and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Public Law 115–91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

* * * * *

§ 752.407 [Removed]

■ 17. Remove § 752.407.

Subpart F—Regulatory Requirements for Taking Adverse Action Under the Senior Executive Service

§ 752.602 [Amended]

■ 18. Amend § 752.602 by removing the definition for ''Business day''.

■ 19. Amend § 752.603 by revising the section heading and removing paragraphs (c) through (f) to read as follows:

§ 752.603 Standard for action.

* * * * *

§ 752.604 [Amended]

■ 20. Amend § 752.604 by revising paragraph (b)(1), and removing paragraph (g)(3) to read as follows:

§ 752.604 Procedures.

* * * * *

(b) * * *

(1) An appointee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. The notice must state the specific reason(s) for the proposed action and inform the appointee of his or her right to review the material that is relied on to support the reasons for action given in the notice. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Public Law 115–91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

* * * * *

§ 752.607 [Removed]

■ 21. Remove § 752.607.

[FR Doc. 2021–28205 Filed 1–3–22; 8:45 am]

BILLING CODE 6325–39–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–R01–RCRA–2020–0175; FRL 8892–01–R1]

Massachusetts: Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Massachusetts has applied to the EPA for final authorization of revisions to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA), as amended. The EPA proposes to grant final authorization to Massachusetts for these revisions by a direct final rule, which can be found in the ''Rules and Regulations'' section of this issue of the **Federal Register**. We have explained the reasons for this authorization in the preamble to the direct final rule. Unless the EPA receives written comments that oppose this authorization during the comment period, the direct final rule will become effective on the date it establishes, and the EPA will not take further action on this proposal.

DATES: Send your written comments by February 3, 2022.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–RCRA–2020–0175, at *https://www.regulations.gov/.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *www.regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full the EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Sara Kinslow, RCRA Waste Management, UST, and Pesticides Section; Land, Chemicals, and Redevelopment Division; U.S. EPA Region 1, 5 Post Office Square, Suite 100 (Mail code 07–1), Boston, MA 02109–3912; phone: 617–918–1648; email: *kinslow.sara@epa.gov.*

SUPPLEMENTARY INFORMATION: In the ''Rules and Regulations'' section of this issue of the **Federal Register**, the EPA is authorizing the revisions by a direct final rule. The EPA did not make a proposal prior to the direct final rule because we believe this action is not controversial and do not expect comments that oppose it. We have explained the reasons for this authorization in the preamble of the direct final rule. Unless the EPA receives adverse written comments that oppose this authorization during the comment period, the direct final rule will become effective on the date it establishes, and the EPA will not take further action on this proposal. If the EPA receives comments that oppose this action, we will withdraw the direct final rule, and it will not take effect. The EPA will then respond to public comments in a later final rule based on this

proposal. You may not have another opportunity for comment. If you want to comment on this action, you must do so at this time. For additional information, please see the direct final rule published in the ''Rules and Regulations'' section of this issue of the **Federal Register**.

Authority: This proposed action is issued under the authority of Sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912(a), 6926, 6974(b).

Deb Szaro,

Acting Regional Administrator, U.S. EPA Region I.

[FR Doc. 2021–28332 Filed 1–3–22; 8:45 am]

BILLING CODE 6560–50–P

NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES

National Endowment for the Humanities

45 CFR Part 1167

RIN 3136–AA44

Testimony and Production of Records

AGENCY: National Endowment for the Humanities; National Foundation on the Arts and the Humanities.

ACTION: Proposed rule with request for comments.

SUMMARY: The National Endowment for the Humanities (NEH) is proposing to issue regulations to be followed when an NEH employee receives a demand or request to provide testimony or produce records in a legal proceeding. These procedures are designed to promote economy and efficiency in NEH's programs and operations, to minimize the possibility of involving NEH in controversial issues not related to its functions, to maintain the impartiality of NEH among private litigants, and to protect sensitive, confidential information and the deliberative process.

DATES: Send comments on or before February 3, 2022.

ADDRESSES: You may send comments by email to *gencounsel@neh.gov.*

Instructions: Include ''3136–AA44'' in the subject line of the email.

FOR FURTHER INFORMATION CONTACT: Elizabeth Voyatzis, Deputy General Counsel, Office of the General Counsel, National Endowment for the Humanities, 400 7th Street SW, Room 4060, Washington, DC 20506; (202) 606–8322; *gencounsel@neh.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Federal courts have upheld the authority of a Federal agency to establish procedures governing the production of records and testimony by personnel in legal proceedings in which the agency is not a party. *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951). This proposed rule would establish policies and procedures that the agency will follow when, in a legal proceeding, a current or former NEH employee receives a demand or request to testify as to facts or events that relate to his or her official duties or the functions of NEH or to produce official records and information.

This proposed rule relates to testimony and the production of records only in connection with legal proceedings to which the United States is not a party. It would not apply to requests under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act of 1974, 5 U.S.C. 552a; Congressional demands or requests for testimony or records; or legal proceedings to which the United States is a party.

Request for Comments

NEH requests comments, which NEH must receive at the above address, by the above date.

Executive Order 12866, Regulatory Planning and Review, and Executive Order 13563, Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget for review.

Executive Order 13132, Federalism

This rulemaking does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

Executive Order 12988, Civil Justice Reform

This rulemaking meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988. Specifically, this rulemaking is written in clear language designed to help reduce litigation.

Executive Order 13175, Indian Tribal Governments

Under the criteria in Executive Order 13175, NEH evaluated this rulemaking and determined that it will not have any potential effects on Federally recognized Indian Tribes.

Executive Order 12630, Takings

Under the criteria in Executive Order 12630, this rulemaking does not have significant takings implications. Therefore, a takings implication assessment is not required.

Regulatory Flexibility Act of 1980

This rulemaking will not have a significant adverse impact on a substantial number of small entities, including small businesses, small governmental jurisdictions, or certain small not-for-profit organizations.

Paperwork Reduction Act of 1995

This rulemaking does not impose an information collection burden under the Paperwork Reduction Act. This action contains no provisions constituting a collection of information pursuant to the Paperwork Reduction Act.

Unfunded Mandates Reform Act of 1995

This rulemaking does not contain a Federal mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year.

National Environmental Policy Act of 1969

This rulemaking will not have a significant effect on the human environment.

Small Business Regulatory Enforcement Fairness Act of 1996

This rulemaking will not be a major rule as defined in section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rulemaking will not result in an annual effect on the economy of $100 million or more, a major increase in costs or prices, significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

E-Government Act of 2002

All information about NEH required to be published in the **Federal Register** may be accessed at *www.neh.gov.* The website *www.regulations.gov* contains electronic dockets for NEH's rulemakings under the Administrative Procedure Act of 1946.

Plain Writing Act of 2010

To ensure this proposed rule speaks in plain and clear language so that the

public can use and understand it, NEH modeled the language of the proposed rule on the Federal Plain Language Guidelines.

List of Subjects in 45 CFR Part 1167

Administrative practice and procedure.

For the reasons set forth in the preamble, the National Endowment for the Humanities proposes to amend 45 CFR chapter XI by adding part 1167 to read as follows:

PART 1167—TESTIMONY AND PRODUCTION OF RECORDS

Sec.
1167.1 Purpose.
1167.2 Applicability.
1167.3 Definitions.
1167.4 Testimony and production of official records and information.
1167.5 Procedure when demand is made.
1167.6 Office of Inspector General employees.

Authority: 5 U.S.C. 301.

§ 1167.1 Purpose.

(a) This part sets forth policies and procedures to be followed when an employee of the National Endowment for the Humanities (NEH) receives a demand to provide testimony or produce official records and information in connection with a legal proceeding in which the United States is not a party.

(b) The provisions of this part are intended to promote economy and efficiency in NEH's programs and operations; minimize the possibility of involving NEH in controversial issues not related to its functions; maintain the impartiality of NEH among private litigants; and protect sensitive, confidential information and the agency's internal deliberative process.

(c) This part does not waive the sovereign immunity of the United States.

(d) This part does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States.

(e) This regulation is not intended to conflict with 5 U.S.C. 2302(b)(13).

§ 1167.2 Applicability.

This part applies to demands and requests for factual or expert testimony or for official records or information in legal proceedings, except that it does not apply to:

(a) Demands upon or requests for an NEH employee to testify as to facts or events that are in no way related to his or her official duties or to the functions of NEH;

(b) Demands upon or requests for a former NEH employee to testify as to matters in which the former employee was not directly or materially involved while at NEH;

(c) Requests for the release of records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act of 1974, 5 U.S.C. 552a;

(d) Congressional demands and requests for testimony or records; and

(e) Legal proceedings to which the United States is a party.

§ 1167.3 Definitions.

(a) *Agency* or *NEH* means the National Endowment for the Humanities.

(b) *Demand* means a subpoena, order, or other demand of a court or other competent authority, issued in a legal proceeding, for the production of official records and information or for the testimony of an NEH employee.

(c) *General Counsel* means the General Counsel of the agency, or any person to whom the General Counsel has delegated authority under this part.

(d) *Legal proceeding* means any proceeding before a court of law, administrative board or commission, hearing officer, or other body conducting a legal or administrative proceeding.

(e) *NEH employee* or *employee* means any present or former officer or employee of NEH; any other individual hired through contractual agreement by or on behalf of NEH, or who has performed or is performing services under such an agreement for NEH; and any individual who served or is serving on an NEH advisory committee.

(f) *Official records and information* means all documents and material in the custody and control of NEH; relating to information in the custody and control of NEH; or acquired by an NEH employee in the performance of his or her official duties or because of his or her official status, while the individual was employed by or on behalf of the NEH.

(g) *Request* means any request in connection with an ongoing or threatened legal proceeding, by whatever method, for the production of official records and information or for testimony, other than a demand.

(h) *Testimony* means any written or oral statement by a witness, and includes depositions, answers to interrogatories, affidavits, declarations, and statements at a hearing or trial.

§ 1167.4 Testimony and production of official records and information.

(a) No employee may produce official records and information or provide any testimony in response to a demand or request unless authorized to do so by the General Counsel in accordance with this part.

(b) The General Counsel, in his or her discretion, may grant an employee permission to testify or produce official records and information in response to a demand or request. In making this decision, the General Counsel shall consider whether:

(1) Allowing such testimony or production of records would be consistent with the purposes of this part;

(2) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;

(3) Allowing such testimony or production of records would be in the best interest of NEH and the United States; or

(4) NEH has an interest in the outcome of the legal proceeding.

(c) If authorized to testify pursuant to this part, an employee may testify as to facts within his or her personal knowledge or produce official records and information, but, unless specifically authorized to do so by the General Counsel, shall not:

(1) Disclose confidential or privileged information;

(2) Testify as to matters regarding which the General Counsel determines that testimony would not be in the best interest of NEH or the United States;

(3) Produce official records and information regarding which the General Counsel determines that production would not be in the best interest of NEH or the United States; or

(4) Testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of NEH. (*See also* 5 CFR 2635.805.)

§ 1167.5 Procedure when demand is made.

(a) Whenever an employee is served with a demand to testify in his or her official capacity, or to produce official records and information, the employee shall notify the General Counsel immediately.

(b) The General Counsel shall review the demand and, in accordance with the provisions of § 1167.4, shall determine whether, or on what conditions, to authorize the employee to testify and/or produce official records and information.

(c) If a demand requires a response before the General Counsel has made the determination referred to in paragraph (b) of this section, the General Counsel shall provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the demand is being reviewed, and seek a stay of the demand pending a final determination.

(d) If a court or other competent authority orders that an NEH employee comply with a demand notwithstanding a final decision by the General Counsel to the contrary, or at any other stage in the process, the General Counsel shall advise the employee on how to respond to such order and may arrange for legal representation of the employee.

§ 1167.6 Office of Inspector General employees.

Notwithstanding the requirements set forth in §§ 1167.1 through 1167.5, when an employee of the agency's Office of the Inspector General receives a demand or request to provide testimony or produce official records and information, the Inspector General or his or her designee shall be responsible for performing the functions assigned to the General Counsel under this part with respect to such demand or request.

Dated: December 28, 2021.

Samuel Roth,

Attorney-Advisor, National Endowment for the Humanities.

[FR Doc. 2021–28468 Filed 1–3–22; 8:45 am]

BILLING CODE 7536–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[WC Docket No. 12–375, DA 21–1583; FR ID 64286]

Wireline Competition Bureau Seeks Comment on Revisions to Annual Reporting and Certification Requirements for Inmate Calling Services (ICS) Providers

AGENCY: Federal Communications Commission.

ACTION: Solicitation of comments.

SUMMARY: In this document, the Wireline Competition Bureau (WCB or the Bureau) of the Federal Communications Commission (FCC or the Commission) seeks comment on proposed revisions to the instructions and templates for the Annual Reports and Annual Certifications submitted by providers of inmate calling services.

DATES: Comments are due on or before January 12, 2022; and reply comments are due on or before January 27. 2022.

ADDRESSES: You may submit comments, identified by WC Docket No. 12–375, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *https://apps.fcc.gov/ecfs/*.
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. *See* FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, DA 20–304 (March 19, 2020). *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy*.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

FOR FURTHER INFORMATION CONTACT: Minsoo Kim, Pricing Policy Division, Wireline Competition Bureau, at (202) 418–1739 or via email at *Minsoo.Kim@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, Public Notice, DA 21–1583, released December 15, 2022. The full text of this document is available at *https://www.fcc.gov/document/wcb-seeks-comment-ics-annual-reporting-and-certification-revisions*.

Synopsis

By this document, the Wireline Competition Bureau (WCB or the Bureau) seeks comment on proposed revisions to the instructions and templates for the Annual Reports and Annual Certifications submitted by providers of inmate calling services (ICS). The Commission requires ICS providers to make these filings to enable the Commission to monitor and track trends in the ICS marketplace, increase provider transparency, and ensure compliance with the Commission's ICS rules.

Pursuant to delegated authority, the Bureau created standardized reporting templates (FCC Form 2301(a)) for the Annual Report and a related certification of accuracy (FCC Form 2301(b)), as well as instructions to guide providers through the reporting process. The Bureau amended the instructions and template for the Annual Report in 2020 in order to improve the type and quality of the information collected.

In the 2021 ICS Order, the Commission revised its ICS rules by adopting, inter alia, lower interim rate caps for interstate ICS calls, new interim rate caps for international ICS calls, and a rate cap structure that requires ICS providers to differentiate between legally mandated and contractually required site commissions. The new 2021 rules necessitate further changes to the annual reporting and certification templates for which WCB seeks comment herein. Pursuant to the Paperwork Reduction Act of 1995 (PRA), WCB will publish a notice in the **Federal Register** seeking comment on the information collection requirements for the annual reporting and certification requirements in the Public Notice.

I. Overall Structure of the Annual Reporting and Certification Requirements

Pursuant to delegated authority, WCB proposes to revise the instructions and templates for the Annual Reports and Certifications to be consistent with the Commission's rules. These revised instructions and the associated templates, if adopted, will consolidate and supplant the instructions and templates for earlier iterations of the ICS annual reporting and certification requirements. WCB also proposes improvements based on experience reviewing prior Annual Reports, which has persuaded us that revised instructions would help providers better understand the requirements, making the submitted reports more useful to the Commission and consumers. To that end, WCB proposes to adopt both an Excel-format template and a Word-format template for the Annual Reports to better separate individual data items from narrative responses. For simplicity, WCB refers to these respective portions of the template as the Word template and the Excel template. WCB seeks comment on these proposed revisions, generally, and on the specific structure, content, and format of the proposed templates and instructions attached hereto. WCB likewise proposes minor revisions to the certification form. Are

there other changes or additions WCB should make to gather better or more accurate data or to make the instructions more clear? Is there additional information or data that WCB should require providers to submit to enable the Commission to better monitor compliance and industry trends, or increase transparency to the public? Conversely, are there any proposed instructions, inquiries, or data fields that should be removed because they are unnecessary to ensure that providers report uniform and accurate data and other information or they would reduce the burdens on providers in submitting this data?

A. Proposed Instructions for Annual Reports

WCB seeks comment on whether the proposed instructions provide sufficient guidance to ensure that providers use uniform methodologies and report the required information in a consistent manner. Are there any additional changes that would clarify the instructions, including the definitions, to help increase uniformity across providers' responses? WCB seeks comment on all aspects of the proposed instructions, including any proposed revisions not explicitly addressed in the Public Notice.

Reporting Period. As has been the case with prior annual reports, the reporting period is the year immediately preceding the year during which the annual report is due. Thus, the reporting period for the next annual reports due April 1, 2022 will be January 1, 2021 through December 31, 2021. The Commission's new interim interstate and international ICS rate caps adopted in the 2021 ICS Order became effective on October 26, 2021. In various places, the proposed instructions explain how providers may report less detailed information for the period between January 1, 2021 and October 25, 2021 than for the period between October 26, 2021 and December 31, 2021 and going forward.

General Categories of Information Requested. The proposed instructions, like for prior reports, require providers to submit certain types of information related to their operations, ICS rates, ancillary service charges, site commissions, and disability access. Do the proposed instructions describe these categories of data in sufficient detail? Is there additional information or data that WCB should require providers to submit in any of these categories to enable the Commission to better monitor compliance and industry trends, or increase transparency to the public? Are there any changes WCB should make to the proposed instructions and templates to make them easier for providers to understand?

B. Specific Data and Information Inquiries

Inmate Calling Service Rates. The proposed instructions require providers to submit intrastate, interstate, and international ICS rates across three general categories: (i) Highest rates charged, (ii) average rates charged, and (iii) year-end rates charged at a particular facility. Specifically, WCB proposes to require the reporting of the highest 15-minute rate, highest year-end 15-minute rate, and average per-minute rate. WCB's current instructions require providers to report every single rate charged over the reporting period. WCB believes the proposed categories will significantly reduce the burdens on providers, particularly those that frequently change their rates. Further, because certain providers may charge one rate for the initial minute of a call and another for each successive minute, obtaining information for 15-minute calls (a duration that the Commission has previously treated as the length of a typical call) will help the Commission compare rates among providers without imposing unwarranted burdens on them. With regard to the highest 15-minute rate, WCB proposes to require providers to break down those rates into the first-minute rate and the rate for additional minutes, and to further report the site commission amounts included in those rates. For interstate and international rates, WCB adds a fourth category, that would require providers to identify all rates charged in excess of the applicable rate caps. For international rates, WCB further proposes to require providers to report terminating charges they paid to their underlying international service provider to each destination. Are the proposed instructions for reporting average international termination charges clear? WCB also proposes to seek certain narrative information about the reported rates, including explanations for rates that exceed the Commission's rate caps.

WCB seeks comment on this rate reporting approach. Will seeking rate information in these categories provide the Commission adequate rate information to ensure compliance with the Commission's rules? Are there other changes WCB can make to the proposed rate reporting structure to make it easier for providers to respond, without sacrificing any necessary information or transparency? That structure is a departure from the previous requirement that a provider must submit every rate charged over the reporting period, a step that should significantly reduce burdens on providers that frequently adjust their rates. WCB believes that requiring providers to identify and submit information on all interstate and international rates that exceed the applicable caps will not impose an unwarranted burden, as WCB expects such violations to be infrequent. WCB believes the proposed rate reporting structure properly balances the need for accurate information on ICS rates with the need to avoid imposing unwarranted burdens on providers. WCB invites comment on this assessment.

Ancillary Service Charges. The proposed instructions continue to require providers to report a variety of information about any ancillary services charges they have assessed. WCB proposes to require a narrative explanation concerning any allocation methodology among facilities in a single contract, where applicable. Is there any additional information WCB should seek that would improve the quantity or quality of ancillary charge information providers are required to submit?

Site Commissions. The proposed instructions seek information concerning site commissions on a more disaggregated basis than WCB has previously required. WCB proposes to require providers to report their average total monthly site commission payments on a facility-by-facility basis and to separate those payments between legally mandated and contractually prescribed site commission payments, consistent with the Commission's rules. WCB also proposes to require providers to subdivide both types of payments between monetary and in-kind payments and, within those subdivisions, to report the portions of the payments that were either fixed or variable. How should providers report the value of in-kind site commission payments? Should WCB, for example, require providers to identify the type and quantity of in-kind payment (such as free or reduced-price equipment) and then assign a dollar value to that payment? Should WCB instruct providers on how to determine the dollar value of an in-kind payment and, if so, what instructions should WCB adopt?

Disability Access and Related Considerations. The proposed instructions continue to require providers to report a variety of information about the provision of ICS to incarcerated people with hearing and speech disabilities, including any Ancillary Service Charges that providers have assessed for or in connection with

TTY-based calls. WCB proposes to also require a narrative explanation concerning any allocation methodology used in connection with this information, where applicable, and WCB seeks comment on this approach.

Miscellaneous. The proposed instructions contain a variety of questions seeking basic provider information, as well as questions seeking narrative information about provider operations and facilities. Is there additional information the Commission should seek that would help increase transparency and compliance without imposing unwarranted burdens on providers?

II. Procedural Matters

Filing of Comments and Replies. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System. See FCC, Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (May 1, 1998).

Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.49 and all other applicable sections of the Commission's rules. WCB directs all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to use a table of contents, regardless of the length of their submission. WCB also strongly encourages parties to track the organization set forth in the Public Notice and the instructions in order to facilitate the internal review process.

Ex Parte Presentations. This proceeding shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in the prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with § 1.1206(b) of the Commission's rules. Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Federal Communications Commission.

Pamela Arluk,

Chief, Competition Policy Division, Wireline Competition Bureau.

[FR Doc. 2021–28494 Filed 1–3–22; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register

Vol. 87, No. 2

Tuesday, January 4, 2022

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

DEPARTMENT OF COMMERCE

International Trade Administration

[A–357–818]

2016 Agreement Suspending the Antidumping Duty Investigation on Lemon Juice From Argentina; Final Results of the Expedited Second Sunset Review of the Suspension Agreement

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

SUMMARY: As a result of this sunset review, the U.S. Department of Commerce (Commerce) finds that termination of the 2016 Agreement Suspending the Antidumping Duty Investigation on Lemon Juice from Argentina (2016 Agreement) and the suspended antidumping duty investigation would be likely to lead to continuation or recurrence of dumping at the levels indicated in the ''Final Results of Review'' section of this notice.

DATES: Applicable: January 4, 2022.

FOR FURTHER INFORMATION CONTACT: Sally C. Gannon or Jill Buckles, Bilateral Agreements Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–0162 or (202) 482–6230, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 1, 2021, Commerce published the notice of initiation of the second sunset review of the suspended investigation of lemon juice from Argentina,[1] pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2] On September 15, 2021, Commerce received a timely and complete notice of intent to participate from domestic interested party Ventura Coastal LLC (Ventura Coastal) within the deadline specified in 19 CFR 351.218(d)(1)(i).[3] Ventura Coastal claimed interested party status under section 771(9)(C) of the Act.

On October 1, 2021, Commerce received an adequate substantive response from Ventura Coastal within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i).[4] Commerce did not receive a substantive response from any respondent interested party and no hearing was requested. As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), Commerce conducted an expedited (120-day) sunset review of the 2016 Agreement and suspended investigation.

Scope of the 2016 Agreement

The product covered by the 2016 Agreement is lemon juice for further manufacture, with or without addition of preservatives, sugar, or other sweeteners, regardless of the GPL (grams per liter of citric acid) level of concentration, brix level, brix/acid ratio, pulp content, clarity, grade, horticulture method (*e.g.,* organic or not), processed form (*e.g.,* frozen or not-from-concentrate), FDA standard of identity, the size of the container in which packed, or the method of packing.

Excluded from the scope are: (1) Lemon juice at any level of concentration packed in retail-sized containers ready for sale to consumers, typically at a level of concentration of 48 GPL; and (2) beverage products such as lemonade that typically contain 20% or less lemon juice as an ingredient.

Lemon juice is classifiable under subheadings 2009.39.6020, 2009.31.6020, 2009.31.4000, 2009.31.6040, and 2009.39.6040 of the Harmonized Tariff Schedule of the United States (HTSUS). While HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the 2016 Agreement is dispositive.

Analysis of Comments Received

All issues raised in this sunset review are addressed in the accompanying Issues and Decision Memorandum.[5] The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* A list of topics discussed in the Issues and Decision Memorandum is included as an appendix to this notice. A complete version of the Issues and Decision Memorandum can be accessed at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Final Results of Review

Pursuant to sections 751(c)(1) and 752(c) of the Act, Commerce determines that termination of the 2016 Agreement and suspended investigation of lemon juice from Argentina would likely lead to continuation or recurrence of dumping, and that the magnitude of the weighted-average dumping margins likely to prevail are up to 128.50 percent.[6]

Notification Regarding Administrative Protective Order

This notice also serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or 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.

[1] *See Lemon Juice from Argentina: Continuation of Suspension of Antidumping Investigation,* 81 FR 74395 (October 26, 2016).

[2] *See Initiation of Five-Year (Sunset) Reviews,* 86 FR 48983 (September 1, 2021).

[3] *See* Ventura Coastal's Letter, ''2nd Five-Year ('Sunset') Review of Agreement to Suspend Antidumping Investigation of Lemon Juice from Argentina: Notice of Intent to Participate,'' dated September 15, 2021.

[4] *See* Ventura Coastal's Letter, ''2nd Five-Year ('Sunset') Review of the Agreement to Suspend the Antidumping Duty Investigation of Lemon Juice from Argentina: Substantive Response of Domestic Interested Party,'' dated October 1, 2021.

[5] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Expedited Sunset Review of the 2016 Agreement Suspending the Antidumping Duty Investigation on Lemon Juice from Argentina,'' dated concurrently with and hereby adopted by this notice (Issues and Decision Memorandum).

[6] *See Lemon Juice from Argentina: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances,* 72 FR 20820 (April 26, 2007).

Notification to Interested Parties

We are 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: December 29, 2021.

Ryan Majerus,

Deputy Assistant Secretary for Policy & Negotiations, Performing the Non-Exclusive Functions and Duties of the Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Agreement
IV. History of the Current and Prior Agreements
V. Legal Framework
VI. Discussion of the Issues
1. Likelihood of Continuation or Recurrence of Dumping
2. Magnitude of the Dumping Margins Likely to Prevail
VII. Final Results of Expedited Sunset Review
VIII. Recommendation

[FR Doc. 2021–28506 Filed 1–3–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–086]

Steel Propane Cylinders From the People's Republic of China: Notice of Final Results of Antidumping Duty Changed Circumstances Review

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

SUMMARY: On November 19, 2021, the Department of Commerce (Commerce) published the initiation and preliminary results of a changed circumstances review (CCR) of the antidumping duty (AD) order on steel propane cylinders from the People's Republic of China (China). For these final results, Commerce continues to find that Yi Jun Hong Kong Limited (Yi Jun) is the successor-in-interest to Hong Kong GSBF Company Limited (GSBF) and should be assigned the same AD cash deposit rates for purposes of determining AD liability.

DATES: Applicable January 4, 2022.

FOR FURTHER INFORMATION CONTACT: Katherine Sliney, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2437.

SUPPLEMENTARY INFORMATION:

Background

On September 30, 2021, Yi Jun requested that, pursuant to section 751(b) of the Tariff Act of 1930, as amended (the Act), 19 CFR 351.216, and 19 CFR 351.221(c)(3), Commerce conduct a CCR of the *Order* [1] to confirm that Yi Jun is the successor-in-interest to GSBF, and to assign it the cash deposit rate of GSBF.[2] In its submission, Yi Jun states that it underwent a name change, but otherwise was unchanged.[3]

On November 19, 2021, Commerce initiated a CCR and preliminarily determined that Yi Jun is the successor-in-interest to GSBF.[4] In the *Initiation and Preliminary Results CCR,* we provided all interested parties with an opportunity to comment.[5] However, we received no comments.

Scope of the Order

The merchandise subject to the *Order* is steel cylinders for compressed or liquefied propane or other gases (steel propane cylinders). The merchandise subject to the *Order* is properly classified under statistical reporting numbers 7311.00.0060 and 7311.00.0090 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS statistical reporting numbers are provided for convenience and customs purposes, the written description of the merchandise is dispositive.[6]

Final Results of Changed Circumstances Review

For the reasons stated in the *Initiation and Preliminary Results CCR,* Commerce continues to find that Yi Jun is the successor-in-interest to GSBF. As a result of this determination and consistent with established practice, we find that Yi Jun should receive the cash deposit rate previously assigned to GSBF. Consequently, Commerce will instruct U.S. Customs and Border Protection to suspend liquidation of all shipments of subject merchandise produced by GSBF Tank Inc. (GSBF Tank) and exported by Yi Jun and entered, or withdrawn from warehouse, for consumption on or after the publication date of this notice in the **Federal Register** at the cash deposit rate in effect for subject merchandise produced by GSBF Tank and exported by GSBF. This cash deposit requirement shall remain in effect until further notice.

Notification to Interested Parties

We are issuing this determination and publishing these final results and notice in accordance with sections 751(b)(1) and 777(i)(1) and (2) of the Act, and 19 CFR 351.216(e), 351.221(b), and 351.221(c)(3).

Dated: December 27, 2021.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2021–28487 Filed 1–3–22; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Steel Propane Cylinders from the People's Republic of China and Thailand: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Orders,* 84 FR 41703 (August 15, 2019) (*Order*).

[2] *See* Yi Jun's Letter, ''Steel Propane Cylinders from the People's Republic of China—Yi Jun/GSBF Changed Circumstances Review,'' dated September 30, 2021.

[3] *Id.* at 3–7.

[4] *See Steel Propane Cylinders from the People's Republic of China: Notice of Initiation and Preliminary Results of Antidumping Duty Changed Circumstance Review,* 86 FR 64899 (November 19, 2021) (*Initiation and Preliminary Results CCR*).

[5] *Id.,* 86 FR at 64901.

[6] For the full scope language, *see id.,* 86 FR at 64900.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–044]

1,1,1,2-Tetrafluoroethane (R-134a) From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2020–2021

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that the sole company subject to this administrative review is part of the China-wide entity because it did not file a separate rate application (SRA). The period of review (POR) is April 1, 2020, through March 31, 2021. We invite interested parties to comment on these preliminary results.

DATES: Applicable January 4, 2022.

FOR FURTHER INFORMATION CONTACT: Brendan Quinn, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5848.

SUPPLEMENTARY INFORMATION:

Background

On April 1, 2021, Commerce published a notice of opportunity to request an administrative review of the antidumping duty order on 1,1,1,2-

Tetrafluoroethane (R-134a) from the People's Republic of China (China).[1] In response, on April 30, 2021, the American HFC Coalition and its individual members[2] (the petitioners) requested a review of one company, Puremann, Inc. (Puremann).[3] Commerce initiated a review of this company on June 11, 2021.[4] The deadline for interested parties to submit an SRA or separate rate certification (SRC) was July 11, 2021.[5] No party submitted an SRA or an SRC. On June 29, 2021, the petitioners submitted initial comments on the record of this review.[6] On August 16, 2021, Commerce placed U.S. Customs and Border Protection (CBP) data on the record of this review demonstrating that there were no entries of subject merchandise during the POR.[7] The petitioners submitted rebuttal comments on the CBP data on September 2, 2021, and supplemental comments on September 23, 2021.[8] The deadline for the preliminary results of this review is January 3, 2022.

Scope of the Order

The merchandise covered by the order is 1,1,1,2-Tetrafluoroethane, R-134a, or its chemical equivalent, regardless of form, type, or purity level. The chemical formula for 1,1,1,2-Tetrafluoroethane is CF_3-CH_2 F, and the Chemical Abstracts Service registry number is CAS 811–97–2.[9]

Merchandise subject to the order is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 2903.39.2020. Although the HTSUS subheading and CAS registry number are provided for convenience and customs purposes, the written description of the scope is dispositive.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213.

Preliminary Results of Review

Puremann, the sole company subject to this review, did not file an SRA, nor a claim that it did not ship subject merchandise during the POR. Thus, Commerce preliminarily determines that this company has not demonstrated its eligibility for separate rate status. As such, Commerce preliminarily determines that the company subject to this review is part of the China-wide entity. In addition, Commerce no longer considers the non-market economy (NME) entity as an exporter conditionally subject to an antidumping duty administrative review.[10] Accordingly, the NME entity will not be under review unless Commerce specifically receives a request for, or self-initiates, a review of the NME entity. In this administrative review, no party requested a review of the China-wide entity. Moreover, we have not self-initiated a review of the China-wide entity. Because no review of the China-wide entity is being conducted, the China-wide entity's entries are not subject to the review, and the rate applicable to the NME entity is not subject to change as a result of this review. The China-wide entity rate is 167.02 percent.[11]

Public Comment

Interested parties are invited to comment on the preliminary results and may submit case briefs and/or written comments, filed electronically via Enforcement and Compliance's Antidumping Duty and Countervailing Duty Centralized Electronic Service System (ACCESS), within 30 days after the date of publication of these preliminary results of review.[12] ACCESS is available to registered users at *https://access.trade.gov.* Rebuttal briefs, limited to issues raised in the case briefs, must be filed within seven days after the time limit for filing case briefs.[13] Parties who submit case or rebuttal briefs in this proceeding are requested to submit with each argument a statement of the issue, a brief summary of the argument, and a table of authorities.[14] Note that Commerce has temporarily modified certain portions of its requirements for serving documents containing business proprietary information, until further notice.[15]

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to Commerce within 30 days of the date of publication of this notice.[16] Requests should contain: (1) The party's name, address, the telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing to be held.[17] Commerce intends to issue the final results of this administrative review, which will include the results of our analysis of all issues raised in the case briefs, within 120 days of publication of these preliminary results in the **Federal Register**, unless extended, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results of this review, Commerce will determine, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise covered by this review.[18] We intend to instruct CBP to liquidate entries containing subject merchandise exported by the company under review that we determine in the final results to be part of the China-wide entity at the China-wide entity rate of 167.02 percent. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 86 FR 17137 (April 1, 2021).

[2] American HFC Coalition's members include the following companies: Arkema Inc., the Chemours Company FC LLC, Honeywell International Inc., and Mexichem Fluor, Inc.

[3] *See* Petitioner's Letter, ''1,1,1,2-Tetrafluoroethane (R-134a) from the People's Republic of China: Request for Administrative Review of Antidumping Duty Order,'' dated April 30, 2021.

[4] *See Initiation of Antidumping Duty and Countervailing Duty Administrative Reviews,* 86 FR 31282 (June 11, 2021) (*Initiation Notice*).

[5] SRAs and SRCs were due thirty days from the publication of Commerce's *Initiation Notice.* In this administrative review, the deadline was July 11, 2021.

[6] *See* Petitioners' Letter, ''Antidumping Duty Administrative Review of 1,1,1,2-Tetrafluoroethane (R134a) from China: Request to Collect Additional CBP Data,'' dated June 29, 2021.

[7] *See* Memorandum, ''2020–2021 Administrative Review of the Antidumping Duty Order on 1,1,1,2-Tetrafluoroethane (R-134a) from the People's Republic of China,'' dated August 16, 2021.

[8] *See* Petitioners' Letters, ''Antidumping Duty Administrative Review of 1,1,1,2-Tetrafluoroethane (R-134a) from China: Rebuttal Comments on CBP Entry Data,'' dated September 2, 2021, and ''Antidumping Duty Administrative Review of 1,1,1,2-Tetrafluoroethane (R-134a) from China: Supplemental Information Concerning Census Data,'' dated September 23, 2021.

[9] 1,1,1,2-Tetrafluoroethane is sold under a number of trade names including Klea 134a and Zephex 134a (Mexichem Fluor); Genetron 134a (Honeywell); Freon™ 134a, Suva 134a, Dymel 134a, and Dymel P134a (Chemours); Solkane 134a (Solvay); and Forane 134a (Arkema). Generically, 1,1,1,2-Tetrafluoroethane has been sold as Fluorocarbon 134a, R-134a, HFC-134a, HF A-134a, Refrigerant 134a, and UN3159.

[10] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963, 65970 (November 4, 2013).

[11] *See 1,1,1,2 Tetrafluoroethane (R-134a) from the People's Republic of China: Antidumping Duty Order,* 82 FR 18422, 18423 (April 19, 2017).

[12] *See* 19 CFR 351.309(c)(1)(ii).

[13] *See* 19 CFR 351.309(d)(1) and (2).

[14] *See* 19 CFR 351.309(c) and (d); *see also* 19 CFR 351.303 (for general filing requirements).

[15] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

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

[17] *See* 19 CFR 310(d).

[18] *See* 19 CFR 351.212(b)(1).

publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this review for shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by sections 751(a)(2)(C) of the Act: (1) For companies that have a separate rate, the cash deposit rate will be that established in the final results of this review (except, if the rate is zero or *de minimis,* then zero cash deposit will be required); (2) for previously investigated or reviewed Chinese or non-Chinese exporters not listed above that received a separate rate in a prior segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific rate; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be that for the China-wide entity (*i.e.,* 167.02 percent); and (4) for all non-Chinese exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the Chinese exporter that supplied that non-Chinese exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a reminder to importers of their responsibility under 19 CFR 315.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

We are issuing and publishing these preliminary results in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.213(h) and 351.221(b)(4).

Dated: December 27, 2021.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2021–28486 Filed 1–3–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–822]

Welded Line Pipe From the Republic of Turkey: Partial Rescission and Preliminary Intent to Rescind the Antidumping Duty Administrative Review; 2019–2020

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

SUMMARY: The Department of Commerce (Commerce) is rescinding this administrative review with respect to companies for which requests for review were timely withdrawn and preliminarily rescinding this administrative review with respect to Cimtas Boru Imalatlari ve Ticaret, Ltd. Sti. The period of review (POR) is December 1, 2019, through November 30, 2020. Interested parties are invited to comment on this preliminary rescission.

DATES: Applicable January 4, 2022.

FOR FURTHER INFORMATION CONTACT: Alice Maldonado, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4682.

SUPPLEMENTARY INFORMATION:

Background

On February 4, 2021, based on timely requests for review in accordance with section 751(a)(1) of the Tariff Act of 1930, as amended (the Act), we initiated an administrative review of the antidumping duty order on welded line pipe from the Republic of Turkey (Turkey).[1] This review covers 19 producers and/or exporters of the subject merchandise.

On April 27, 2021, the petitioners [2] withdrew their request for an administrative review with respect to 18 companies.[3] The petitioners did not withdraw their review request for Cimtas Boru Imalatlari ve Ticaret, Ltd. Sti. (Cimtas).[4]

On August 18, 2021, Commerce extended the preliminary results of this review by 119 days, until December 30, 2021.[5] For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[6]

Scope of the Order

The products covered by the order include circular welded carbon and alloy steel (other than stainless steel) pipe from Turkey. Imports of subject merchandise are currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7305.11.1030, 7305.11.5000, 7305.12.1030, 7305.12.5000, 7305.19.1030, 7305.19.5000, 7306.19.1010, 7306.19.1050, 7306.19.5110, and 7306.19.5150. The subject merchandise may also enter in HTSUS 7305.11.1060 and 7305.12.1060. While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.[7]

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) and (2) of the Tariff Act of 1930, as amended (the Act). For a full description of the methodology underlying our decision, *see* the Preliminary Decision Memorandum. A list of the sections in the Preliminary Decision Memorandum is attached in Appendix II of this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

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[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 86 FR 8166, 8171 (February 4, 2021).

[2] The petitioners are Maverick Tube Corporation and IPSCO Tubulars Inc.

[3] *See* Petitioners' Letter, ''Welded Line Pipe from Turkey: Partial Withdrawal of Request for Administrative Review of Antidumping Duty Order,'' dated April 27, 2021.

[4] *Id.*

[5] *See* Memorandum, ''Welded Line Pipe from Turkey: Extension of Deadline for Preliminary Results of 2019–2020 Antidumping Duty Administrative Review,'' dated August 18, 2021.

[6] *See* Memorandum, ''Decision Memorandum for the Partial Rescission and Preliminary Intent to Rescind the 2019–2020 Administrative Review of the Antidumping Duty Order on Welded Line Pipe from the Republic of Turkey,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[7] For a complete description of the scope, *see* the Preliminary Decision Memorandum.

Partial Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if a party who requested the review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. On April 27, 2021, the petitioners timely withdrew their requests for an administrative review for the 18 companies listed in Appendix I of this notice. No other party requested a review of these companies. Accordingly, we are rescinding this review, in part, with respect to these companies, pursuant to 19 CFR 351.213(d)(1).

Preliminary Intent To Rescind Administrative Review

Regarding the remaining company, Cimtas, as discussed in the Preliminary Decision Memorandum, Commerce preliminarily finds that Cimtas had no reviewable shipments, sales, or entries of subject merchandise during the POR.[8] Therefore, we are preliminarily rescinding this review with respect to Cimtas, in accordance with 19 CFR 351.213(d)(3).

Verification

On May 17, 2020, Commerce received a request from the petitioners to conduct verification of Cimtas's statement that it had no reviewable shipments or sales during the POR and no entries of welded line pipe during the POR were manufactured by Cimtas.[9] Commerce is currently unable to conduct on-site verification of the information relied upon in this review. However, we took additional steps in lieu of an on-site verification to verify this information, in accordance with section 782(i) of the Act.[10]

Public Comment

Interested parties are invited to comment on the preliminary rescission of this review. Case briefs or other written comments may be submitted to Commerce no later than 30 days after the date of publication of this notice.[11] Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline for case briefs.[12] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[13]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, filed electronically via ACCESS within 30 days after the date of publication of this notice.[14] Hearing requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to issues raised in the briefs. If a request for a hearing is made, Commerce intends to hold the hearing at a date and time to be determined.[15] Parties should confirm the date, time, and location of the hearing two days before the scheduled date.

An electronically-filed document must be received successfully in its entirety via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS) by 5:00 p.m. Eastern Time on the established deadline. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information.[16]

Commerce intends to issue the final results of this administrative review, including the results of its analysis of issues raised in any written briefs, not later than 120 days after the date of publication of this notice, unless otherwise extended.[17]

Assessment

Commerce will instruct U.S. Customs and Border Protection (CBP) to liquidate any suspended entries for the 18 companies listed in Appendix I at the rate in effect at the time of entry. Further, we previously deferred Cimtas's sales reporting for entries made during the 2018–2019 POR to this administrative review and stated that the 2018–2019 POR entries "will remain suspended until the completion of the review and will be liquidated based on the final results for Cimtas.[18] Thus, if Commerce proceeds to a final rescission of this administrative review with respect to Cimtas, Commerce will instruct CBP to assess antidumping duties on and liquidate any of Cimtas's suspended entries at the cash deposit rate in effect at the time of entry, including any suspended entries from the 2018–2019 POR.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

If Commerce proceeds to a final rescission of this administrative review, no cash deposit rates will change. Accordingly, the current cash deposit requirements shall remain in effect until further notice.

Notification to Importers

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

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) of the Act and 19 CFR 351.213(d).

Dated: December 27, 2021.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix I

1. Borusan Istikbal Ticaret
2. Borusan Mannesmann Boru Sanayi ve

[8] *See* Preliminary Decision Memorandum.

[9] *See* Petitioner's Letter, "Welded Line Pipe from Turkey: Request for Verification," dated May 17, 2020.

[10] *See* Commerce's Letter, Antidumping Administrative Review of Welded Line Pipe from the Republic of Turkey, dated July 21, 2021; *see also* Cimtas's Letter, "Antidumping Administrative Review of Welded Line Pipe from the Republic of Turkey: Response to Questions," dated August 4, 2021.

[11] *See* 19 CFR 351.309(c).

[12] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020); *see also Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020) (*Temporary Rule*).

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

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

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

[16] *See Temporary Rule.*

[17] *See* section 751(a)(3)(A) of the Act.

[18] *See Welded Line Pipe from the Republic of Turkey: Final Rescission of Antidumping Duty Administrative Review, in Part, and Final Deferral of Administrative Review, in Part; 2018–2019,* 86 FR 17363, 17364 (April 2, 2021).

Ticaret A.S.
3. Cayirova Boru Sanayi ve Ticaret A.S.
4. Emek Boru Makina Sanayi ve Ticaret A.S.
5. Erbosan Erciyas Tube Industry and Trade Co. Inc.
6. Erciyas Celik Boru Sanayii A.S.
7. Guven Celik Boru Sanayii ve Ticaret Ltd. Sti.
8. Has Altinyagmur celik Boru Sanayii ve Ticaret Ltd. Sti.
9. HDM Steel Pipe Industry & Trade Co. Ltd.
10. Metalteks Celik Urunleri Sanayii
11. MMZ Onur Boru Profil Uretim Sanayii ve Ticaret A.S.
12. Noksel Steel Pipe Co. Inc.
13. Ozbal Celik Boru
14. Toscelik Profile and Sheet Industry, Co.
15. Tosyali Dis Ticaret A.S.
16. Umran Celik Boru Sanayii
17. YMS Pipe & Metal Sanayii A.S.
18. Yucelboru Ihracat Ithalat Pazzarlam

Appendix II

List of Sections in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Partial Rescission of Administrative Review
V. Preliminary Intent To Rescind Administrative Review
VI. Recommendation

[FR Doc. 2021–28507 Filed 1–3–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–074]

Common Alloy Aluminum Sheet From the People's Republic of China: Preliminary and Final Results of Countervailing Duty Administrative Review; 2018–2019; Correction

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

ACTION: Notice; correction.

SUMMARY: The Department of Commerce (Commerce) published **Federal Register** notices of the preliminary and final results of the administrative review of the countervailing duty (CVD) order on common alloy aluminum sheet (aluminum sheet) from the People's Republic of China (China) covering the period April 23, 2018, through December 31, 2019, on June 25, 2021, and December 23, 2021, respectively. These notices contained incorrect spellings of company names subject to this administrative review.

DATES: Applicable January 4, 2022.

FOR FURTHER INFORMATION CONTACT: Natasia Harrison, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1240.

SUPPLEMENTARY INFORMATION:

Corrections

In the **Federal Register** of June 25, 2021, in FR Doc 2021–13551, on page 33651, in footnote 14, correct the spelling of ''Shejiang Nanjie Industry Co., Ltd'' to ''Zhejiang Nanjie Industry Co., Ltd.'' Similarly, in the **Federal Register** of December 23, 2021, in FR Doc 2021–27893, on page 72928, in footnote 16, correct the spelling of ''Shejiang Nanjie Industry Co., Ltd'' to ''Zhejiang Nanjie Industry Co., Ltd.''

In the **Federal Register** of June 25, 2021, in FR Doc 2021–13551, on page 33651, in the third column, the subsidy rate table, and footnote 12, correct the spelling of ''Zhengzhou Mingtai Industry Co.,'' to ''Zhengzhou Mingtai Industry Co., Ltd.'' Similarly, in the **Federal Register** of December 23, 2021, in FR Doc 2021–27893, on page 72927, in third column, and on page 72928, in the subsidy rate table and in footnote 13, correct the spelling of ''Zhengzhou Mingtai Industry Co.,'' to ''Zhengzhou Mingtai Industry Co., Ltd.''

Background

On June 25, 2021, and December 23, 2021, respectively, Commerce published in the **Federal Register** the preliminary and final results of the administrative review of the CVD order on aluminum sheet from China covering the period April 23, 2018, through December 31, 2019.[1] Both notices contained incorrect spellings of the company names, ''Zhejiang Nanjie Industry Co., Ltd.'' and ''Zhengzhou Mingtai Industry Co., Ltd.'' misspelled as ''Shejiang Nanjie Industry Co., Ltd.'' and ''Zhengzhou Mingtai Industry Co.'' respectively.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended.

Dated: December 29, 2021.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, Performing the Non-Exclusive Functions and Duties of the Assistant Secretary Enforcement and Compliance.

[FR Doc. 2021–28505 Filed 1–3–22; 8:45 am]

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[1] *See Common Alloy Aluminum Sheet from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review, Rescission of Review, in Part, and Intent to Rescind, in Part; 2018–2019,* 86 FR 33650 (June 25, 2021); and *Common Alloy Aluminum Sheet from the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2018–2019,* 86 FR 72927 (December 23, 2021).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP20–507–000]

Transcontinental Gas Pipe Line Company, LLC; Sea Robin Pipeline Company, LLC; Florida Gas Transmission Company, LLC; Notice of Request for Extension of Time

Take notice that on December 22, 2021, Transcontinental Gas Pipe Line Company, LLC (Transco), 2800 Post Oak Boulevard, Houston, Texas 77056, requested that the Federal Energy Regulatory Commission (Commission) grant an extension of time, until December 31, 2022, in order to complete abandonment activities as authorized in Transco's VR22 to Shore Abandonment Project (Project) in the March 18, 2021 Order Granting Abandonment[1] (March 18 Order). The March 18 Order, Ordering Paragraph (C) required Transco[2] to complete abandonment of the facilities within one year of the order date.

Transco's request for an extension of time until December 31, 2022 to complete abandonment of the Project facilities, due the timing of the issuance of the Louisiana Department of Natural Resources' Office of Coastal Management—Coastal Use Permit, which is anticipated to be received early 2022. Transco estimates that it will submit a Notice-to-Proceed request during the first quarter of 2022. Transco states that its extension request is also due to the challenging nature of offshore activities. Transco asserts that the extended time will allow flexibility in scheduling around weather events that may delay abandonment activities.

This notice establishes a 15-calendar day intervention and comment period deadline. Any person wishing to comment on Transco's request for an extension of time may do so. No reply comments or answers will be considered. If you wish to obtain legal status by becoming a party to the

[1] *Transcontinental Gas Pipe Line Company, LLC,* 174 FERC ¶ 62,169 (2021).

[2] Transco is the operator of the pipeline facilities proposed to be abandoned.

proceedings for this request, you should, on or before the comment date stated below, file 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 Natural Gas Act (18 CFR 157.10).[3]

As a matter of practice, the Commission itself generally acts on requests for extensions of time to complete construction for Natural Gas Act facilities when such requests are contested before order issuance. For those extension requests that are contested,[4] the Commission will aim to issue an order acting on the request within 45 days.[5] The Commission will address all arguments relating to whether the applicant has demonstrated there is good cause to grant the extension.[6] The Commission will not consider arguments that re-litigate the issuance of the certificate order, including whether the Commission properly found the project to be in the public convenience and necessity and whether the Commission's environmental analysis for the certificate complied with the National Environmental Policy Act.[7] At the time a pipeline requests an extension of time, orders on certificates of public convenience and necessity are final and the Commission will not re-litigate their issuance.[8] The OEP Director, or his or her designee, will act on all of those extension requests that are uncontested.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*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. At this time, the Commission has suspended access to Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFile'' link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Comment Date: 5:00 p.m. Eastern Time on January 12, 2022.

Dated: December 28, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–28475 Filed 1–3–22; 8:45 am]

BILLING CODE 6717–01–P

[3] Only motions to intervene from entities that were party to the underlying proceeding will be accepted. *Algonquin Gas Transmission, LLC,* 170 FERC ¶ 61,144, at P 39 (2020).

[4] Contested proceedings are those where an intervenor disputes any material issue of the filing. 18 CFR 385.2201(c)(1) (2019).

[5] *Algonquin Gas Transmission, LLC,* 170 FERC ¶ 61,144, at P 40 (2020).

[6] *Id.* at P 40.

[7] Similarly, the Commission will not re-litigate the issuance of an NGA section 3 authorization, including whether a proposed project is not inconsistent with the public interest and whether the Commission's environmental analysis for the permit order complied with NEPA.

[8] *Algonquin Gas Transmission, LLC,* 170 FERC ¶ 61,144, at P 40 (2020).

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: EC22–30–000.
Applicants: TENASKA GEORGIA PARTNERS, L.P., GEPIF III Concord Holdco LLC.
Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Tenaska Georgia Partners, L.P., et al.
Filed Date: 12/28/21.
Accession Number: 20211228–5079.
Comment Date: 5 p.m. ET 1/18/22.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–276–006; ER10–1790–020; ER10–2595–005; ER21–1716–002.
Applicants: BP Energy Retail LLC, Flat Ridge Wind Energy, LLC, BP Energy Company, Rolling Thunder I Power Partners, LLC.
Description: Triennial Market Power Analysis for Southwest Power Pool Inc. Region of Rolling Thunder I Power Partners, LLC, et al.
Filed Date: 12/27/21.
Accession Number: 20211227–5261.
Comment Date: 5 p.m. ET 2/25/22.

Docket Numbers: ER10–1107–001.
Applicants: Pacific Gas and Electric Company.
Description: Updated Market Power Analysis for the CAISO BAA Market of Pacific Gas and Electric Company.
Filed Date: 12/23/21.
Accession Number: 20211223–5272.
Comment Date: 5 p.m. ET 2/21/22.

Docket Numbers: ER10–2302–010; ER19–1342–003; ER19–1343–003; ER19–2674–003.
Applicants: New Mexico PPA Corporation, NMRD Data Center II, LLC, NMRD Data Center III, LLC, Public Service Company of New Mexico.
Description: Triennial Market Power Analysis for Southwest Region of Public Service Company of New Mexico, et al.
Filed Date: 12/27/21.
Accession Number: 20211227–5258.
Comment Date: 5 p.m. ET 2/25/22.

Docket Numbers: ER10–2357–010; ER10–2361–011; ER10–2368–009; ER10–2369–009; ER10–2382–010; ER10–2385–011; ER10–1238–001; ER10–1239–001; ER10–1200–001.
Applicants: Elkhorn Ridge Wind, LLC, San Juan Mesa Wind Project, LLC, Taloga Wind, LLC, Laredo Ridge Wind, LLC, Wildorado Wind, LLC, Sleeping Bear, LLC, Broken Bow Wind, LLC, Crofton Bluffs Wind, LLC, Clearway Power Marketing LLC.
Description: Triennial Market Power Analysis for Southwest Power Pool Inc. Region of Sleeping Bear, LLC, et al.
Filed Date: 12/28/21.
Accession Number: 20211228–5080.
Comment Date: 5 p.m. ET 2/28/22.

Docket Numbers: ER10–2437–017.
Applicants: Arizona Public Service Company.
Description: Triennial Market Power Analysis for Southwest Region of Arizona Public Service Company.
Filed Date: 12/28/21.
Accession Number: 20211228–5135.
Comment Date: 5 p.m. ET 2/28/22.

Docket Numbers: ER10–2794–034; ER12–1825–032; ER14–2672–019.
Applicants: EDF Energy Services, LLC, EDF Industrial Power Services (CA), LLC, EDF Trading North America, LLC.
Description: Triennial Market Power Analysis for Southwest Power Pool Inc. Region of EDF Trading North America, LLC, et al.
Filed Date: 12/28/21.
Accession Number: 20211228–5132.
Comment Date: 5 p.m. ET 2/28/22.

Docket Numbers: ER10–3063–003.
Applicants: Green Country Energy, LLC.
Description: Triennial Market Power Analysis for Southwest Power Pool Inc. Region of Green Country Energy, LLC.
Filed Date: 12/28/21.

Accession Number: 20211228–5086.
Comment Date: 5 p.m. ET 2/28/22.

Docket Numbers: ER12–2037–014; ER12–2314–010; ER15–2129–007; ER15–2130–007; ER15–2131–007; ER16–2360–009; ER17–2258–005; ER20–1515–002.

Applicants: Milligan 1 Wind LLC, Rock Falls Wind Farm LLC, Great Western Wind Energy, LLC, Milo Wind Project, LLC, Roosevelt Wind Project, LLC, Slate Creek Wind Project, LLC, Spinning Spur Wind LLC, Spearville 3, LLC.

Description: Triennial Market Power Analysis for Southwest Power Pool Inc. Region of Spearville 3, LLC, et al.

Filed Date: 12/28/21.
Accession Number: 20211228–5147.
Comment Date: 5 p.m. ET 2/28/22.

Docket Numbers: ER18–920–010.

Applicants: Marco DM Holdings, L.L.C.

Description: Notice of Change in Status of Marco DM Holdings, L.L.C., et al.

Filed Date: 12/23/21.
Accession Number: 20211223–5271.
Comment Date: 5 p.m. ET 1/13/22.

Docket Numbers: ER20–2878–000; ER20–2878–010.

Applicants: Pacific Gas and Electric Company.

Description: Informational Filing to correct Wholesale Distribution Rates for the City and County of San Francisco, et al. effective January 1, 2022 of Pacific Gas and Electric Company.

Filed Date: 12/21/21.
Accession Number: 20211221–5275.
Comment Date: 5 p.m. ET 1/11/22.

Docket Numbers: ER20–681–005.

Applicants: Tri-State Generation and Transmission Association, Inc.

Description: Triennial Market Power Analysis for Southwest and Northwest Regions and Notice of Change in Status of Tri-State Generation and Transmission Association, Inc.

Filed Date: 12/27/21.
Accession Number: 20211227–5262.
Comment Date: 5 p.m. ET 2/25/22.

Docket Numbers: ER21–2900–003.

Applicants: Duke Energy Florida, LLC, Duke Energy Carolinas, LLC, Duke Energy Progress, LLC.

Description: Tariff Amendment: Duke Energy Florida, LLC submits tariff filing per 35.17(b): Amendment to Joint OATT (Network Contract Demand Service) to be effective 11/17/2021.

Filed Date: 12/28/21.
Accession Number: 20211228–5000.
Comment Date: 5 p.m. ET 1/18/22.

Docket Numbers: ER22–69–000.

Applicants: Indeck Niles, LLC.

Description: Response to December 1, 2021 Deficiency Letter of Indeck Niles, LLC.

Filed Date: 12/23/21.
Accession Number: 20211223–5275.
Comment Date: 5 p.m. ET 1/13/22.

Docket Numbers: ER22–657–001.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Errata to ISA SA No. 6248, Queue No. AE2–206 in Docket No. ER22–657 to be effective 11/15/2021.

Filed Date: 12/28/21.
Accession Number: 20211228–5141.
Comment Date: 5 p.m. ET 1/18/22.

Docket Numbers: ER22–730–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original Service Agreement No. 6272—NITSA among PJM and AEPEP to be effective 1/1/2022.

Filed Date: 12/28/21.
Accession Number: 20211228–5044.
Comment Date: 5 p.m. ET 1/18/22.

Docket Numbers: ER22–731–000.

Applicants: AEP Texas Inc.

Description: § 205(d) Rate Filing: AEPTX–RE Bravepost Solar Cancellation to be effective 1/2/2022.

Filed Date: 12/28/21.
Accession Number: 20211228–5053.
Comment Date: 5 p.m. ET 1/18/22.

Docket Numbers: ER22–732–000.

Applicants: Sayreville Power Generation LP.

Description: § 205(d) Rate Filing: Notice of Succession and Revisions to Rate Schedule to be effective 12/8/2021.

Filed Date: 12/28/21.
Accession Number: 20211228–5054.
Comment Date: 5 p.m. ET 1/18/22.

Docket Numbers: ER22–733–000.

Applicants: ISO New England Inc., New England Power Pool Participants Committee.

Description: § 205(d) Rate Filing: ISO New England Inc. submits tariff filing per 35.13(a)(2)(iii: ISO–NE and NEPOOL; Transmission Planning Improvements to be effective 2/28/2022.

Filed Date: 12/28/21.
Accession Number: 20211228–5067.*Comment Date:* 5 p.m. ET 1/18/22.

Docket Numbers: ER22–734–000.

Applicants: SR Arlington, LLC.

Description: Baseline eTariff Filing: Market-Based Rate Application to be effective 12/29/2021.

Filed Date: 12/28/21.
Accession Number: 20211228–5099.
Comment Date: 5 p.m. ET 1/18/22.

Docket Numbers: ER22–735–000.

Applicants: Avista Corporation.

Description: § 205(d) Rate Filing: Avista Open Access Transmission Tariff Revisions, Attachments M, N, Q to be effective 3/31/2022.

Filed Date: 12/28/21.
Accession Number: 20211228–5102.
Comment Date: 5 p.m. ET 1/18/22.

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 28, 2021.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2021–28477 Filed 1–3–22; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket No. 92–237; DA 21–1575; FRS 63571]

Next Meeting of the North American Numbering Council

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Commission released a public notice announcing the meeting of the North American Numbering Council (NANC), which will be held via video conference and available to the public via live internet feed.

DATES: Wednesday, February 9, 2022. The meeting will come to order at 2:00 p.m.

ADDRESSES: The meeting will be conducted via video conference and available to the public via the internet at *http://www.fcc.gov/live.*

FOR FURTHER INFORMATION CONTACT: Christi Shewman, Designated Federal Officer, at *christi.shewman@fcc.gov* or 202–418–0646. More information about the NANC is available at *https://www.fcc.gov/about-fcc/advisory-committees/general/north-american-numbering-council.*

SUPPLEMENTARY INFORMATION: The NANC meeting is open to the public on

the internet via live feed from the FCC's web page at *http://www.fcc.gov/live.* Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations should be submitted via email to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). Such requests should include a detailed description of the accommodation needed. In addition, please include a way for the FCC to contact the requester if more information is needed to fill the request. Please allow at least five days' advance notice for accommodation requests; last minute requests will be accepted but may not be possible to accommodate. Members of the public may submit comments to the NANC in the FCC's Electronic Comment Filing System, ECFS, at *www.fcc.gov/ecfs.* Comments to the NANC should be filed in CC Docket No. 92–237. This is a summary of the Commission's document in CC Docket No. 92–237, DA 21–1575, released December 15, 2021.

Proposed Agenda: At the February 9 meeting, the NANC will consider and vote on recommendations from the Call Authentication Trust Anchor working group on a set of best practices relating to how terminating voice service providers can best protect their subscribers using caller ID authentication information. The NANC will also hear routine status reports from the Numbering Administration Oversight working group, the North American Portability Management, LLC, and the Secure Telephone Identity Governance Authority. This agenda may be modified at the discretion of the NANC Chair and the Designated Federal Officer.

(5 U.S.C. App 2 § 10(a)(2)).

Federal Communications Commission.

Pamela Arluk,

Chief, Competition Policy Division, Wireline Competition Bureau.

[FR Doc. 2021–28478 Filed 1–3–22; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[IB Docket No. 16–185; DA 21–1633; FR ID 65393]

The World Radiocommunication Conference Advisory Committee Schedules Its Fifth Meeting on February 15, 2022

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the fifth meeting of the World Radiocommunication Conference Advisory Committee (WAC or Advisory Committee) meeting will be held on Tuesday, February 15, 2022 at 11:00 EST. Due to exceptional circumstances, the fifth WAC meeting will be convened as a virtual meeting with remote participation only. The meeting is open to the public. A draft agenda of the fifth WAC meeting is attached. This fifth WAC meeting will consider status reports and recommendations from its IWG–1, IWG–2, IWG–3, and IWG–4 concerning preparation for the 2023 World Radiocommunication Conference (WRC–23). The fifth WAC meeting will be broadcast live with open captioning over the internet from the FCC Live web page at *www.fcc.gov/live.* There will be audience participation available; send live questions to *livequestions@fcc.gov* only during this meeting. The Commission's WRC–23 website (*www.fcc.gov/wrc-23*) contains the latest information on the IWG meeting agendas and audience participation information, all scheduled meeting dates and updates, and Advisory Committee matters. Comments may be presented at the Advisory Committee meeting or in advance of the meeting by email to: *WRC-23@fcc.gov.*

DATES: Tuesday, February 15, 2022 (11:00 a.m. EST).

ADDRESSES: The meetings will be held virtually.

FOR FURTHER INFORMATION CONTACT: Dante Ibarra, Designated Federal Official, World Radiocommunication Conference Advisory Committee, FCC International Bureau, Global Strategy and Negotiation Division, at *Dante.Ibarra@fcc.gov,* (202) 418–0610 or *WRC-23@fcc.gov.*

SUPPLEMENTARY INFORMATION: The FCC established the Advisory Committee to provide advice, technical support and recommendations relating to the preparation of United States proposals and positions for the 2023 World Radiocommunication Conference (WRC–23). In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, this notice advises interested persons of the fifth meeting of the Advisory Committee. The Commission's WRC–23 website (*www.fcc.gov/wrc-23*) contains the latest information on the WAC and IWG meeting agendas and audience participation information, all scheduled meeting dates and updates, and other WRC–23 Advisory Committee matters. The fifth WAC meeting will be broadcast live with open captioning over the internet from the FCC Live web page at *www.fcc.gov/live.* There will be audience participation available; send live questions to *livequestions@fcc.gov* only during this meeting.

The proposed agenda for the fifth WAC meeting is as follows:

Fifth Meeting of WRC–23 Advisory Committee Meeting Agenda

Tuesday, February 15, 2022 (11:00 a.m. EST)

1. Opening Remarks
2. Approval of Agenda
3. Approval of the Minutes of the Fourth Meeting
4. IWG Reports and Documents
5. Future Meetings
6. Other Business

Federal Communications Commission.

Nese Guendelsberger,

Deputy Bureau Chief, International Bureau.

[FR Doc. 2021–28488 Filed 1–3–22; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained

on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington DC 20551–0001, not later than February 3, 2022.

A. Federal Reserve Bank of San Francisco (Sebastian Astrada, Director, Applications) 101 Market Street, San Francisco, California 94105–1579:

1. *PBCO Financial Corporation,* to become a bank holding company by acquiring People's Bank of Commerce, both of Medford, Oregon.

Board of Governors of the Federal Reserve System, December 29, 2021.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2021–28491 Filed 1–3–22; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than January 18, 2022.

A. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *The Donna L. Butcher Trust B, Hutchinson, Kansas, Joe D. Butcher, as co-trustee, Cimarron, Kansas;* to join the Butcher Family Group, by retaining voting shares of Santa Fe Trail Banc Shares, Inc., and thereby indirectly retaining voting shares of Centera Bank, both of Sublette, Kansas. Joe D. Butcher was previously approved as a member of the Butcher Family Group in his individual capacity and as trustee of the Joe D. Butcher Trust No. 1, Cimarron, Kansas. Kimberly Fairbank, Cimarron, Kansas, and First National Bank of Hutchinson, Hutchinson, Kansas, are the other co-trustees of the Donna L. Butcher Trust B.

Board of Governors of the Federal Reserve System, December 28, 2021.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2021–28458 Filed 1–3–22; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington DC 20551–0001, not later than January 19, 2022.

A. Federal Reserve Bank of Atlanta (Erien O. Terry, Assistant Vice President) 1000 Peachtree Street NE, Atlanta, Georgia 30309. Comments can also be sent electronically to *Applications.Comments@atl.frb.org:*

1. *Bradley C. Davis, a member of the Davis Family Group, Charleston, South Carolina;* to retain voting shares of Peoples Bancshares, Inc., and thereby indirectly retain voting shares of Peoples Bank, both of Mendenhall, Mississippi.

In addition, Sidney Dewitt Davis III, Mendenhall, Mississippi, and Bradley C. Davis, Charleston, South Carolina, as co-trustees of The Sid Davis Trust, Atlanta, Georgia; Melissa Lenox, Charleston, South Carolina; Sharon Ammann, Steve Ammann, and Steven Wade Ammann, all of Mendenhall, Mississippi; Charles Cockrell, Dauphin Island, Alabama; Michael Tolleson and Brian Jernigan, both of Madison, Mississippi; Margaret Steinberger, as trustee of the Margaret Steinberger Revocable Trust, and Bruce Steinberger, individually, all of Coral Gables, Florida; and Audrey Davis, Magee, Mississippi; to join the Davis Family Group, a group acting in concert, to retain voting shares of Peoples Bancshares, Inc., and thereby indirectly retain voting shares of Peoples Bank.

Board of Governors of the Federal Reserve System, December 29, 2021.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2021–28496 Filed 1–3–22; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage de novo, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than January 18, 2022.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Senior Vice President) 33 Liberty Street, New York, New York 10045–0001. Comments can also be sent electronically to *Comments.applications@ny.frb.org:*

1. *AIB Group, p.l.c., Dublin, Ireland;* to retain GANMAC Holdings (BVI) Limited, and thereby indirectly retain Goodbody Securities, Inc., both of Dublin, Ireland, and engage in securities brokerage activities pursuant to section 225.28(b)(7)(i) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, December 28, 2021.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2021–28462 Filed 1–3–22; 8:45 am]

BILLING CODE P

GOVERNMENT ACCOUNTABILITY OFFICE

Request for Medicaid and CHIP Payment and Access Commission (MACPAC) Nominations

AGENCY: U.S. Government Accountability Office (GAO).

ACTION: Request for letters of nomination and resumes.

SUMMARY: The Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) established MACPAC to review Medicaid and CHIP access and payment policies and to advise Congress on issues affecting Medicaid and CHIP. CHIPRA gave the Comptroller General of the United States responsibility for appointing MACPAC's members. GAO is now accepting nominations for MACPAC appointments that will be effective May 2022. Nominations should be sent to the email address listed below. Acknowledgement of receipt will be provided within a week of submission.

DATES: Letters of nomination and resumes should be submitted no later than January 27, 2022, to ensure adequate opportunity for review and consideration of nominees prior to appointment.

ADDRESSES: Submit letters of nomination and resumes to *MACPACappointments@gao.gov.*

FOR FURTHER INFORMATION CONTACT: Susan Anthony at (312) 220–7666 or *anthonys@gao.gov* if you do not receive an acknowledgment or need additional information. For general information, contact GAO's Office of Public Affairs, (202) 512–4800.

(Authority: Pub. L. 111–3, sec. 506; 42 U.S.C. 1396.)

Gene L. Dodaro,

Comptroller General of the United States.

[FR Doc. 2021–27494 Filed 1–3–22; 8:45 am]

BILLING CODE 1610–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2021–N–0506]

William Kulakevich: Final Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is issuing an order under the Federal Food, Drug, and Cosmetic Act (FD&C Act) debarring William Kulakevich for a period of 5 years from importing or offering for import any drug into the United States. FDA bases this order on a finding that Mr. Kulakevich was convicted of one felony count under Federal law for conspiracy to commit offenses against the United States. The factual basis supporting Mr. Kulakevich's conviction, as described below, is conduct relating to the importation into the United States of a drug or controlled substance. Mr. Kulakevich was given notice of the proposed debarment and was given an opportunity to request a hearing to show why he should not be debarred. As of September 16, 2021 (30 days after receipt of the notice), Mr. Kulakevich had not responded. Mr. Kulakevich's failure to respond and request a hearing constitutes a waiver of his right to a hearing concerning this matter.

DATES: This order is applicable January 4, 2022.

ADDRESSES: Submit applications for termination of debarment to the Dockets Management Staff, Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500, or at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jaime Espinosa, Division of Enforcement (ELEM–4029), Office of Strategic Planning and Operational Policy, Office of Regulatory Affairs, Food and Drug Administration, 12420 Parklawn Dr., Rockville, MD 20857, 240–402–8743, or at *debarments@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 306(b)(1)(D) of the FD&C Act (21 U.S.C. 335a(b)(1)(D)) permits debarment of an individual from importing or offering for import any drug into the United States if FDA finds, as required by section 306(b)(3)(C) of the FD&C Act, that the individual has been convicted of a felony for conduct relating to the importation into the United States of any drug or controlled substance. On July 23, 2019, Mr. Kulakevich was convicted, as defined in section 306(l)(1) of FD&C Act, in the U.S. District Court for the Western District of Pennsylvania, when the court entered judgment against him for the offense of conspiracy to commit offenses against the United States, in violation of 18 U.S.C. 2 and 371.

FDA's finding that debarment is appropriate is based on the felony conviction referenced herein. The factual basis for this conviction is as follows: As contained in the indictment in Mr. Kulakevich's case, filed August 22, 2017, to which he plead guilty, from on or about April 2015, and continuing until May 2017, Mr. Kulakevich was the owner and a co-operator of a website, *www.etizy.com,* through which he sold and distributed a drug known as etizolam to consumers throughout the United States. Etizolam is a drug known as thienodiazepine, which is chemically similar to benzodiazepines and carries risks of dependency, toxicity, and the possibility of fatal overdose. Etizolam is not FDA-approved in the United States. Mr. Kulakevich and his co-conspirator illegally bought etizolam from an overseas supplier in India, after which he arranged to have it smuggled into the United States through the use of multiple post office boxes controlled by him and his coconspirator. To avoid Federal regulators, Mr. Kulakevich used

false and misleading labeling and generally misrepresented the nature of the products sold on his website. Mr. Kulakevich reshipped the misbranded etizolam to customers located in the United States.

As a result of this conviction, FDA sent Mr. Kulakevich, by certified mail, on August 3, 2021, a notice proposing to debar him for a 5-year period from importing or offering for import any drug into the United States. The proposal was based on a finding under section 306(b)(3)(C) of the FD&C Act that Mr. Kulakevich's felony conviction under Federal law for conspiracy to commit offenses against the United States, in violation of 18 U.S.C. 2 and 371, was for conduct relating to the importation into the United States of any drug or controlled substance because he illegally imported, relabeled, and then introduced unapproved etizolam products into interstate commerce. In proposing a debarment period, FDA weighed the considerations set forth in section 306(c)(3) of the FD&C Act that it considered applicable to Mr. Kulakevich's offense and concluded that the offense warranted the imposition of a 5-year period of debarment.

The proposal informed Mr. Kulakevich of the proposed debarment and offered him an opportunity to request a hearing, providing him 30 days from the date of receipt of the letter in which to file the request, and advised him that failure to request a hearing constituted a waiver of the opportunity for a hearing and of any contentions concerning this action. Mr. Kulakevich received the proposal and notice of opportunity for a hearing on August 17, 2021. Mr. Kulakevich failed to request a hearing within the timeframe prescribed by regulation and has, therefore, waived his opportunity for a hearing and waived any contentions concerning his debarment (21 CFR part 12).

II. Findings and Order

Therefore, the Assistant Commissioner, Office of Human and Animal Food Operations, under section 306(b)(3)(C) of the FD&C Act, under authority delegated to the Assistant Commissioner, finds that Mr. William Kulakevich has been convicted of a felony under Federal law for conduct relating to the importation into the United States of any drug or controlled substance. FDA finds that the offense should be accorded a debarment period of 5 years as provided by section 306(c)(2)(A)(iii) of the FD&C Act.

As a result of the foregoing finding, Mr. Kulakevich is debarred for a period of 5 years from importing or offering for import any drug into the United States, effective (see **DATES**). Pursuant to section 301(cc) of the FD&C Act (21 U.S.C. 331(cc)), the importing or offering for import into the United States of any drug or controlled substance by, with the assistance of, or at the direction of Mr. Kulakevich is a prohibited act.

Any application by Mr. Kulakevich for termination of debarment under section 306(d)(1) of the FD&C Act should be identified with Docket No. FDA–2021–N–0506 and sent to the Dockets Management Staff (see **ADDRESSES**). The public availability of information in these submissions is governed by 21 CFR 10.20(j).

Publicly available submissions will be placed in the docket and will be viewable at *https://www.regulations.gov* or at the Dockets Management Staff (see **ADDRESSES**) between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

Dated: December 28, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–28479 Filed 1–3–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2021–N–1353]

Joint Meeting of the Anesthetic and Analgesic Drug Products Advisory Committee and the Drug Safety and Risk Management Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; establishment of a public docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Anesthetic and Analgesic Drug Products Advisory Committee and the Drug Safety and Risk Management Advisory Committee. The general function of the committees is to provide advice and recommendations to FDA on regulatory issues. The meeting will be open to the public. FDA is establishing a docket for public comment on this document.

DATES: The meeting will be held on February 15, 2022, from 9:30 a.m. to 5 p.m. Eastern Time.

ADDRESSES: Please note that due to the impact of this COVID–19 pandemic, all meeting participants will be joining this advisory committee meeting via an online teleconferencing platform. Answers to commonly asked questions about FDA advisory committee meetings may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.*

FDA is establishing a docket for public comment on this meeting. The docket number is FDA–2021–N–1353. The docket will close on February 14, 2022. Submit either electronic or written comments on this public meeting by February 14, 2022. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before February 14, 2022. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 14, 2022. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Comments received on or before February 1, 2022, will be provided to the committees. Comments received after that date will be taken into consideration by FDA. In the event that the meeting is cancelled, FDA will continue to evaluate any relevant applications or information, and consider any comments submitted to the docket, as appropriate.

You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

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

public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2021–N–1353 for ''Joint Meeting of the Anesthetic and Analgesic Drug Products Advisory Committee and the Drug Safety and Risk Management Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

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

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Moon Hee V. Choi, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 301–796–2894, Fax: 301–847–8533, email: *AADPAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last-minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the FDA's website at *https://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

SUPPLEMENTARY INFORMATION:

Agenda: The meeting presentations will be heard, viewed, captioned, and recorded through an online teleconferencing platform. The committees will be asked to discuss new drug application (NDA) 213231, for tramadol hydrochloride injection, submitted by Avenue Therapeutics, Inc., for the management of moderate to moderately severe pain in adults in a medically supervised healthcare setting. The issues for the committees to discuss include the clinical relevance of tramadol hydrochloride injection, an opioid intended for management of acute pain in a medically supervised healthcare setting, when its onset of action is delayed, and its proposed dosing is a fixed-dosing regimen.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available on FDA's website at the time of the advisory committee meeting. Background material and the link to the online teleconference meeting room will be available at *https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link. The meeting will include slide presentations with audio components to allow the presentation of materials in a manner that most closely resembles an in-person advisory committee meeting.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committees. All electronic and written submissions submitted to the Docket (see **ADDRESSES**) on or before February 1, 2022, will be provided to the committees. Oral presentations from the public will be scheduled between approximately 2 p.m. and 3 p.m. Eastern Time. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before January 24, 2022. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by January 25, 2022.

For press inquiries, please contact the Office of Media Affairs at *fdaoma@fda.hhs.gov* or 301–796–4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Moon Hee V. Choi (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: December 28, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–28474 Filed 1–3–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2019–N–3077]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Obtaining Information To Understand Challenges and Opportunities Encountered by Compounding Outsourcing Facilities

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by February 3, 2022.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The OMB control number for this information collection is 0910–0883. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Ila S. Mizrachi, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–7726, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Obtaining Information To Understand Challenges and Opportunities Encountered by Compounding Outsourcing Facilities

OMB Control Number 0910–0883—Extension

This information collection supports FDA research in obtaining a range of information pertaining to human prescription drug compounding by outsourcing facilities. Generally, drug compounding is the practice of combining, mixing, or altering ingredients of a drug to create a medication tailored to an individual patient's needs. Although compounded drugs can serve an important medical need for certain patients when an approved drug is not medically appropriate, compounded drugs also present a risk to patients. Compounded drugs are not FDA-approved; therefore, they do not undergo FDA premarket review for safety, effectiveness, and quality.

Section 503A of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 353a) describes the conditions that must be satisfied for compounded human prescription drug products to be exempt from certain sections of the FD&C Act: (1) Section 501(a)(2)(B) (21 U.S.C. 351(a)(2)(B)) (current good manufacturing practice (CGMP) requirements), (2) section 502(f)(1) (21 U.S.C. 352(f)(1)) (labeling of drugs with adequate directions for use), and (3) section 505 (21 U.S.C. 355) (approval of drugs under new drug applications or abbreviated new drug applications).

The Drug Quality and Security Act of 2013 (Pub. L. 113–54) created ''outsourcing facilities''—a new industry sector of drug compounders held to higher quality standards to protect patient health. Section 503B of the FD&C Act (21 U.S.C. 353b) describes the conditions that outsourcing facilities must satisfy for drug products compounded in an outsourcing facility by or under the direct supervision of a licensed pharmacist to be exempt from certain sections of the FD&C Act. Outsourcing facilities are intended to offer a more reliable supply of compounded drugs that hospitals, clinics, and other providers need.

FDA continues to find concerning quality and safety problems during inspections of outsourcing facilities. FDA has implemented and will continue to implement programs to support compounding quality and compliance. One initiative is FDA's Compounding Quality Center of Excellence (Center of Excellence), *https://www.fda.gov/drugs/human-drug-compounding/compounding-quality-center-excellence,* which was developed to focus on improving the quality of compounded human prescription drugs to promote patient safety. One of our top priorities is to help ensure that compounded drugs are safe by focusing on quality. FDA, State regulators, pharmacy associations, and compounders, including outsourcing facilities, share the responsibility for patient safety.

The Center of Excellence engages and collaborates with compounders, including outsourcing facilities, and other stakeholders to improve the overall quality of compounded drugs. Furthermore, the Center of Excellence promotes collaboration to help compounders implement robust quality management systems that are better for business and the safety of patients.

To help strengthen the outsourcing facility industry's ability to provide quality compounded drugs to patients who need them, the Center of Excellence offers training sessions and opportunities to develop manufacturing quality and other policies for outsourcing facilities, including CGMPs.

The Center of Excellence offers several training sessions (available at *https://www.fda.gov/drugs/human-drug-compounding/compounding-quality-center-excellence-training-programs*). Self-guided training sessions teach the following topics: (1) Environmental monitoring, (2) sterile drug compounding, (3) cleanroom performance tests, and (4) conducting investigations and formulating corrective and preventive actions. Instructor-led sessions teach the regulatory framework for these topics: (1) Human drug compounding, (2) airflow practices, (3) insanitary conditions and sterility, (4) stability and beyond use dates, (5) requirements for outsourcing facility guides, and (6) conducting investigations and formulating corrective and preventive actions. Management and staff from outsourcing facilities have attended the training sessions. Feedback on the training sessions has been positive, and interest in the sessions continues to grow.

In addition, the Center of Excellence is conducting in-depth research to better understand outsourcing facilities' challenges and opportunities in different areas to help guide decisions regarding future training and other engagement. Outsourcing facilities encounter the following challenges and opportunities: (1) Operational barriers and opportunities related to the outsourcing facility market and business viability, (2) knowledge and operational barriers and opportunities related to

compliance with Federal policies and good quality drug production, and (3) barriers and opportunities related to outsourcing facility interactions with FDA.

FDA used previous research results under this information collection to develop an understanding of the outsourcing facility sector, the sector's challenges, and opportunities for advancement. The information collected was an essential tool to help FDA identify knowledge and information gaps, operational barriers, and views on interactions with FDA. FDA has presented this information in public settings, such as stakeholder meetings. Continuing this collection will enable FDA to deepen our understanding of the outsourcing facility sector and increase our efficacy in developing a Center of Excellence that is responsive to outsourcing facilities' needs. The research results will inform FDA's future activities for the Center of Excellence in the areas of communication, education, training, and other engagement with outsourcing facilities to address challenges and support advancement.

Researchers engage with pharmacists, staff, management from outsourcing facilities, similar compounding businesses, and related stakeholders and may use surveys, interviews, and focus groups to obtain information about outsourcing facilities' challenges and opportunities. Within this context, we may pose the following questions or similar, related questions:

1. What financial and operational considerations inform outsourcing facility operational and business model decisions?
2. What factors impact developing a sustainable outsourcing facility business?
3. What financial and operational considerations inform outsourcing facility product decisions?
4. Do outsourcing facilities understand the Federal laws and policies that apply to them? What, if any, knowledge gaps do we need to address?
5. What are outsourcing facilities' challenges when implementing Federal CGMP requirements?
6. How do outsourcing facilities implement quality practices at their facilities?
7. How do outsourcing facilities develop CGMP and quality expertise? How do they obtain this knowledge, and what training do they need?
8. What are the economic consequences of CGMP noncompliance and product failures for outsourcing facilities?
9. What are outsourcing facility management and staff views on current interactions with FDA? How do they want the interactions to change?
10. What are outsourcing facilities' understanding of how to engage with FDA during and following an inspection?

In the **Federal Register** of October 1, 2021 (86 FR 54450), FDA published a 60-day notice requesting public comment on the proposed collection of information. FDA received one comment from an industry association relating to the quality of questions previously posed to industry stakeholders concerning outsourcing facilities. Specifically, the commenter stated that the proposed questions included in the 60-day notice were insufficient to fully acquire information relating to the challenges and opportunities outsourcing facilities face. Accordingly, the commenter provided a number of additional questions for FDA to use, which the commenter believes will better solicit relevant information. FDA has considered the commenter's additional questions and will take them under advisement for possible inclusion in future studies. However, at this time FDA will not include the commenter's questions in this particular study because we believe the proposed questions listed in the 60-day notice will sufficiently solicit the specific information we are currently seeking.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Surveys, focus groups, and interviews	300	2	600	1	600

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Our original request for the information collection was approved January 21, 2020; however, the subsequent public health emergency inhibited our ability to administer the requested survey. We have therefore made no adjustments to our current burden estimate.

Dated: December 28, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–28465 Filed 1–3–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Statement of Organization, Functions, and Delegations of Authority

This notice amends Part R of the Statement of Organization, Functions and Delegations of Authority of the Department of Health and Human Services (HHS), Health Recourses and Services Administration (HRSA) (60 FR 56605, as amended November 6, 1995; as last amended at 86 FR 48737–48743 dated August 31, 2021).

This reorganization updates the functions of the HIV/AIDS Bureau's Division Policy and Data (RVA).

Chapter RVA—Division of Policy and Data

Section RVA.20 Function

Delete the functional statement for the Division of Policy and Data (RVA) in its entirety and replace with the following:

Division of Policy and Data (RVA)

The Division of Policy and Data serves as the Bureau's focal point for program data collection and analysis, development of policy guidance, advancement of implementation science, and analyses of data for reports for dissemination, coordination of program and clinical performance activities, and technical assistance and training internally and externally. The division directs and manages the portfolio of recipients and programs funded under Special Projects of

National Significance of title XXVI of the Public Health Service Act as amended by the Ryan White HIV/AIDS Treatment Extension Act of 2009, Public Law 111–87 (the Ryan White HIV/AIDS Program), 42 U.S.C. 300ff–101 (§ 2691 of the Public Health Service Act). The Division advises the Bureau's associate administrator and collaborates with division directors to develop policy, evaluation, data, and clinical proposals to support the Bureau's mission. The Division also coordinates and develops efforts with other HHS components and all HRSA Bureaus and Offices, including HRSA's Office of Planning, Analysis and Evaluation and Office of Legislation, in the preparation of HIV-related program policies.

Section RVA.30 Delegation of Authority

All delegations of authority and re-delegations of authority made to officials and employees of affected organizational components will continue in them or their successors pending further redelegation, if allowed, provided they are consistent with this reorganization.

This reorganization is effective upon date of signature.

(Authority: 44 U.S.C. 3101)

Diana Espinosa,

Acting Administrator.

[FR Doc. 2021–28463 Filed 1–3–22; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–New]

Agency Information Collection Request; 60-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before March 7, 2022.

ADDRESSES: Submit your comments to *Sherrette.Funn@hhs.gov* or by calling (202) 795–7714.

FOR FURTHER INFORMATION CONTACT: When submitting comments or requesting information, please include the document identifier 0990-New-60D and project title for reference, to Sherrette A. Funn, email: *Sherrette.Funn@hhs.gov,* or call (202) 795–7714 the Reports Clearance Officer.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collection: Understanding Economic Risk for Low Income Families: Economic Security, Program Benefits, and Decisions about Work.

Type of Collection: New.

OMB No.: 0990–XXXX.

Abstract: The primary purpose of this study is to identify the risks that federal program benefit recipients weigh when faced with an opportunity to increase earnings, including benefit reductions, earnings instability and the ease of regaining lost benefits if needed.

The study will use a discrete choice experiment to explore the importance of these considerations when low-income individuals are presented with a hypothetical opportunity to increase earnings. Statistical analysis will explore interactions between factors and threshold effects. The focus population will be persons currently receiving benefits from at least one of the following programs: Supplemental Nutrition Assistance Program (SNAP), Medicaid/Children's Health Insurance Program (CHIP), housing assistance, Child Care Development Fund (CCDF) subsidies, and/or Temporary Assistance for Needy Families (TANF). The study will explore whether different preferences are exhibited by parents with children and by persons of different races and ethnicities.

The results of this study will provide HHS with a better understanding of the economic risks that people weigh when they make decisions about increasing earnings, which will inform HHS policy and programs at large, and further lines of research around benefit programs and employment decisions.

The length of the request for data collection is one year. The data will be collected once, using primarily a web-based survey, from a sample of low-income persons receiving one or more federal benefit programs. The survey consists of five vignettes presenting different combinations of experimental conditions surrounding a hypothetical earnings increase. In each vignette, respondents will be presented with a scenario where a hypothetical individual is presented with an opportunity to increase their earnings (by accepting a higher hourly wage); consequences of the earnings increase for his or her receipt of benefits; the risk of going back down to the lower, original hourly wage at a later time; and the prospect of re-applying for lost benefits. Respondents will be asked to review the vignette and choose whether they think the hypothetical individual should accept the earnings increase. In addition, the questionnaire includes follow-up questions for each vignette/experimental condition, and a set of demographic questions.

ANNUALIZED BURDEN HOUR TABLE

Number of respondents	Number of responses per respondents	Average burden per response	Total burden hours
Approximately 2,000	1	20/60	667

Sherrette A. Funn,

Paperwork Reduction Act Reports Clearance Officer, Office of the Secretary.

[FR Doc. 2021–28466 Filed 1–3–22; 8:45 am]

BILLING CODE 4150–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Sensory-Motor Neuroscience Study Section.
Date: February 1–2, 2022.
Time: 10:00 a.m. to 8:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive Bethesda, MD 20892 (Virtual Meeting).
Contact Person: John Bishop, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182, MSC 7844, Bethesda, MD 20892, (301) 408–9664, *bishopj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: Cancer Health Disparities.
Date: February 2–3, 2022.
Time: 9:00 a.m. to 6:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Sulagna Banerjee, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 612.309.2479, *sulagna.banerjee@nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Auditory System Study Section.
Date: February 2–3, 2022.
Time: 10:00 a.m. to 8:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Brian H. Scott, Ph.D., Scientific Review Officer, National Institutes of Health, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, 301–827–7490, *brianscott@mail.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Behavioral Neuroendocrinology, Neuroimmunology, Rhythms, and Sleep Study Section.
Date: February 3–4, 2022.
Time: 8:00 a.m. to 7:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Michael Selmanoff, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5164, MSC 7844, Bethesda, MD 20892, 301–435–1119, *selmanom@csr.nih.gov.*

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Kidney, Nutrition, Obesity and Diabetes Study Section.
Date: February 3–4, 2022.
Time: 10:00 a.m. to 8:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Steven Michael Frenk, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3141, Bethesda, MD 20892, (301) 480–8665, *frenksm@mail.nih.gov.*

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Social Sciences and Population Studies A Study Section.
Date: February 3–4, 2022.
Time: 10:00 a.m. to 4:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Suzanne Ryan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3139, MSC 7770, Bethesda, MD 20892, (301) 435–1712, *ryansj@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 29, 2021.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–28482 Filed 1–3–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Eye Council.

The meeting will be held as a virtual meeting on February 11, 2022 and is open to the public as indicated below. The open session (event) will be videocast by NIH with closed captioning at: *https://videocast.nih.gov/watch=44313.* To request reasonable accommodations, please contact *Nathan.Brown2@nih.gov* at least 15 days before the event. The agenda can be found at: *https://www.nei.nih.gov/about/advisory-committees/national-advisory-eye-council-naec/national-advisory-eye-council-naec-meetings.*

A portion of this will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Eye Council.
Date: February 11, 2022.
Open: 10:00 a.m. to 02:00 p.m.
Agenda: Presentation of the NEI Director's report, discussion of NEI programs, and concept clearances.
Place: National Eye Institutes, National Institutes of Health, 6700B Rockledge Drive, Suite 3400, Bethesda, MD 20892 (Virtual Meeting).
Closed: 2:00 p.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Eye Institutes, National Institutes of Health, 6700B Rockledge Drive, Suite 3400, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Kathleen C. Anderson, Ph.D., Director, Division of Extramural Activities, National Eye Institute, National Institutes of Health, 6700B Rockledge Drive, Room 3440, Bethesda, MD 20892, 301–451–2020, *kanders1@nei.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the contact person listed above before the meeting or within 15 days after the meeting. The statement should include the name, address, telephone number and when applicable, the business or

professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *https://www.nei.nih.gov/about/advisory-committees/national-advisory-eye-council-naec,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: December 29, 2021.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–28481 Filed 1–3–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; R25 Review.

Date: January 24, 2022.

Time: 4:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Eliane Lazar-Wesley, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, 6001 Executive Boulevard, Room 8339, MSC 9670, Bethesda, MD 20892–8401, 301–496–8683, *el6r@nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: December 29, 2021.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–28480 Filed 1–3–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Current List of HHS-Certified Laboratories and Instrumented Initial Testing Facilities Which Meet Minimum Standards To Engage in Urine and Oral Fluid Drug Testing for Federal Agencies

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) notifies federal agencies of the laboratories and Instrumented Initial Testing Facilities (IITFs) currently certified to meet the standards of the Mandatory Guidelines for Federal Workplace Drug Testing Programs using Urine or Oral Fluid (Mandatory Guidelines).

FOR FURTHER INFORMATION CONTACT: Anastasia Donovan, Division of Workplace Programs, SAMHSA/CSAP, 5600 Fishers Lane, Room 16N06B, Rockville, Maryland 20857; 240–276–2600 (voice); *Anastasia.Donovan@samhsa.hhs.gov* (email).

SUPPLEMENTARY INFORMATION: In accordance with Section 9.19 of the Mandatory Guidelines, a notice listing all currently HHS-certified laboratories and IITFs is published in the **Federal Register** during the first week of each month. If any laboratory or IITF certification is suspended or revoked, the laboratory or IITF will be omitted from subsequent lists until such time as it is restored to full certification under the Mandatory Guidelines.

If any laboratory or IITF has withdrawn from the HHS National Laboratory Certification Program (NLCP) during the past month, it will be listed at the end and will be omitted from the monthly listing thereafter.

This notice is also available on the internet at *https://www.samhsa.gov/workplace/resources/drug-testing/certified-lab-list.*

The Department of Health and Human Services (HHS) notifies federal agencies of the laboratories and Instrumented Initial Testing Facilities (IITFs) currently certified to meet the standards of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Mandatory Guidelines) using Urine and of the laboratories currently certified to meet the standards of the Mandatory Guidelines using Oral Fluid.

The Mandatory Guidelines using Urine were first published in the **Federal Register** on April 11, 1988 (53 FR 11970), and subsequently revised in the **Federal Register** on June 9, 1994 (59 FR 29908); September 30, 1997 (62 FR 51118); April 13, 2004 (69 FR 19644); November 25, 2008 (73 FR 71858); December 10, 2008 (73 FR 75122); April 30, 2010 (75 FR 22809); and on January 23, 2017 (82 FR 7920).

The Mandatory Guidelines using Oral Fluid were first published in the **Federal Register** on October 25, 2019 (84 FR 57554) with an effective date of January 1, 2020.

The Mandatory Guidelines were initially developed in accordance with Executive Order 12564 and section 503 of Public Law 100–71 and allowed urine drug testing only. The Mandatory Guidelines using Urine have since been revised, and new Mandatory Guidelines allowing for oral fluid drug testing have been published. The Mandatory Guidelines require strict standards that laboratories and IITFs must meet in order to conduct drug and specimen validity tests on specimens for federal agencies. HHS does not allow IITFs to conduct oral fluid testing.

To become certified, an applicant laboratory or IITF must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification, a laboratory or IITF must participate in a quarterly performance testing program plus undergo periodic, on-site inspections.

Laboratories and IITFs in the applicant stage of certification are not to be considered as meeting the minimum requirements described in the HHS Mandatory Guidelines using Urine and/or Oral Fluid. An HHS-certified laboratory or IITF must have its letter of certification from HHS/SAMHSA (formerly: HHS/NIDA), which attests that the test facility has met minimum standards. HHS does not allow IITFs to conduct oral fluid testing.

HHS-Certified Laboratories Approved to Conduct Oral Fluid Drug Testing

In accordance with the Mandatory Guidelines using Oral Fluid dated October 25, 2019 (84 FR 57554), the following HHS-certified laboratories meet the minimum standards to conduct drug and specimen validity tests on oral fluid specimens:

At this time, there are no laboratories certified to conduct drug and specimen validity tests on oral fluid specimens.

HHS-Certified Instrumented Initial Testing Facilities Approved To Conduct Urine Drug Testing

In accordance with the Mandatory Guidelines using Urine dated January 23, 2017 (82 FR 7920), the following HHS-certified IITFs meet the minimum standards to conduct drug and specimen validity tests on urine specimens:

Dynacare, 6628 50th Street NW, Edmonton, AB Canada T6B 2N7, 780–784–1190 (Formerly: Gamma-Dynacare Medical Laboratories).

HHS-Certified Laboratories Approved To Conduct Urine Drug Testing

In accordance with the Mandatory Guidelines using Urine dated January 23, 2017 (82 FR 7920), the following HHS-certified laboratories meet the minimum standards to conduct drug and specimen validity tests on urine specimens:

Alere Toxicology Services, 1111 Newton St., Gretna, LA 70053, 504–361–8989/800–433–3823 (Formerly: Kroll Laboratory Specialists, Inc., Laboratory Specialists, Inc.).

Alere Toxicology Services, 450 Southlake Blvd., Richmond, VA 23236, 804–378–9130 (Formerly: Kroll Laboratory Specialists, Inc., Scientific Testing Laboratories, Inc.; Kroll Scientific Testing Laboratories, Inc.).

Clinical Reference Laboratory, Inc., 8433 Quivira Road, Lenexa, KS 66215–2802, 800–445–6917.

Cordant Health Solutions, 2617 East L Street, Tacoma, WA 98421, 800–442–0438 (Formerly: STERLING Reference Laboratories).

Desert Tox, LLC, 5425 E Bell Rd, Suite 125, Scottsdale, AZ 85254, 602–457–5411/623–748–5045.

DrugScan, Inc., 200 Precision Road, Suite 200, Horsham, PA 19044, 800–235–4890.

Dynacare,* 245 Pall Mall Street, London, ONT, Canada N6A 1P4, 519–679–1630 (Formerly: Gamma-Dynacare Medical Laboratories).

ElSohly Laboratories, Inc., 5 Industrial Park Drive, Oxford, MS 38655, 662–236–2609.

Laboratory Corporation of America Holdings, 7207 N Gessner Road, Houston, TX 77040, 713–856–8288/800–800–2387.

Laboratory Corporation of America Holdings, 69 First Ave., Raritan, NJ 08869, 908–526–2400/800–437–4986 (Formerly: Roche Biomedical Laboratories, Inc.).

Laboratory Corporation of America Holdings, 1904 TW Alexander Drive, Research Triangle Park, NC 27709, 919–572–6900/800–833–3984 (Formerly: LabCorp Occupational Testing Services, Inc., CompuChem Laboratories, Inc.; CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory; Roche CompuChem Laboratories, Inc., A Member of the Roche Group).

Laboratory Corporation of America Holdings, 1120 Main Street, Southaven, MS 38671, 866–827–8042/800–233–6339 (Formerly: LabCorp Occupational Testing Services, Inc.; MedExpress/National Laboratory Center).

LabOne, Inc. d/b/a Quest Diagnostics, 10101 Renner Blvd., Lenexa, KS 66219, 913–888–3927/800–873–8845 (Formerly: Quest Diagnostics Incorporated; LabOne, Inc.; Center for Laboratory Services, a Division of LabOne, Inc.).

Legacy Laboratory Services Toxicology, 1225 NE 2nd Ave., Portland, OR 97232, 503–413–5295/800–950–5295.

MedTox Laboratories, Inc., 402 W County Road D, St. Paul, MN 55112, 651–636–7466/800–832–3244.

Minneapolis Veterans Affairs Medical Center, Forensic Toxicology Laboratory, 1 Veterans Drive, Minneapolis, MN 55417, 612–725–2088. Testing for Veterans Affairs (VA) Employees Only.

Pacific Toxicology Laboratories, 9348 DeSoto Ave., Chatsworth, CA 91311, 800–328–6942 (Formerly: Centinela Hospital Airport Toxicology Laboratory).

Phamatech, Inc., 15175 Innovation Drive, San Diego, CA 92128, 888–635–5840.

Quest Diagnostics Incorporated, 400 Egypt Road, Norristown, PA 19403, 610–631–4600/877–642–2216 (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories).

US Army Forensic Toxicology Drug Testing Laboratory, 2490 Wilson St., Fort George G. Meade, MD 20755–5235, 301–677–7085, Testing for Department of Defense (DoD) Employees Only.

Upon finding a Canadian laboratory to be qualified, HHS will recommend that DOT certify the laboratory (**Federal Register**, July 16, 1996) as meeting the minimum standards of the Mandatory Guidelines published in the **Federal Register** on January 23, 2017 (82 FR 7920). After receiving DOT certification, the laboratory will be included in the monthly list of HHS-certified laboratories and participate in the NLCP certification maintenance program.

Anastasia Marie Donovan,

Policy Analyst, Division of Workplace Programs.

[FR Doc. 2021–28492 Filed 1–3–22; 8:45 am]

BILLING CODE 4162–20–P

* The Standards Council of Canada (SCC) voted to end its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that program were accredited to conduct forensic urine drug testing as required by U.S. Department of Transportation (DOT) regulations. As of that date, the certification of those accredited Canadian laboratories will continue under DOT authority. The responsibility for conducting quarterly performance testing plus periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the U.S. HHS, with the HHS' NLCP contractor continuing to have an active role in the performance testing and laboratory inspection processes. Other Canadian laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as U.S. laboratories do.

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Quarterly IRS Interest Rates Used in Calculating Interest on Overdue Accounts and Refunds on Customs Duties

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This notice advises the public that the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties will remain the same from the previous quarter. For the calendar quarter beginning January 1, 2022, the interest rates for overpayments will be 2 percent for corporations and 3 percent for non-corporations, and the interest rate for underpayments will be 3 percent for both corporations and non-corporations. This notice is published for the convenience of the importing public and U.S. Customs and Border Protection personnel.

DATES: The rates announced in this notice are applicable as of January 1, 2022.

FOR FURTHER INFORMATION CONTACT: Bruce Ingalls, Revenue Division, Collection Refunds & Analysis Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 298–1107.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in

the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 provides different interest rates applicable to overpayments: One for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2021–24, the IRS determined the rates of interest for the calendar quarter beginning January 1, 2022, and ending on March 31, 2022. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (0%) plus three percentage points (3%) for a total of three percent (3%) for both corporations and non-corporations. For corporate overpayments, the rate is the Federal short-term rate (0%) plus two percentage points (2%) for a total of two percent (2%). For overpayments made by non-corporations, the rate is the Federal short-term rate (0%) plus three percentage points (3%) for a total of three percent (3%). These interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties remain the same from the previous quarter. These interest rates are subject to change for the calendar quarter beginning April 1, 2022, and ending on June 30, 2022.

For the convenience of the importing public and U.S. Customs and Border Protection personnel, the following list of IRS interest rates used, covering the period from July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate over-payments (Eff. 1–1–99) (percent)
070174	063075	6	6	
070175	013176	9	9	
020176	013178	7	7	
020178	013180	6	6	
020180	013182	12	12	
020182	123182	20	20	
010183	063083	16	16	
070183	123184	11	11	
010185	063085	13	13	
070185	123185	11	11	
010186	063086	10	10	
070186	123186	9	9	
010187	093087	9	8	
100187	123187	10	9	
010188	033188	11	10	
040188	093088	10	9	
100188	033189	11	10	
040189	093089	12	11	
100189	033191	11	10	
040191	123191	10	9	
010192	033192	9	8	
040192	093092	8	7	
100192	063094	7	6	
070194	093094	8	7	
100194	033195	9	8	
040195	063095	10	9	
070195	033196	9	8	
040196	063096	8	7	
070196	033198	9	8	
040198	123198	8	7	
010199	033199	7	7	6
040199	033100	8	8	7
040100	033101	9	9	8
040101	063001	8	8	7
070101	123101	7	7	6
010102	123102	6	6	5
010103	093003	5	5	4
100103	033104	4	4	3
040104	063004	5	5	4
070104	093004	4	4	3
100104	033105	5	5	4
040105	093005	6	6	5
100105	063006	7	7	6
070106	123107	8	8	7
010108	033108	7	7	6
040108	063008	6	6	5
070108	093008	5	5	4
100108	123108	6	6	5
010109	033109	5	5	4
040109	123110	4	4	3
010111	033111	3	3	2

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate over-payments (Eff. 1–1–99) (percent)
040111	093011	4	4	3
100111	033116	3	3	2
040116	033118	4	4	3
040118	123118	5	5	4
010119	063019	6	6	5
070119	063020	5	5	4
070120	033122	3	3	2

Dated: December 27, 2021.

Crinley S. Hoover,

Acting Chief Financial Officer, U.S. Customs and Border Protection.

[FR Doc. 2021–28489 Filed 1–3–22; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[223D0102DM, DS6CS00000, DLSN00000.000000. DX6CS25; Docket No. DOI–2021–0016]

Request for Information To Inform Interagency Efforts To Develop the American Conservation and Stewardship Atlas

AGENCY: Department of the Interior.

ACTION: Request for information and notice of public listening sessions.

SUMMARY: The Department of the Interior (Department), on behalf of an interagency working group co-led with the Council on Environmental Quality (CEQ), Department of Agriculture (USDA), and Department of Commerce (DOC) through National Oceanic and Atmospheric Administration (NOAA), is soliciting comments to inform how the American Conservation and Stewardship Atlas (Atlas) can best serve as a useful tool for the public and how it should reflect a continuum of conservation actions in the America the Beautiful initiative, recognizing that many uses of lands and waters can be consistent with the long-term health of natural systems and contribute to addressing climate change and environmental injustices. The input received will be used to develop the Atlas.

DATES: Interested persons are invited to submit comments by 11:59 p.m. on March 7, 2022.

The interagency group will host virtual public listening sessions at the dates and times below.

- Thursday, January 13, 2022, 2:00–3:30 p.m. ET
- Wednesday, January 19, 2022, 6:00–7:30 p.m. ET
- Friday, January 21, 2022, 11:00 a.m.–12:30 p.m. ET

Specific details will be posted on the Department's America the Beautiful web page on January 4, 2022. Listening sessions may end before the time noted above if all those participating have completed their oral comments.

ADDRESSES: Comments must be submitted through *https://www.regulations.gov* and will be available for public viewing and inspection. In the Search box, enter the docket number presented above in the document headings. For best results, do not copy and paste the number; instead, type the docket number into the Search box using hyphens. Then, click on the Search button. You may submit a comment by clicking on ''Comment.''

FOR FURTHER INFORMATION CONTACT: Eve Barnett, Policy and Intergovernmental Affairs Analyst, Office of Intergovernmental and External Affairs, Office of the Secretary, Department of the Interior, (202) 208–1923.

SUPPLEMENTARY INFORMATION:

Section 216(a) of Executive Order 14008 established the first-ever national conservation goal, calling for the conservation of ''at least 30 percent of U.S. lands and waters by 2030.'' In accordance with Executive Order 14008, the Department, USDA, DOC, and CEQ released the *Conserving and Restoring America the Beautiful* report on May 6, 2021. The report calls for a decade-long national initiative to advance locally led conservation and restoration on public, private, and Tribal lands and waters. It acknowledges—and celebrates—the wide-ranging contributions that diverse conservation efforts can make to the initiative and its goals of tackling climate change, sustaining biodiversity, and increasing equitable access to nature.

The report emphasizes that there is a continuum of conservation in America that aligns with the guiding principles of the initiative. These core principles commit the effort to:

- Pursue a Collaborative and Inclusive Approach to Conservation
- Conserve America's Lands and Waters for the Benefit of All People
- Support Locally Led and Locally Designed Conservation Efforts
- Honor Tribal Sovereignty and Support the Priorities of Tribal Nations
- Pursue Conservation and Restoration Approaches that Create Jobs and Support Healthy Communities
- Honor Private Property Rights and Support the Voluntary Stewardship Efforts of Private Landowners and Fishers
- Use Science as a Guide
- Build on Existing Tools and Strategies with an Emphasis on Flexibility and Adaptive Approaches

The report also outlines the six areas of focus that elected officials, Tribal leaders, and stakeholders lifted up as early opportunities for successful collaboration: Creating more parks and safe outdoor opportunities in nature-deprived communities; supporting Tribally led conservation and restoration priorities; expanding collaborative conservation of fish and wildlife habitats and corridors; increasing access for outdoor recreation; incentivizing and rewarding the voluntary conservation efforts of fishers, ranchers, farmers, and forest owners; and creating jobs by investing in restoration and resilience.

The report specifies that an interagency working group will develop an Atlas through interagency collaboration to develop and track a clear baseline of information on lands and waters that are conserved or restored. The Atlas is intended to be an accessible, updated, and comprehensive tool through which to measure the progress of conservation, stewardship, and restoration efforts in a manner that reflects the goals and principles of the initiative. The interagency group, co-led by the U.S. Geological Survey (USGS) within the Department as well as USDA and NOAA, in partnership with CEQ and other Federal agencies, will develop the Atlas with input from the public, States, Tribal Nations, scientists, and a wide range of stakeholders. While agencies have already received feedback

on the America the Beautiful initiative from a broad set of stakeholders, this request for information offers a formal comment period to collect input specific to the development of the Atlas. The group is seeking input from the public on the following:

• *Science and Data.* What data sources, standards, and technical approaches should be applied to data included in the Atlas to ensure that it is an authoritative and useful tool for the public?

• *Conservation as a Continuum.* How can the Atlas reflect the meaningful conservation work already underway in America?

○ What stewardship actions should be considered, in addition to permanent protections, to capture a more complete picture of conservation and restoration in America?

○ What are the attributes of lands and waters that should be included in the Atlas? Considerations could include, for example, a clearly defined geographic boundary, status of ecological function, representation of species and habitats, extent of disturbance, expected future risks from climate change or other human stressors, ecosystem connectivity, or durability of management status.

○ How can the Atlas best reflect the contributions of State, local, Tribal, territorial, and private lands?

• *Outcomes.* How can the Atlas best reflect land and water contributions to biodiversity, climate change mitigation and resilience, and equitable access to nature and its benefits?

Additional information about this project can be found at: *https://www.doi.gov/priorities/america-the-beautiful.*

Eric Werwa,

Deputy Assistant Secretary—Policy and Environmental Management, Exercising the Delegated Authority of the Assistant Secretary for Policy, Management and Budget.

[FR Doc. 2021–28548 Filed 1–3–22; 8:45 am]

BILLING CODE 4334–63–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR85672000, 21XR0680A2, RX.31480001.0040000; OMB Control Number 1006–0003]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Bureau of Reclamation Use Authorization Application

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Bureau of Reclamation (Reclamation) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before February 3, 2022.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently Under 30-day Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to Jason Kirby, Bureau of Reclamation, P.O. Box 25007, Denver, CO 80225–0007; or by email to *jkirby@usbr.gov.* Please reference OMB Control Number 1006–0003 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this information collection request (ICR), contact Jason Kirby by email at *jkirby@usbr.gov,* or by telephone at (303) 445–2895. Individuals who are hearing or speech impaired may call the Federal Relay Service at (800) 877–8339 for TTY assistance. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on August 4, 2021 (86 FR 41990). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency 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 response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: Reclamation is responsible for approximately 6.5 million acres of land which directly support Reclamation's Federal water projects in the 17 Western States. Under Title 43 CFR part 429, individuals or entities wanting to use Reclamation's lands, facilities, or waterbodies must apply using Form 7–2540. Examples of such uses are:

—Agricultural uses such as grazing and farming;
—commercial or organized recreation and sporting activities;
—other commercial activities such as ''guiding and outfitting'' and ''filming and photography;'' and,
—resource exploration and extraction, including sand and gravel removal and timber harvesting.

We review applications to determine whether granting individual use authorizations are compatible with Reclamation's present or future uses of the lands, facilities, or waterbodies. When we find a proposed use compatible, we advise the applicant of the estimated administrative costs and estimated application processing time. In addition to the administrative costs, we require the applicant to pay a use fee based on a valuation or by competitive

bidding. If the application is for construction of a bridge, building, or other significant construction project, Reclamation may require that all plans and specifications be signed and sealed by a licensed professional engineer.

Title of Collection: Bureau of Reclamation Use Authorization Application.

OMB Control Number: 1006–0003.

Form Number: Form 7–2540.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Individuals, corporations, companies, and State and local entities who want to use Reclamation lands, facilities, or waterbodies.

Total Estimated Number of Annual Respondents: 225.

Total Estimated Number of Annual Responses: 225.

Estimated Completion Time per Response: 2 hours.

Total Estimated Number of Annual Burden Hours: 450 hours.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: Each time a use authorization is requested.

Total Estimated Annual Non-Hour Burden Cost: None.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq*).

Karen Knight,

Director, Dam Safety and Infrastructure.

[FR Doc. 2021–28470 Filed 1–3–22; 8:45 am]

BILLING CODE 4332–90–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Amended 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 an amended complaint entitled *Certain Video Processing Devices, Components Thereof, and Digital Smart Televisions Containing the Same (II), DN 3578;* the Commission is soliciting comments on any public interest issues raised by the amended complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.*

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 an amended complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of DivX, LLC on December 28, 2021. The original complaint was filed on November 24, 2021, and a notice of receipt of complaint; solicitation of comments relating to the public interest published in the **Federal Register** on December 1, 2021. The amended 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 video processing devices, components thereof, and digital smart televisions containing the same (II). The amended complaint names as respondents: TCL Technology Group Corporation of China; TCL Electronics Holdings Limited of China; TTE Technology, Inc. of Corona, CA; Shenzhen TCL New Technologies Co. Ltd. of China; TCL King Electrical Appliances (Huizhou) Co. Ltd. of China; TCL MOKA International Limited of Hong Kong; and TCL Smart Device (Vietnam) Co., Ltd of Vietnam. The complaint and amended complaint alleges infringement of claims of U.S. Patent Nos. 8,832,297 (the "'297 Patent"), and 8,472,792 (the "'792 Patent") (collectively, "the Asserted Patents") The complainant requests that the Commission issue a permanent limited exclusion order, cease and desist orders and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the amended 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 on the public interest 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. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due. No other submissions will be accepted, unless requested by the Commission. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. Submissions should refer

to the docket number (''Docket No. 3578'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures [1]). Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov.*) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions regarding filing should contact the Secretary *at EDIS3Help@usitc.gov.*

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. appendix 3; or (ii) by U.S. government employees and contract personnel,[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)).

Issued: December 29, 2021.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2021–28500 Filed 1–3–22; 8:45 am]

BILLING CODE 7020–02–P

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1255]

Notice of Request for Submissions on the Public Interest; Certain Apparatus and Methods of Opening Containers

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that, on December 20, 2021, the presiding chief administrative law judge (''CALJ'') issued an Initial Determination Granting Complainant's Motion for Summary Determination Under Section 337 of the Tariff Act of 1930, as Amended, which includes a recommended determination on remedy and bonding should a violation be found in the above-captioned investigation. The Commission is soliciting submissions on public interest issues raised by the recommended relief should the Commission find a violation. This notice is soliciting comments from the public only.

FOR FURTHER INFORMATION CONTACT: Richard P. Hadorn, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–3179. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal, telephone (202) 205–1810.

SUPPLEMENTARY INFORMATION: Section 337 of the Tariff Act of 1930 provides that, if the Commission finds a violation, it shall exclude the articles concerned from the United States:

unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.

19 U.S.C. 1337(d)(1).

The Commission is soliciting submissions on public interest issues raised by the recommended relief should the Commission find a violation, specifically: A general exclusion order directed to certain apparatus and methods of opening containers that are imported, sold for importation, and/or sold after importation that infringe claim 12 of U.S. Patent No. 10,519,016. Parties are to file public interest submissions pursuant to 19 CFR 210.50(a)(4).

The Commission is interested in further development of the record on the public interest in this investigation. Accordingly, members of the public are invited to file submissions of no more than five (5) pages, inclusive of attachments, concerning the public interest in light of the CALJ's recommended relief set forth in the Initial Determination Granting Complainant's Motion for Summary Determination Under Section 337 of the Tariff Act of 1930, as Amended, issued in this investigation on December 20, 2021. Comments should address whether issuance of the recommended remedial order in this investigation, should the Commission find a violation, 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 recommended remedial order are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the recommended order;

(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 recommended order within a commercially reasonable time; and

(v) explain how the recommended order would impact consumers in the United States.

Written submissions from the public must be filed no later than by close of business on January 20, 2022.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (Mar. 19, 2020). Submissions should refer to the investigation number (''Inv. No. 337–TA–1255'') in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment by marking each document with a header indicating that the document contains confidential information. This marking will be deemed to satisfy the request procedure set forth in Rules 201.6(b) and 210.5(e)(2) (19 CFR 201.6(b) & 210.5(e)(2)). Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. 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, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection on EDIS.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

Issued: December 29, 2021.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2021–28502 Filed 1–3–22; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. S&P Global Inc., et al.: Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Order and Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America* v. *S&P Global Inc., et al.,* Civil Action No. 1:21–cv–03003. On November 12, 2021, the United States filed a Complaint alleging that (1) S&P's proposed merger with IHS Markit Ltd. would violate Section 7 of the Clayton Act, 15 U.S.C. 18; and (2) the exclusivity and non-compete provisions of IHS Markit's Data License with GasBuddy LLC violate Section 1 of the Sherman Act, 15 U.S.C. 1. The proposed Final Judgment, filed at the same time as the Complaint: (1) Requires S&P and IHS Markit to divest three price reporting agency businesses, Oil Price Information Services (OPIS), Coals, Metals, and Mining (CMM), and PetrochemWire (PCW); (2) requires S&P and IHS Markit to waive the exclusivity and non-compete provisions of IHS Markit's Data License with GasBuddy; and (3) prohibits S&P, IHS Markit, and OPIS LLC from entering into, enforcing, renewing, or extending the term of any similar exclusive or non-compete provisions.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's website at *https://www.justice.gov/atr* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's website, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments should be submitted in English and directed to Owen Kendler, Chief, Financial Services, Fintech, and Banking Section, Antitrust Division, Department of Justice, 450 Fifth Street NW, Suite 4000, Washington, DC 20530 (email address: *owen.kendler@usdoj.gov*).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

United States District Court for the District of Columbia

United States of America, U.S. Department of Justice, Antitrust Division, 450 Fifth Street NW, Suite 4000, Washington, DC 20530, Plaintiff, v. *S&P Global Inc., 55 Water Street, New York, NY 10041,* and *IHS Markit Ltd., 4th Floor, Ropemaker Place, 25 Ropemaker Street, London, United Kingdom, EC2Y 9LY,* Defendants.

Civil Action No.: 1:21–cv–3003–JEB

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action against S&P Global Inc. (''S&P'') and IHS Markit Ltd. (''IHSM'') to enjoin S&P's proposed merger with IHSM, to enjoin anticompetitive conduct by IHSM, and to obtain other equitable relief. The United States complains and alleges as follows:

I. Introducton

1. On November 30, 2020, S&P and IHSM announced a merger to combine in an all-stock transaction that values IHSM at approximately $44 billion. S&P and IHSM are both financial and commodity information conglomerates, providing market data, indices, news, and analytical tools to participants in various financial and commodity markets around the world.

2. S&P and IHSM operate two of the four global price reporting agencies (''PRAs'') and two of the three leading PRAs in the United States. S&P provides PRA services through its Platts division (''Platts''), while IHSM offers PRA services primarily through its Oil Price Information Services (''OPIS''), Coal, Metals, and Mining (''CMM''), and PetrochemWire (''PCW'') businesses.

3. PRAs provide price assessments, news, and analysis related to numerous commodity markets around the world. PRAs sell their services to commodity industry participants (*e.g.,* oil refiners, commodities traders, large fuel consumers like airlines), that use the information to inform supply and demand decisions, as a reference for price terms in supply contracts, and as the basis for settling hedging instruments like futures contracts.

4. Competition between S&P's Platts division and IHSM's OPIS, CMM, and PCW businesses has resulted in lower prices and increased quality and innovation for PRA customers. The proposed merger would eliminate this significant competition in markets that are already highly concentrated.

5. Accordingly, the proposed merger is likely to lessen competition substantially in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

6. Separately, in 2016, IHSM's OPIS division entered into a 20-year exclusive data license and non-compete agreement (the ''Data License'') with a third-party data provider, GasBuddy LLC (''GasBuddy''), that operates a popular crowd-sourced retail gas price information app and has long provided OPIS with pricing data for resale to commercial customers (*e.g.,* retail gas station operators). This non-compete has effectively prevented and continues to prevent GasBuddy—a company well positioned to enter the retail gas price data market—from launching a data service that would compete with OPIS.

7. Accordingly, the Data License unreasonably restrains trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

II. Parties to the Proposed Merger and the Data License

8. S&P is a New York corporation headquartered in New York, New York. S&P is comprised of four business divisions: S&P Global Ratings, S&P Global Market Intelligence, S&P Dow Jones Indices, and S&P Platts. It reported global 2020 revenues of $7.44 billion.

9. S&P Platts, which offers PRA services, among other products and services, accounts for roughly 12% of S&P's revenue, reporting global 2020 revenues of $878 million.

10. IHSM is a Bermuda corporation headquartered in London, England. IHSM is comprised of four business divisions: Financials Services, Transportation, Consolidated Markets & Solutions, and Resources. It reported global 2020 revenues of $4.29 billion.

11. IHSM provides PRA services primarily through its OPIS, CMM, and PCW businesses, which are housed within IHSM's Resources division. OPIS, CMM, and PCW reported global 2020 revenues of approximately $140 million.

12. GasBuddy is a Delaware limited liability company that provides a crowd-sourced retail gas price information app. From 2013 until 2021, GasBuddy was owned by UCG Holdings LP (''UCG''). In early 2021, UCG sold GasBuddy to Professional Datasolutions, Inc.

III. Jurisdiction and Venue

13. The United States brings this action under Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, and Section 4 of the Sherman Act, 15 U.S.C. 4, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. 18, and to prevent and restrain Defendant IHSM from violating Section 1 of the Sherman Act, 15 U.S.C. 1.

14. Defendants are engaged in, and their activities substantially affect, interstate commerce. Defendants both offer commodity price assessments, news, and analysis throughout the United States. This Court therefore has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. 25, and Section 4 of the Sherman Act, 15 U.S.C. 4, and 28 U.S.C. 1331, 1337(a), and 1345.

15. Defendants have each consented to personal jurisdiction and venue in this jurisdiction for purposes of this action. Venue is proper under Section 12 of the Clayton Act, 15 U.S.C. 22, and under 28 U.S.C. 1391(b) and (c).

IV. Industry Background

16. PRAs provide commodity price assessments, news, and analysis that are critical to the proper functioning of numerous commodity markets. Some commodities, like corn or wheat, are traded on exchanges, which make price information readily accessible. But for many commodities—including many energy commodities like refined petroleum products (*e.g.,* gasoline and jet fuel), coal, and petrochemicals—trading is done off-exchange in private transactions with no reporting obligations. It is in these opaque markets where PRA price assessments are used as a proxy for the prevailing market price.

17. To produce these price assessments, PRAs collect information from commodity suppliers and participants in commodities transactions and then apply proprietary methodologies and editorial judgment. PRAs focus on providing daily price assessments, and often make the assessments available to subscribers via a data feed.

18. In most cases, PRAs assess prices at a given time for a specific commodity at a specific geographic location (*e.g.,* jet fuel in Los Angeles). In addition, most PRAs focus on assessing prices for spot (or bulk) transactions, which happen at the top of the supply chain (*e.g.,* at the refinery gate where the commodity is created). Some PRAs—like OPIS—also sell information regarding commodity prices down the supply chain at the wholesale (referred to as ''rack'' in the industry) and retail levels. In contrast to spot-level PRA services, however, collecting rack and retail prices does not involve any ''assessment.'' Rack and retail prices are posted and PRAs simply collect these posted (or charged) prices from market participants, or through third party aggregators, and then combine and offer the data to end customers. For example, retail gas station prices are knowable and the collection thereof does not require further assessment because gas stations advertise their prices for passing motorists.

19. PRA customers are located worldwide and span a wide range of industries. While major oil and gas companies, commodities traders, and large energy consumers generate the majority of PRA revenues, there are many smaller customers that participate in, or are affected by, commodity markets.

V. Relevant Markets Related to the Proposed Merger

A. Relevant Product Markets

20. S&P, through its Platts division, and IHSM, through its OPIS, CMM, and PCW businesses, both provide PRA services for refined petroleum products (*e.g.,* gasoline and jet fuel), coal, and petrochemicals. More specifically, both companies provide spot-level price assessments, and related news and analysis, for dozens of the same types of refined petroleum products, coal, and petrochemicals, across dozens of the same geographic locations across the United States and the world.

21. PRA services for any particular type of refined petroleum product, coal, or petrochemical are not a reasonable substitute for PRA services for any other type of refined petroleum product, coal, or petrochemical. Similarly, PRA services for a particular commodity at one geographic location are not a reasonable substitute for PRA services for the same commodity at a different geographic location. For example, the spot price of jet fuel in Los Angeles is not a reasonable substitute for a customer seeking the spot price of jet fuel in New York.

22. Despite the lack of substitutability between PRA services for different commodities, or for the same commodity at different geographic locations, spot-level PRA services for U.S.-located (i) refined petroleum products, (ii) coal, and (iii) petrochemicals can be analyzed in the

aggregate because each is offered under similar competitive conditions.

23. Therefore, spot-level PRA services for U.S.-located refined petroleum products, coal, and petrochemicals are each lines of commerce, or relevant product markets, for the purposes of analyzing the effects of the proposed merger under Section 7 of the Clayton Act, Clayton Act, 15 U.S.C. 18.

B. Relevant Geographic Market

24. Commodity market participants looking for spot-level PRA services for U.S.-located refined petroleum products, coal, or petrochemicals cannot reasonably turn to a PRA without significant U.S. operations and an established reputation for accurately reporting commodity prices and developments. To gather the trading details and market intelligence necessary to provide PRA services that customers can trust to reflect current trading conditions, PRAs must have a large number of U.S.-based analysts (referred to as ''price reporters'' in the industry) with close connections to the relevant players, and a detailed understanding of supply and demand dynamics, in the major U.S. trading hubs. In addition, PRA customers value established PRA providers that have a proven track record of accurately covering a given U.S. commodity market.

25. A hypothetical monopolist of spot-level PRA services for refined petroleum products, coal, or petrochemicals in the United States could profitably impose a small but significant non-transitory increase in price for its services without losing sufficient sales to render the price increase unprofitable. Accordingly, spot-level PRA services for refined petroleum products, coal, or petrochemicals in the United States is a relevant market for the purposes of analyzing the effects of the proposed merger under Section 7 of the Clayton Act, Clayton Act, 15 U.S.C. 18.

VI. S&P'S Proposed Merger With IHSM is Likely to Result in Anticompetitive Effects

26. Today, S&P and IHSM compete vigorously in each of the relevant markets, resulting in lower prices and increased quality and innovation for PRA customers.

27. In each of the relevant markets, S&P and IHSM are two of a very small number of companies providing PRA services. In spot-level PRA services for both refined petroleum products and coal in the United States, S&P and IHSM are two of the three companies that generate the vast majority of revenues in the two markets. And in spot-level PRA services for petrochemicals in the United States, S&P and IHSM are two of the four companies that generate the vast majority of revenues.

28. For many price assessments (*e.g.,* the spot price for jet fuel in Los Angeles), one PRA will become the market standard, or benchmark, after an initial period where PRAs vie for market adoption. Once market adoption occurs, that PRA's price assessment becomes embedded in the market ecosystem, as it is frequently referenced in price indexation formulas in supply contracts and in the relevant derivative contracts traded on major derivatives exchanges that are used by market participants to hedge their positions.

29. Competition among PRAs plays out in various forms. As referenced above, PRAs initially vie to become the benchmark price assessment for many commodities. Because benchmark price assessments can generate substantial subscription revenues, PRAs compete fiercely on price, quality, and innovation dimensions to gain benchmark status. And given the ongoing energy transition to more renewable energy sources like biofuels, there are likely to be many new benchmark opportunities in the near future. Established PRAs—like those operated by S&P and IHSM—are often best placed to compete for new benchmark opportunities.

30. Even after one PRA has been chosen as the benchmark, substantial competition remains between the PRAs covering that commodity, including competition (i) among the non-benchmark PRAs to serve as a secondary source for many customers, who use the secondary source as a ''second look'' to check the accuracy of the benchmark provider, and (ii) between the secondary source and the benchmark provider along both price and quality dimensions, resulting from the disciplining effect of this second-look, accuracy check.

31. While it is rare, some commodity markets have switched their benchmark from one PRA to another because of price and/or quality concerns. So, as one industry observer put it, ''[d]espite the enormous difficulties of displacing an incumbent and the extreme rarity of switches, rival PRAs have to nonetheless invest heavily in marketing and in business development staff in order to be considered as a credible alternative during those rare moments when the incumbent stumbles.'' [1]

[1] Owain Johnson, *The Price Reporters: A Guide to PRAs and Commodity Benchmarks* (Routledge 2018) at 34.

32. By eliminating the substantial head-to-head competition that exists today between S&P and IHSM, the proposed merger would result in higher prices and decreased quality and innovation for PRA customers. Accordingly, the proposed merger likely would substantially lessen competition in spot-level PRA services for refined petroleum products, coal, and petrochemicals in the United States.

VII. Absence of Countervailing Factors Related to the Proposed Merger

33. Entry into spot-level PRA services for refined petroleum products, coal, or petrochemicals in the United States is unlikely to be timely, likely, or sufficient to prevent the proposed merger's anticompetitive effects. As S&P and IHSM executives have recognized, barriers to entry into spot-level PRA services for refined petroleum products, coal, or petrochemicals in the United States are high. These barriers to entry include (i) the large sunk costs and significant other expenditures necessary to begin providing commodity price assessments, news, and analysis; (ii) significant time and expense to build a reputation for accurately covering commodity markets; and (iii) the difficulty of displacing a benchmark PRA provider once that PRA's price assessment becomes the benchmark and gets embedded in supply and derivative contracts. Unsurprisingly given all of these barriers, no significant PRA has entered in over 20 years.

34. The proposed merger is unlikely to generate verifiable, merger-specific efficiencies sufficient to reverse or outweigh the anticompetitive effects that are likely to occur.

VIII. The Data License Is an Unreasonable Restraint of Trade

35. As noted above, in addition to offering spot-level PRA services, OPIS also collects and resells information related to retail gas prices, largely in the United States. Since 2009, GasBuddy has been one of OPIS's two main sources of retail gas price data.

36. OPIS resells these data to customers like retail gas station operators or oil refiners, that use the data for competitive benchmarking and to inform supply and demand decisions.

37. In 2012, OPIS learned that ''GasBuddy [saw] a big opportunity in pursuing data sales,'' and GasBuddy notified OPIS in ''October [2012] that they [would] cease providing retail prices to [OPIS] effective Jan. 1 [2013].'' OPIS saw GasBuddy's plan as a significant threat to its retail gas price information business because it would greatly reduce the number of real-time

gas prices that OPIS could provide, and it would also ''greatly intensify competition in the retail pricing space.'' In response, OPIS made a ''tactical plan'' to ''buy[ ] GasBuddy'' to thwart this potential competition.

38. In March 2013, UCG—OPIS's then-owner—followed through with this plan and bought GasBuddy in a transaction that was below the reportability thresholds of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.

39. In 2016, UCG sold OPIS to IHSM, but retained its ownership of GasBuddy. In order to maximize the value of OPIS and prevent GasBuddy from competing with OPIS under IHSM's ownership, UCG had OPIS and GasBuddy enter into the Data License, which (1) gave OPIS exclusive, worldwide rights to GasBuddy's data for 20 years; (2) required OPIS to pay no licensing fees for the data; and (3) subjected GasBuddy to a non-compete provision that restrained it from competing with OPIS or any other firm in the sale of retail gas price data to commercial customers. OPIS summarized the Data License simply as a ''long-term agreement where we are the sole distributor of GasBuddy data and they can't even sell it themselves.''

40. Retail gas price data providers compete to serve commercial customers on both price and quality, and the Data License has prevented—and continues to prevent—GasBuddy from launching a competing retail gas price data service. But for the non-compete agreement, GasBuddy would be free to enter the retail gas price data market and compete with OPIS. The non-compete provision imposed on GasBuddy is a horizontal restraint that stifles competition. The Data License, therefore, has resulted, and continues to result, in higher prices and lower quality in the retail gas price data market.

41. Furthermore, the non-compete provision imposed on GasBuddy was not reasonably necessary to a separate, legitimate transaction or collaboration. For example, the 20-year term of the non-compete was overbroad in its duration. That is, the noncompete was longer than necessary to effectuate and transfer any intellectual property, goodwill, or customer relationships associated with UCG's 2016 sale of OPIS. Nothing about IHSM's 2016 acquisition of OPIS justified a ban on competition between GasBuddy and OPIS until 2036. To the contrary, the non-compete simply inflated the value of OPIS and now protects only IHSM's desire to be free from competition in the market for the sale of retail gas price data.

42. The Data License, therefore, unreasonably restrains trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

IX. Violations Alleged

Count One: Violation of Section 7 of the Clayton Act, 15 U.S.C. 18

43. The United States hereby incorporates the allegations of paragraphs 1 through 42 above as if set forth fully herein.

44. S&P and IHSM are hereby named defendants on Count One of this Complaint.

45. S&P's proposed merger with IHSM is likely to substantially lessen competition in the relevant markets, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

46. Unless enjoined, the proposed merger would likely have the following anticompetitive effects, among others, in the relevant markets:

(a) eliminate present and future competition between S&P and IHSM;

(b) competition generally will be substantially lessened; and

(c) prices will likely increase and quality and innovation will likely decrease.

Count Two: Violation of Section 1 of the Sherman Act, 15 U.S.C. 1

47. The United States hereby incorporates the allegations of paragraphs 1 through 42 above as if set forth fully herein.

48. IHSM is hereby named as the defendant on Count Two of this Complaint.

49. Beginning at least as early as 2016, and continuing to this day, IHSM's subsidiary OPIS has engaged in a contract, the Data License, with GasBuddy that unreasonably restrains trade to OPIS's benefit, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

50. Unless enjoined, the contract would likely continue to have the following anticompetitive effects, among others:

(a) eliminate future competition between OPIS and GasBuddy for the sale of retail gas price information; and

(b) cause prices for retail gas price information to be higher than they would otherwise be and reduce the levels of quality, service, and innovation below what they would be absent the agreement.

X. Request for Relief

51. The United States requests that the Court:

(a) adjudge and decree S&P's proposed merger with IHSM to violate Section 7 of the Clayton Act, 15 U.S.C. 18;

(b) adjudge and decree that the Data License is a contract in unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1;

(c) permanently enjoin Defendants from consummating S&P's proposed merger with IHSM or from entering into or carrying out any other agreement, understanding, or plan by which the assets or businesses of S&P and IHSM would be combined;

(d) permanently enjoin Defendant IHSM from enforcing the non-compete contained in the Data License;

(e) award the United States its costs of this action; and

(f) grant the United States such other relief the Court deems just and proper.

Dated: November 12, 2021

Respectfully Submitted,

Richard A. Powers,
Acting Assistant Attorney General, Antitrust Division.

Kathleen S. O'Neill,
Senior Director of Investigations and Litigation.

Owen M. Kendler,
Chief, Financial Services, Fintech, and Banking Section.

Lisa A. Scanlon,
Assistant Chief, Financial Services, Fintech, and Banking Section.

Travis Chapman,*
Vittorio Cottafavi, Collier Kelley, Rachel Zwolinski,

Trial Attorneys, Financial Services, Fintech, and Banking Section, Antitrust Division, 450 Fifth Street NW, Suite 4000, Washington, DC 20530, Telephone: (202) 353–9006, Email: *travis.chapman@usdoj.gov.*

* Lead Attorney to be noticed.

United States District Court

District of Columbia

United States of America, Plaintiff, v. *S&P Global Inc., IHS Markit Ltd.,* and *Oil Price Information Services, LLC,* Defendants.

Civil Action No.: 1:21–cv–3003–JEB

PROPOSED FINAL JUDGMENT

Whereas, Plaintiff, United States of America, filed its Complaint against S&P Global Inc. (''S&P'') and IHS Markit Ltd. (''IHSM'') on November 12, 2021;

And whereas, pursuant to a Stipulation and Order among S&P, IHSM, and Oil Price Information Services, LLC (''OPIS LLC'') (collectively, ''Defendants'') and Plaintiff, the Court has joined OPIS LLC as a defendant to this action for the

purposes of settlement and for the entry of this Final Judgment;

And whereas, Plaintiff and Defendants, have consented to entry of this Final Judgment without the taking of testimony, without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party relating to any issue of fact or law;

And whereas, S&P and IHSM agree to make a divestiture, and Defendants agree to undertake certain actions to remedy the loss of competition alleged in the Complaint;

And whereas, S&P and IHSM represent that the divestiture to News Corp. required by this Final Judgment can and will be made, Defendants represent that the other relief required by this Final Judgment can and will be made, and Defendants represent that they will not later raise a claim of hardship or difficulty as grounds for asking the Court to modify any provision of this Final Judgment;

Now therefore, it is *ordered, adjudged, and decreed:*

I. Jurisdiction

The Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against S&P and IHSM under Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 1 of the Sherman Act, as amended (15 U.S.C. 1). Pursuant to the Stipulation and Order filed simultaneously with this Final Judgment joining OPIS LLC as a defendant to this action, OPIS LLC has consented to this Court's exercise of specific personal jurisdiction over OPIS LLC in this matter solely for the purposes of settlement and for the entry and enforcement of the Final Judgment.

II. Definitions

As used in this Final Judgment:

A. ''Data License'' means the Data License Agreement between Oil Price Information Service, LLC, and GasBuddy/Open Store, LLC, dated January 5, 2016.

B. ''Divestiture Business'' means (1) IHSM's Oil Price Information Service (''OPIS'') business, including the business known as PetrochemWire and OPIS's 15% stake in PRIMA Regulated Markets Limited and 25% stake in a2i systems A/S, and (2) IHSM's Coals, Metals, and Mining (''CMM'') business.

C. ''Divestiture Assets'' means all of S&P's and IHSM's rights, titles, and interests in and to all property and assets, tangible and intangible, wherever located, (1) owned by the Divestiture Business, or (2) primarily related to or used in connection with, or necessary to the operation of, the Divestiture Business (with the United States, in its sole discretion, to resolve any disagreement regarding which property and assets, tangible and intangible, are Divestiture Assets), including:

1. Lease agreements for offices located at: (a) 2099 Gaither Road, Rockville, MD 20850; (b) 3349 Highway 139, Wall Township, NJ 07719; and (c) 1295 Bandana Boulevard North, Saint Paul, MN 55018;

2. all other real property, including fee simple interests and real property leasehold interests and renewal rights thereto, and improvements to real property, together with all buildings, facilities, and other structures;

3. all tangible personal property, including fixed assets, office equipment and furniture, computer hardware, and supplies;

4. all contracts, contractual rights, and customer relationships, and all other agreements, commitments, and understandings, including supply agreements, teaming agreements, and all outstanding offers or solicitations to enter into a similar arrangement;

5. all licenses, permits, certifications, approvals, consents, registrations, waivers, and authorizations, and all pending applications or renewals;

6. all records and data, including (a) customer lists, accounts, sales, and credits records, (b) manuals and technical information that S&P and IHSM provide to their own employees, customers, suppliers, agents, or licensees, and (c) records and research data concerning historic and current research and development activities;

7. all intellectual property owned, licensed, or sublicensed, either as licensor or licensee, including (a) patents, patent applications, and inventions and discoveries that may be patentable, (b) registered and unregistered copyrights and copyright applications, and (c) registered and unregistered trademarks, trade dress, service marks, trade names, and trademark applications; and

8. all other intangible property, including (a) commercial names and d/b/a names, (b) technical information, (c) design tools and simulation capabilities, (d) computer software and related documentation, know-how, trade secrets, quality assurance and control procedures, and (e) rights in internet websites and internet domain names.

D. ''Divestiture Date'' means the date on which the Divestiture Assets are divested to News Corp. pursuant to this Final Judgment.

E. ''GasBuddy'' means GasBuddy, LLC, a Delaware limited liability company with its headquarters in Boston, Massachusetts, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

F. ''IHSM'' means Defendant IHS Markit Ltd., a Bermuda corporation with its headquarters in London, United Kingdom, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

G. ''Including'' means including, but not limited to.

H. ''OPIS LLC'' means Defendant Oil Price Information Services, LLC, a Maryland limited liability company with its headquarters in Rockville, Maryland, its successors and assigns, and their directors, officers, managers, agents, and employees.

I. ''Relevant Personnel'' means all full-time, part-time, or contract employees of IHSM, wherever located, who work in OPIS or CMM, or whose job responsibilities relate primarily to the operation or management of the Divestiture Business, at any time between November 30, 2020, and the Divestiture Date. The United States, in its sole discretion, will resolve any disagreement regarding which employees are Relevant Personnel.

J. ''News Corp.'' means News Corporation, a Delaware corporation with its headquarters in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

K. ''Regulatory Approvals'' means (1) any approvals or clearances under antitrust, competition, or other U.S. or international laws that are required for the Transaction to proceed; and (2) any approvals or clearances under antitrust, competition, or other U.S. or international laws that are required for News Corp.'s acquisition of the Divestiture Assets to proceed.

L. ''S&P'' means Defendant S&P Global Inc., a New York corporation with its headquarters in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

M. ''Transaction'' means the proposed merger between S&P and IHSM.

III. Applicability

A. This Final Judgment applies to Defendants, as defined above, and all other persons, in active concert or participation with any Defendant, who receive actual notice of this Final Judgment.

B. If, prior to complying with Section IV and Section V of this Final Judgment, S&P and IHSM sell or otherwise dispose of all or substantially all of their assets or of business units that include the Divestiture Assets, S&P and IHSM must require any purchaser to be bound by the provisions of this Final Judgment.

IV. Divestiture

A. S&P and IHSM are ordered and directed, within 30 calendar days after the Court's entry of the Asset Preservation and Hold Separate Stipulation and Order in this matter, to divest the Divestiture Assets in a manner consistent with this Final Judgment to News Corp. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed 90 calendar days in total and will notify the Court of any extensions.

B. If S&P and IHSM have not received all Regulatory Approvals within 30 calendar days after the Court's entry of the Stipulation and Order in this matter, the time period provided in Paragraph IV.A. will be extended until 30 calendar days after all Regulatory Approvals are received. This extension allowed for securing Regulatory Approvals may be no longer than 120 calendar days past the time period provided in Paragraph IV.A., unless the United States, in its sole discretion, consents to an additional extension.

C. S&P and IHSM must use best efforts to divest the Divestiture Assets as expeditiously as possible. S&P and IHSM must take no action that would jeopardize the completion of the divestiture ordered by the Court, including any action to impede the permitting, operation, or divestiture of the Divestiture Assets.

D. Unless the United States otherwise consents in writing, divestiture pursuant to this Final Judgment must include the entire Divestiture Assets and must be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by News Corp. as part of a viable, ongoing business providing commodity price assessments and related news and analysis and that the divestiture to News Corp. will remedy the competitive harm alleged in the Complaint.

E. The divestiture must be accomplished in a manner that satisfies the United States, in its sole discretion, that none of the terms of any agreement between News Corp. and S&P and IHSM give S&P and IHSM the ability unreasonably to raise News Corp.'s costs, to lower News Corp.'s efficiency, or otherwise interfere in the ability of News Corp. to compete effectively in providing commodity price assessments and related news and analysis.

F. S&P and IHSM must cooperate with and assist News Corp. in identifying and, at the option of News Corp., hiring all Relevant Personnel, including:

1. Within 10 business days following the filing of the Complaint in this matter, S&P and IHSM must identify all Relevant Personnel to News Corp. and the United States, including by providing organization charts covering all Relevant Personnel.

2. Within 10 business days following receipt of a request by News Corp. or the United States, S&P and IHSM must provide to News Corp. and the United States additional information relating to Relevant Personnel, including name, job title, reporting relationships, past experience, responsibilities, training and educational histories, relevant certifications, and job performance evaluations. S&P and IHSM must also provide to News Corp. and the United States current and accrued compensation and benefits of Relevant Personnel, including most recent bonuses paid, aggregate annual compensation, current target or guaranteed bonus, if any, any retention agreement or incentives, and any other payments due, compensation or benefited accrued, or promises made to the Relevant Personnel. If S&P and IHSM are barred by any applicable law from providing any of this information, S&P and IHSM must provide, within 10 business days following receipt of the request, the requested information to the full extent permitted by law and also must provide a written explanation of S&P's and IHSM's inability to provide the remaining information, including specifically identifying the provisions of the applicable laws.

3. At the request of News Corp., S&P and IHSM must promptly make Relevant Personnel available for private interviews with News Corp. during normal business hours at a mutually agreeable location.

4. S&P and IHSM must not interfere with any effort by News Corp. to employ any Relevant Personnel. Interference includes offering to increase the compensation or improve the benefits of Relevant Personnel unless (a) the offer is part of a company-wide increase in compensation or improvement in benefits that was announced prior to November 30, 2020 or (b) the offer is approved by the United States in its sole discretion. S&P's and IHSM's obligations under this Paragraph IV.H.4. will expire 180 calendar days after the Divestiture Date.

5. For Relevant Personnel who elect employment with News Corp. within 180 calendar days of the Divestiture Date, S&P and IHSM must waive all non-compete and non-disclosure agreements; vest and pay to the Relevant Personnel (or to News Corp. for payment to the employee) on a prorated basis any bonuses, incentives, other salary, benefits or other compensation fully or partially accrued at the time of the transfer of the employee to News Corp.; vest any unvested pension and other equity rights; and provide all other benefits that those Relevant Personnel otherwise would have been provided had the Relevant Personnel continued employment with S&P and IHSM, including but not limited to any retention bonuses or payments. S&P and IHSM may maintain reasonable restrictions on disclosure by Relevant Personnel of S&P's and IHSM's proprietary non-public information that is unrelated to the Divestiture Assets or the provision of commodity price assessments and related news and analysis and not otherwise required to be disclosed by this Final Judgment.

6. For a period of 12 months from the Divestiture Date, S&P and IHSM may not solicit to rehire Relevant Personnel who were hired by News Corp. within 180 days of the Divestiture Date unless (a) an individual is terminated or laid off by News Corp. or (b) News Corp. agrees in writing that S&P and IHSM may solicit to rehire that individual. Nothing in this Paragraph IV.H.6. prohibits S&P and IHSM from advertising employment openings using general solicitations or advertisements and rehiring Relevant Personnel who apply for an employment opening through a general solicitation or advertisement.

G. S&P and IHSM must warrant to News Corp. that (1) the Divestiture Assets will be operational and without material defect on the date of their transfer to News Corp.; (2) there are no material defects in the environmental, zoning, or other permits relating to the operation of the Divestiture Assets; and (3) S&P and IHSM have disclosed all encumbrances on any part of the Divestiture Assets, including on intangible property. Following the sale of the Divestiture Assets, S&P and IHSM must not undertake, directly or indirectly, challenges to the environmental, zoning, or other permits

relating to the operation of the Divestiture Assets.

H. S&P and IHSM must assign, subcontract, or otherwise transfer all contracts, agreements, and customer relationships (or portions of such contracts, agreements, and customer relationships) included in the Divestiture Assets, including all supply and sales contracts, to News Corp.; *provided, however,* that for any contract or agreement that requires the consent of another party to assign, subcontract, or otherwise transfer, S&P and IHSM must use best efforts to accomplish the assignment, subcontracting, or transfer. S&P and IHSM must not interfere with any negotiations between News Corp. and a contracting party.

I. S&P and IHSM must use best efforts to assist News Corp. to obtain all necessary licenses, registrations, and permits to operate the Divestiture Business. Until News Corp. obtains the necessary licenses, registrations, and permits, S&P and IHSM must provide News Corp. with the benefit of S&P's and IHSM's licenses, registrations, and permits to the full extent permissible by law; *provided, however,* that S&P and IHSM need not assist News Corp. to obtain licenses, registrations, or permits to operate as benchmark administrators.

J. At the option of News Corp., and subject to approval by the United States in its sole discretion, on or before the Divestiture Date, S&P and IHSM must enter into a contract to provide transition services for back office, human resources, accounting, employee health and safety, and information technology services and support for a period of up to 180 days on terms and conditions reasonably related to market conditions for the provision of the transition services. Any amendment to or modification of any provision of a contract to provide transition services is subject to approval by the United States, in its sole discretion. The United States, in its sole discretion, may approve one or more extensions of any contract for transition services, for a total of up to an additional 180 days. If News Corp. seeks an extension of the term of any contract for transition services, Defendants must notify the United States in writing at least 90 days prior to the date the contract expires. News Corp. may terminate a contract for transition services, or any portion of a contract for transition services, without cost or penalty at any time upon commercially reasonable written notice. The employee(s) of S&P and IHSM tasked with providing transition services must not share any competitively sensitive information of News Corp. with any other employee of S&P and IHSM.

K. If any term of an agreement between S&P and IHSM and News Corp., including an agreement to effectuate the divestiture required by this Final Judgment, varies from a term of this Final Judgment, to the extent that S&P and IHSM, OPIS LLC, and News Corp. cannot fully comply with both, this Final Judgment determines S&P's, IHSM's, OPIS LLC's and News Corp.'s obligations.

V. Appointment of Divestiture Trustee

A. If S&P and IHSM have not divested the Divestiture Assets within the period specified in Paragraphs IV. A. and IV.B., S&P and IHSM must immediately notify the United States of that fact in writing. Upon application of the United States, which S&P and IHSM may not oppose, the Court will appoint a divestiture trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets to News Corp.

B. After the appointment of a divestiture trustee by the Court, only the divestiture trustee will have the right to sell the Divestiture Assets. The divestiture trustee will have the power and authority to accomplish the divestiture to News Corp., at a price and on terms obtainable through reasonable effort by the divestiture trustee, subject to the provisions of Sections IV and V of this Final Judgment, and will have other powers as the Court deems appropriate. The divestiture trustee must sell the Divestiture Assets as quickly as possible.

C. The divestiture trustee must notify the United States, S&P, and IHSM at least 7 calendar days before completion of the sale of the Divestiture Assets to News Corp. S&P and IHSM may not object to a sale to News Corp. by the divestiture trustee on any ground other than malfeasance by the divestiture trustee.

D. The divestiture trustee will serve at the cost and expense of S&P and IHSM pursuant to a written agreement, on terms and conditions, including confidentiality requirements and conflict of interest certifications, approved by the United States, in its sole discretion.

E. The divestiture trustee may hire at the cost and expense of S&P and IHSM any agents or consultants, including investment bankers, attorneys, and accountants, that are reasonably necessary in the divestiture trustee's judgment to assist with the divestiture trustee's duties. These agents or consultants will be accountable solely to the divestiture trustee and will serve on terms and conditions, including confidentiality requirements and conflict-of-interest certifications, approved by the United States in its sole discretion.

F. The compensation of the divestiture trustee and agents or consultants hired by the divestiture trustee must be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement that provides the divestiture trustee with incentives based on the price and terms of the divestiture and the speed with which it is accomplished. If the divestiture trustee and S&P and IHSM are unable to reach agreement on the divestiture trustee's compensation or other terms and conditions of engagement within 14 calendar days of the appointment of the divestiture trustee by the Court, the United States, in its sole discretion, may take appropriate action, including by making a recommendation to the Court. Within three business days of hiring an agent or consultant, the divestiture trustee must provide written notice of the hiring and rate of compensation to S&P and IHSM and the United States.

G. The divestiture trustee must account for all monies derived from the sale of the Divestiture Assets sold by the divestiture trustee and all costs and expenses incurred. Within 30 calendar days of the Divestiture Date, the divestiture trustee must submit that accounting to the Court for approval. After approval by the Court of the divestiture trustee's accounting, including fees for unpaid services and those of agents or consultants hired by the divestiture trustee, all remaining money must be paid to S&P and IHSM and the trust will then be terminated.

H. S&P and IHSM must use best efforts to assist the divestiture trustee to accomplish the required divestiture to News Corp. Subject to reasonable protection for trade secrets, other confidential research, development, or commercial information, or any applicable privileges, S&P and IHSM must provide the divestiture trustee and agents or consultants retained by the divestiture trustee with full and complete access to all personnel, books, records, and facilities of the Divestiture Assets. S&P and IHSM also must provide or develop financial and other information relevant to the Divestiture Assets that the divestiture trustee may reasonably request. S&P and IHSM must not take any action to interfere with or to impede the divestiture trustee's accomplishment of the divestiture to News Corp.

I. The divestiture trustee must maintain complete records of all efforts

made to sell the Divestiture Assets to News Corp., including by filing monthly reports with the United States setting forth the divestiture trustee's efforts to accomplish the divestiture ordered by this Final Judgment.

J. If the divestiture trustee has not accomplished the divestiture ordered by this Final Judgment within 180 days of appointment, the divestiture trustee must promptly provide the United States with a report setting forth: (1) The divestiture trustee's efforts to accomplish the required divestiture; (2) the reasons, in the divestiture trustee's judgment, why the required divestiture has not been accomplished; and (3) the divestiture trustee's recommendations for completing the divestiture. Following receipt of that report, the United States may make additional recommendations to the Court. The Court thereafter may enter such orders as it deems appropriate to carry out the purpose of this Final Judgment, which may include extending the trust and the term of the divestiture trustee's appointment by a period requested by the United States.

K. The divestiture trustee will serve until divestiture of all Divestiture Assets to News Corp. is completed or for a term otherwise ordered by the Court.

L. If the United States determines that the divestiture trustee is not acting diligently or in a reasonably cost-effective manner, the United States may recommend that the Court appoint a substitute divestiture trustee.

VI. Financing

S&P and IHSM may not finance all or any part of News Corp.'s purchase of all or part of the Divestiture Assets.

VII. Asset Preservation and Hold Separate Obligations

Defendants must take all steps necessary to comply with the Asset Preservation and Hold Separate Stipulation and Order entered by the Court.

VIII. Affidavits

A. Within 20 calendar days of the filing of the Complaint in this matter, and every 30 calendar days thereafter until the divestiture required by this Final Judgment has been completed, S&P and IHSM must deliver to the United States an affidavit, signed by each S&P's and IHSM's Chief Financial Officer and General Counsel, describing in reasonable detail the fact and manner of S&P's and IHSM's compliance with this Final Judgment. The United States, in its sole discretion, may approve different signatories for the affidavits.

B. S&P and IHSM must keep all records of any efforts made to divest the Divestiture Assets until one year after the Divestiture Date.

C. Within 20 calendar days of the filing of the Complaint in this matter, S&P and IHSM must deliver to the United States an affidavit signed by S&P's and IHSM's Chief Financial Officer and General Counsel, that describes in reasonable detail all actions S&P and IHSM have taken and all steps that S&P and IHSM have implemented on an ongoing basis to comply with Section VII of this Final Judgment. The United States, in its sole discretion, may approve different signatories for the affidavits.

D. If S&P or IHSM makes any changes to actions and steps described in affidavits provided pursuant to Paragraph VIII.D., S&P or IHSM, as applicable, must, within 15 calendar days after any change is implemented, deliver to the United States an affidavit describing those changes.

E. S&P and IHSM must keep all records of any efforts made to comply with Section VII until one year after the Divestiture Date.

IX. Required Conduct

Prior to the Divestiture Date, and no later than five business days after the Court's entry of the Stipulation and Order in this matter, S&P and IHSM must notify GasBuddy in writing that, effective on the date of completion of the Transaction, OPIS LLC (1) waives the exclusivity obligation in the license grant in Section 2(a) of the Data License, so as to render the license of GasBuddy retail data to OPIS LLC non-exclusive; and (2) waives the GasBuddy restrictive covenants, including the non-compete provision enumerated in Section 4(c) of the Data License. Before such written notice is provided to GasBuddy, the form and content of the written notice must be approved by the United States, in its sole discretion.

X. Prohibited Conduct

A. Without the prior written consent of the United States, in its sole discretion, S&P and IHSM will not (1) enter into, enforce, renew, or extend the term of any exclusive licenses for the provision to S&P and IHSM of GasBuddy's data; or (2) enter into, enforce, renew, or extend the term of any non-compete provisions relating to GasBuddy's data.

B. Without the prior written consent of the United States, in its sole discretion, OPIS LLC will not (1) enter into, enforce, renew, or extend the term of any exclusive licenses for the provision to OPIS LLC of GasBuddy's data or U.S. retail gas price data of any other third-party provider; or (2) enter into, enforce, renew, or extend the term of any non-compete provisions relating to GasBuddy's data or U.S. retail gas price data of any other third-party provider.

XI. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment or of related orders such as the Asset Preservation and Hold Separate Stipulation and Order or of determining whether this Final Judgment should be modified or vacated, upon written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, and reasonable notice to Defendants, Defendants must permit, from time to time and subject to legally recognized privileges, authorized representatives, including agents retained by the United States:

1. To have access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, relating to any matters contained in this Final Judgment. The interviews must be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, Defendants must submit written reports or respond to written interrogatories, under oath if requested, relating to any matters contained in this Final Judgment.

C. No information or documents obtained pursuant to this Section may be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party, including grand jury proceedings, for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. In the event of a request by a third party for disclosure of information under the Freedom of Information Act, 5 U.S.C. 552, the Antitrust Division will act in accordance with that statute, and the Department of Justice regulations at 28 CFR part 16, including the provision

on confidential commercial information, at 28 CFR 16.7. Defendants submitting information to the Antitrust Division should designate the confidential commercial information portions of all applicable documents and information under 28 CFR 16.7. Designations of confidentiality expire ten years after submission, ''unless the submitter requests and provides justification for a longer designation period.'' *See* 28 CFR 16.7(b).

E. If at the time that Defendants furnish information or documents to the United States pursuant to this Section, Defendants represent and identify in writing information or documents for which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,'' the United States must give Defendants ten (10) calendar days' notice before divulging the material in any legal proceeding (other than a grand jury proceeding).

XII. No Reacquisition

S&P and IHSM may not reacquire any part of or any interest in the Divestiture Assets during the term of this Final Judgment without prior authorization of the United States.

XIII. Retention of Jurisdiction

The Court retains jurisdiction to enable any party to this Final Judgment to apply to the Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIV. Enforcement of Final Judgment

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Defendants agree that in a civil contempt action, a motion to show cause, or a similar action brought by the United States relating to an alleged violation of this Final Judgment, the United States may establish a violation of this Final Judgment and the appropriateness of a remedy therefor by a preponderance of the evidence, and Defendants waive any argument that a different standard of proof should apply.

B. This Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore the competition the United States alleges was harmed by the challenged conduct. Defendants agree that they may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In an enforcement proceeding in which the Court finds that Defendants have violated this Final Judgment, the United States may apply to the Court for an extension of this Final Judgment, together with other relief that may be appropriate. In connection with a successful effort by the United States to enforce this Final Judgment against a Defendant, whether litigated or resolved before litigation, that Defendant agrees to reimburse the United States for the fees and expenses of its attorneys, as well as all other costs including experts' fees, incurred in connection with that effort to enforce this Final Judgment, including in the investigation of the potential violation.

D. For a period of four years following the expiration of this Final Judgment, if the United States has evidence that a Defendant violated this Final Judgment before it expired, the United States may file an action against that Defendant in this Court requesting that the Court order: (1) Defendant to comply with the terms of this Final Judgment for an additional term of at least four years following the filing of the enforcement action; (2) all appropriate contempt remedies; (3) additional relief needed to ensure the Defendant complies with the terms of this Final Judgment; and (4) fees or expenses as called for by this Section XIV.

XV. Expiration of Final Judgment

Unless the Court grants an extension, this Final Judgment will expire 10 years from the date of its entry, except that after five years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestiture has been completed and continuation of this Final Judgment is no longer necessary or in the public interest.

XVI. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including by making available to the public copies of this Final Judgment and the Competitive Impact Statement, public comments thereon, and any response to comments by the United States. Based upon the record before the Court, which includes the Competitive Impact Statement and, if applicable, any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

[Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16]

_____

United States District Judge

United States District Court

District of Columbia

United States of America, Plaintiff, v. *S&P Global Inc., IHS Markit Ltd.,* and *Oil Price Information Services, LLC,* Defendants.

Civil Action No.: 1:21–cv–3003–JEB

COMPETITIVE IMPACT STATEMENT

In accordance with the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) (the ''APPA'' or ''Tunney Act''), the United States of America files this Competitive Impact Statement related to the proposed Final Judgment filed in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

On November 29, 2020, S&P Global Inc. (''S&P'') and IHS Markit Ltd. (''IHSM'') entered into a merger agreement to combine in an all-stock transaction that values IHSM at approximately $44 billion. Separately, in January 2016, IHSM's Oil Price and Information Services LLC (''OPIS LLC'') division entered into a 20-year exclusive data license and non-compete agreement (''Data License'') with GasBuddy LLC (''GasBuddy''), an operator of a popular crowd-sourced retail gas price information app that has long provided OPIS LLC with pricing data for resale to commercial customers (*e.g.,* retail gas station operators).

The United States filed a civil antitrust Complaint on November 12, 2021, seeking to enjoin both: (1) The consummation of the proposed merger; and (2) the enforcement of the exclusivity and non-compete provisions contained in the Data License. The Complaint alleges that the likely effect of this merger would be to substantially lessen competition for spot-level price reporting agency (''PRA'') services for refined petroleum products, coal, and petrochemicals in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. The Complaint also alleges that the Data License

unreasonably restrains trade in the market for the sale of retail gas price data in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

At the same time the Complaint was filed, the United States filed a proposed Final Judgment and an Asset Preservation and Hold Separate Stipulation and Order (''Stipulation and Order''), which are designed to remedy the loss of competition and the unreasonable restraint on trade alleged in the Complaint.

Under the proposed Final Judgment, which is explained more fully below, S&P and IHSM are required to divest three IHSM PRA businesses: (1) OPIS LLC, which focuses on refined petroleum products; (2) Coal, Metals, and Mining (''CMM''), which focuses predominately on coal; and (3) PetrochemWire (''PCW''), which focuses on petrochemicals. S&P and IHSM have agreed to divest OPIS LLC, CMM, and PCW to News Corporation (''News Corp.''), a global media conglomerate that operates a financial data company, Dow Jones & Company, Inc. (''Dow Jones'').

In addition, under the proposed Final Judgment, S&P and IHSM must waive the exclusivity and non-compete provisions of the Data License between OPIS LLC and GasBuddy. S&P, IHSM, and OPIS LLC are also prohibited, without the prior written consent of the United States, from entering into, enforcing, renewing, or extending the term of any similar exclusive or non-compete provisions.

Under the terms of the Stipulation and Order, until the divestiture is completed, S&P and IHSM must take certain steps to ensure that OPIS LLC, CMM, and PCW remain independent, economically viable, competitive, and saleable. In addition, the management, sales, and operations of these businesses must be held entirely separate, distinct, and apart from S&P's and IHSM's other operations. The purpose of these terms in the Stipulation and Order is to ensure that competition is maintained during the pendency of the required divestiture.

The Stipulation and Order also requires Defendants to abide by and comply with the provisions of the proposed Final Judgment until the proposed Final Judgment is entered by the Court or until expiration of time for all appeals of any Court ruling declining entry of the proposed Final Judgment. On November 16, 2021, the Court entered the Stipulation and Order.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Description of Events Giving Rise to the Alleged Violations

A. The Defendants and the Proposed Merger

S&P is a global financial data conglomerate headquartered in New York, New York and is comprised of four divisions: S&P Global Ratings, S&P Global Market Intelligence, S&P Dow Jones Indices, and S&P Platts. It reported global 2020 revenues of $7.44 billion. It provides PRA services through its S&P Platts division, which reported global 2020 revenues of $878 million and accounts for roughly 12% of S&P's revenue.

IHSM is a global financial data conglomerate headquartered in London, England and is comprised of four divisions: Financial Services, Transportation, Consolidated Markets & Solutions, and Resources. It reported global 2020 revenues of $4.29 billion. It provides PRA services primarily through its OPIS LLC, CMM, and PCW businesses, which are housed within IHSM's Resources division. OPIS LLC, CMM, and PCW reported global 2020 revenues of approximately $140 million and accounts for roughly 3% of IHSM's revenue.

OPIS LLC, currently an IHSM subsidiary, provides PRA services primarily related to refined petroleum products. OPIS LLC will be acquired by News Corp. pursuant to the divestiture required by the proposed Final Judgment.

Pursuant to a merger agreement dated November 29, 2020, S&P intends to merge with IHSM in an all-stock transaction that values IHSM at approximately $44 billion.

B. The Competitive Effects of the Proposed Merger

The Complaint alleges that the likely effect of this merger would be to substantially lessen competition for spot-level PRA services for refined petroleum products, coal, and petrochemicals in the United States.

1. Relevant Product Markets

PRAs provide commodity price assessments, news, and analysis that are critical to the proper functioning of numerous commodity markets. Some commodities, like corn or wheat, are traded on exchanges, which make price information readily accessible. But for many commodities—including many energy commodities like refined petroleum products (*e.g.,* gasoline and jet fuel), coal, and petrochemicals—trading is done off-exchange in private transactions with no reporting obligations. It is in these opaque markets where PRA price assessments are used as a proxy for the prevailing market price.

To produce these price assessments, PRAs collect information from commodity suppliers and participants in commodities transactions and then apply proprietary methodologies and editorial judgment. PRAs focus on providing daily price assessments, and often make the assessments available to subscribers via a data feed.

In most cases, PRAs assess prices at a given time for a specific commodity at a specific geographic location (*e.g.,* jet fuel in Los Angeles). In addition, most PRAs focus on assessing prices for spot (or bulk) transactions, which happen at the top of the supply chain (*e.g.,* at the refinery gate where the commodity is created).

PRA customers are located worldwide and span a wide range of industries. While major oil and gas companies, commodities traders, and large energy consumers generate the majority of PRA revenues, there are many smaller customers that participate in, or are affected by, commodity markets.

S&P, through its Platts division, and IHSM, through its OPIS LLC, CMM, and PCW businesses, both provide PRA services for refined petroleum products (*e.g.,* gasoline and jet fuel), coal, and petrochemicals. More specifically, both companies provide spot-level price assessments, and related news and analysis, for dozens of the same types of refined petroleum products, coal, and petrochemicals, across dozens of the same geographic locations across the United States and the world.

PRA services for any particular type of refined petroleum product, coal, or petrochemical are not a reasonable substitute for PRA services for any of other type of refined petroleum product, coal, or petrochemical. Similarly, PRA services for a particular commodity at one geographic location are not a reasonable substitute for PRA services for the same commodity at a different geographic location.

Despite the lack of substitutability between PRA services for different commodities within each category, or for the same commodity at different geographic locations, spot-level PRA services for U.S.-located (i) refined petroleum products, (ii) coal, and (iii) petrochemicals can be analyzed in the aggregate because each is offered under

similar competitive conditions. Spot-level PRA services for U.S.-located refined petroleum products, coal, and petrochemicals are each lines of commerce, or relevant product markets, for the purposes of analyzing the effects of the proposed merger under Section 7 of the Clayton Act, 15 U.S.C. 18.

2. Relevant Geographic Market

Commodity market participants looking for spot-level PRA services for U.S.-located refined petroleum products, coal, or petrochemicals cannot reasonably turn to a PRA without significant U.S. operations and an established reputation for accurately reporting commodity prices and developments. To provide customers with trustworthy trading details and market intelligence that reflect current trading conditions, PRAs must have a large number of U.S.-based analysts (referred to as ''price reporters'' in the industry) with close connections to the relevant players, and a detailed understanding of supply and demand dynamics, in the major U.S. trading hubs. In addition, PRA customers value established PRA providers that have a proven track record of accurately covering a given U.S. commodity market.

A hypothetical monopolist of spot-level PRA services for refined petroleum products, coal, or petrochemicals in the United States could profitably impose a small but significant non-transitory increase in price for its services without losing sufficient sales to render the price increase unprofitable. Accordingly, there are three relevant markets for the purposes of analyzing the effects of the proposed merger under Section 7 of the Clayton Act, 15 U.S.C. 18: (1) Spot-level PRA services for refined petroleum products in the United States; (2) spot-level PRA services for coal in the United States; and (3) spot-level PRA services for petrochemicals in the United States.

3. Competitive Effects

Today, S&P and IHSM compete vigorously in each of the relevant markets, resulting in lower prices and increased quality and innovation for PRA customers. In each of the relevant markets, S&P and IHSM are two of a few companies providing PRA services. In spot-level PRA services for both refined petroleum products and coal in the United States, S&P and IHSM are two of the three companies that generate the vast majority of revenues in the two markets. In spot-level PRA services for petrochemicals in the United States, S&P and IHSM are two of the four companies that generate the vast majority of revenues.

For many price assessments (*e.g.,* the spot price for jet fuel in Los Angeles), one PRA will become the market standard, or benchmark, after an initial period where PRAs vie for market adoption. Once market adoption occurs, that PRA's price assessment becomes embedded in the market ecosystem, as it is frequently referenced in price indexation formulas in supply contracts and in the relevant derivative contracts traded on major derivatives exchanges that are used by market participants to hedge their positions.

Competition among PRAs plays out in various forms. As referenced above, PRAs initially vie to become the benchmark price assessment for many commodities. Because benchmark price assessments can generate substantial subscription revenues, PRAs compete fiercely on price, quality, and innovation dimensions to gain benchmark status. The ongoing energy transition to more renewable energy sources like biofuels will likely create many new benchmark opportunities in the near future. Established PRAs (*e.g.,* those operated by S&P and IHSM) are often best placed to compete for new benchmark opportunities.

Even after one PRA has been chosen as the benchmark, substantial competition remains between the PRAs covering that commodity, including competition (i) among the non-benchmark PRAs to serve as a secondary source for many customers, who use the secondary source as a ''second look'' to check the accuracy of the benchmark provider, and (ii) between the secondary source and the benchmark provider along both price and quality dimensions, resulting from the disciplining effect of this second-look, accuracy check.

While it is rare, some commodity markets have switched their benchmark from one PRA to another because of price and/or quality concerns. So, as one industry observer put it, ''[d]espite the enormous difficulties of displacing an incumbent and the extreme rarity of switches, rival PRAs have to nonetheless invest heavily in marketing and in business development staff in order to be considered as a credible alternative during those rare moments when the incumbent stumbles.'' [2]

By eliminating the substantial head-to-head competition that exists today between S&P and IHSM, the proposed merger would result in higher prices and decreased quality and innovation for PRA customers. Accordingly, the proposed merger likely would substantially lessen competition in spot-level PRA services for refined petroleum products, coal, and petrochemicals in the United States.

4. Entry and Expansion

Entry into spot-level PRA services for refined petroleum products, coal, or petrochemicals in the United States is unlikely to be timely, likely, or sufficient to prevent the proposed merger's anticompetitive effects. As S&P and IHSM executives have recognized, barriers to entry into spot-level PRA services for refined petroleum products, coal, or petrochemicals in the United States are high. These barriers to entry include (i) the large sunk costs and significant other expenditures necessary to begin providing commodity price assessments, news, and analysis; (ii) significant time and expense to build a reputation for accurately covering commodity markets; and (iii) the difficulty of displacing a benchmark PRA provider once that PRA's price assessment becomes the benchmark and gets embedded in supply and derivative contracts. Unsurprisingly, given all of these barriers, no significant PRA has entered in over 20 years.

C. Competitive Effects of the Exclusive Data License and Non-Compete Agreement

The Complaint alleges that the Data License unreasonably restrains trade in the sale of retail gas price data.

In addition to offering spot-level PRA services, OPIS LLC also collects and resells information related to retail gas prices, largely in the United States. Since 2009, GasBuddy has been one of OPIS LLC's two main sources of retail gas price data. OPIS LLC resells these data to customers like retail gas station operators or oil refiners, that use the data for competitive benchmarking and to inform supply and demand decisions.

In 2012, OPIS LLC learned that ''GasBuddy [saw] a big opportunity in pursuing data sales,'' and GasBuddy notified OPIS LLC in ''October [2012] that they [would] cease providing retail prices to [OPIS LLC] effective Jan. 1 [2013].'' OPIS LLC saw GasBuddy's plan as a significant threat to its retail gas price information business because it would greatly reduce the number of real-time gas prices that OPIS LLC could provide, and it would also ''greatly intensify competition in the retail pricing space.'' In response, OPIS LLC made a ''tactical plan'' to ''buy[ ] GasBuddy'' to thwart this potential competition.

In March 2013, UCG Holdings LP (''UCG'')—OPIS LLC's then-owner—

[2] Owain Johnson, *The Price Reporters: A Guide to PRAs and Commodity Benchmarks* (Routledge 2018) at 34.

followed through with this plan and bought GasBuddy in a transaction that was below the reportability thresholds of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.

In 2016, UCG sold OPIS LLC to IHSM, but retained its ownership of GasBuddy. In order to maximize the value of OPIS LLC and prevent GasBuddy from competing with OPIS LLC under IHSM's ownership, UCG had OPIS LLC and GasBuddy enter into the Data License, which (1) gave OPIS LLC exclusive, worldwide rights to GasBuddy's data for 20 years; (2) required OPIS LLC to pay no licensing fees for the data; and (3) subjected GasBuddy to a non-compete provision that restrained it from competing with OPIS LLC or any other firm in the sale of retail gas price data to commercial customers. OPIS LLC summarized the Data License simply as a ''long-term agreement where we are the sole distributor of GasBuddy data and they can't even sell it themselves.''

Retail gas price data providers compete to serve commercial customers on both price and quality, and the Data License has prevented—and continues to prevent—GasBuddy from launching a competing retail gas price data service. But for the non-compete agreement, GasBuddy would be free to enter the retail gas price data market and compete with OPIS LLC. The non-compete provision imposed on GasBuddy is a horizontal restraint that stifles competition. The Data License, therefore, has resulted, and continues to result, in higher prices and lower quality in the retail gas price data market.

Furthermore, the non-compete provision imposed on GasBuddy was not reasonably necessary to a separate, legitimate transaction or collaboration. For example, the 20-year term of the non-compete was overbroad in its duration. That is, the noncompete was longer than necessary to effectuate and transfer any intellectual property, goodwill, or customer relationships associated with UCG's 2016 sale of OPIS LLC. Nothing about IHSM's 2016 acquisition of OPIS LLC justified a ban on competition between GasBuddy and OPIS LLC until 2036. To the contrary, the non-compete simply inflated the value of OPIS LLC and now protects only IHSM's desire to be free from competition in the market for the sale of retail gas price data.

The Data License, therefore, unreasonably restrains trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment remedies the anticompetitive effects of the proposed merger by requiring S&P and IHSM to divest OPIS LLC, CMM, and PCW to preserve competition in the markets for spot-level PRA services for refined petroleum products, coal, and petrochemicals in the United States. The United States has evaluated News Corp. and deemed it a suitable acquirer of the businesses, with the incentive, acumen, experience, and financial ability to successfully operate and grow the businesses.

The proposed Final Judgment also addresses the anticompetitive effects of the Data License by requiring S&P and IHSM to waive the exclusivity and non-compete provisions in the agreement with GasBuddy. S&P, IHSM, and OPIS LLC are also prohibited, without the prior written consent of the United States, from entering into, enforcing, renewing, or extending the term of any similar provisions. The waiver of the exclusivity and non-compete provisions in the Data License will allow GasBuddy to compete in the market for sale of retail gas price data.

A. Divestiture

Paragraph IV.A of the proposed Final Judgment requires S&P and IHSM to divest the OPIS LLC, CMM, and PCW businesses to News Corp. The divestiture must be completed within 30 calendar days after the entry of the Stipulation and Order by the Court, unless (1) the United States, in its sole discretion, agrees to one or more extensions not to exceed 90 calendar days in total; or (2) S&P and IHSM have not received all of the regulatory approvals required for their proposed merger, in which case the deadline for completion of the divestiture will be within 30 calendar days of the receipt of all required approvals. The assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the assets can and will be operated by News Corp. as a viable, ongoing business that can compete effectively to provide spot-level PRA services for refined petroleum products, coal, and petrochemicals in the United States. S&P and IHSM must take all reasonable steps necessary to accomplish the divestiture quickly and must cooperate with News Corp.

B. Divestiture Assets

The proposed Final Judgment requires S&P and IHSM to divest the OPIS, CMM, and PCW businesses. Specifically, defendants must divest all of S&P's and IHSM's rights, titles, and interests in and to all property and assets, tangible and intangible, wherever located, (1) owned by OPIS LLC, CMM, and PCW, or (2) primarily related to or used in connection with, or necessary to the operation of, OPIS LLC, CMM, and PCW (collectively, the ''Divestiture Assets''). The United States, in its sole discretion, will resolve any disagreement regarding which property and assets, tangible and intangible, are Divestiture Assets.

C. Personnel

The proposed Final Judgment contains provisions intended to facilitate News Corp.'s efforts to hire certain employees. Specifically, Paragraph IV.F of the proposed Final Judgment requires S&P and IHSM to provide News Corp. and the United States with organization charts and information relating to these employees and to make them available for interviews. It also provides that S&P and IHSM must not interfere with any negotiations by News Corp. to hire these employees.

In addition, for employees who elect employment with News Corp., S&P and IHSM must waive all non-compete and non-disclosure agreements, vest all unvested pension and other equity rights, provide any pay pro rata, provide all compensation and benefits that those employees have fully or partially accrued, and provide all other benefits that the employees would generally be provided had those employees continued employment with S&P and IHSM, including but not limited to any retention bonuses or payments.

Paragraph IV.F further provides that S&P and IHSM may not solicit to rehire any of those employees who were hired by News Corp. within 180 days of the date of the divestiture, unless an employee is terminated or laid off by News Corp. or News Corp. agrees in writing that S&P and IHSM may solicit to rehire that individual. The non-solicitation period runs for 12 months from the date of divestiture for employees hired within 180 days of the date of the divestiture. A 12-month non-solicitation period is necessary in this matter because many OPIS LLC, CMM, and PCW executives, price reporters, and data analysts are integral to the successful operation of the Divestiture Assets. The ability of PRAs to gather trustworthy trading details and market intelligence is dependent largely on the close industry connections, and the detailed understanding of industry supply and demand dynamics, of its employees. Ensuring that News Corp. will have a full complement of

experienced PRA employees during its first year operating the to-be-divested businesses will position News Corp. to compete effectively against its PRA competitors. Notably, this non-solicitation provision does not prohibit S&P and IHSM from advertising employment openings using general solicitations or advertisements and re-hiring anyone who applies for an opening through a general solicitation or advertisement.

D. Customer Contracts, Licensing, and Transition Services Agreements

The proposed Final Judgment will facilitate the transfer to News Corp. of customers and other contractual relationships that are included within the Divestiture Assets. Paragraph IV.H of the proposed Final Judgment requires S&P and IHSM to assign, subcontract, or otherwise transfer all contracts, agreements, and customer relationships (or portions of such contracts, agreements, and customer relationships) included in the Divestiture Assets, including all supply and sales contracts, to News Corp. For any contract or agreement that requires the consent of another party to assign, subcontract, or otherwise transfer, S&P and IHSM must use best efforts to accomplish the assignment, subcontracting, or transfer. S&P and IHSM also must not interfere with any negotiations between News Corp. and a contracting party.

Paragraph IV.I of the proposed Final Judgment requires S&P and IHSM to use best efforts to assist News Corp. to obtain all necessary licenses, registrations, and permits to operate the Divestiture Assets, except with respect to S&P's and IHSM's licenses, registrations, or permits to operate as benchmark administrators, for which News Corp. intends to use the services of a third-party benchmark administrator. Until News Corp. obtains the necessary licenses, registrations, and permits, S&P and IHSM must provide News Corp. with the benefit of S&P's and IHSM's licenses, registrations, and permits to the full extent permissible by law.

The proposed Final Judgment requires S&P and IHSM to provide certain transition services to maintain the viability and competitiveness of the Divestiture Assets during the transition to News Corp. Paragraph IV.J of the proposed Final Judgment requires S&P and IHSM, at News Corp.'s option, to enter into a transition services agreement for back office, human resources, accounting, employee health and safety, and information technology services and support for a period of up to 180 days on terms and conditions reasonably related to market conditions for the provision of the transition services. Any amendment to or modification of any provision of a contract to provide transition services is subject to approval by the United States, in its sole discretion. The United States, in its sole discretion, may approve one or more extensions of any contract for transition services, for a total of up to an additional 180 days. If News Corp. seeks an extension of the term of any contract for transition services, Defendants must notify the United States in writing at least 90 days prior to the date the contract expires. News Corp. may terminate a contract for transition services, or any portion of a contract for transition services, without cost or penalty at any time upon commercially reasonable written notice. The employee(s) of S&P and IHSM tasked with providing transition services must not share any competitively sensitive information of News Corp. with any other employee of S&P and IHSM.

E. Appointment of Divestiture Trustee

If S&P and IHSM do not accomplish the divestiture within the period prescribed in Paragraphs IV.A and IV.B of the proposed Final Judgment, Section V of the proposed Final Judgment provides that the Court will appoint a divestiture trustee selected by the United States to effect the divestiture. If a divestiture trustee is appointed, the proposed Final Judgment provides that S&P and IHSM must pay all costs and expenses of the trustee. The divestiture trustee's commission must be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After the divestiture trustee's appointment becomes effective, the trustee must provide monthly reports to the United States setting forth his or her efforts to accomplish the divestiture. If the divestiture has not been accomplished within 180 days of the divestiture trustee's appointment, the United States may make recommendations to the Court, which will enter such orders as appropriate, in order to carry out the purpose of the Final Judgment, including by extending the trust or the term of the divestiture trustee's appointment.

F. Required and Prohibited Conduct Related to the Data License

In order to restore competition in the retail gas price data market, the proposed Final Judgment requires S&P and IHSM to waive the exclusivity and non-compete provisions contained in the Data License and prohibits S&P, IHSM, and OPIS LLC from entering into similar exclusive licenses or non-compete arrangements. Non-compete provisions that are broader than necessary to protect a legitimate business interest—such as the 20-year non-compete on GasBuddy contained in the Data License—operate as unreasonable horizontal restraints that stifle competition. The elimination of these provisions in this matter will allow GasBuddy, the most likely entrant and potential competitor to OPIS LLC in providing retail gas price data to commercial customers in the United States, to bring much-needed competition to the space.

Section IX of the proposed Final Judgment requires S&P and IHSM, no later than five business days after the Court's entry of the Stipulation and Order, to notify GasBuddy that they waive the exclusivity and non-compete provisions contained in the Data License. Paragraph X.A prohibits S&P and IHSM, without the prior written consent of the United States, in its sole discretion, from entering into, enforcing, renewing, or extending the term of any exclusive licenses for, or non-compete provisions relating to, GasBuddy's data. Paragraph X.B prohibits OPIS LLC, without the prior written consent of the United States, in its sole discretion, from entering into, enforcing, renewing, or extending the term of any exclusive licenses for the provision to OPIS LLC of GasBuddy's data or the U.S. retail gas price data of any other third party, or non-compete provisions relating to GasBuddy's data or the U.S. retail gas price data of any other third-party provider.

G. Enforcement and Expiration of the Proposed Final Judgment

The proposed Final Judgment also contains provisions designed to promote compliance with and make enforcement of the Final Judgment as effective as possible. Paragraph XIV.A provides that the United States retains and reserves all rights to enforce the Final Judgment, including the right to seek an order of contempt from the Court. Under the terms of this paragraph, Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance with the Final Judgment with the standard of proof

that applies to the underlying offense that the Final Judgment addresses.

Paragraph XIV.B provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to remedy the loss of competition the United States alleges would otherwise be harmed by the proposed merger and the exclusivity and non-compete provisions of the Data License. Defendants agree that they will abide by the proposed Final Judgment and that they may be held in contempt of the Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XIV.C provides that if the Court finds in an enforcement proceeding that a Defendant has violated the Final Judgment, the United States may apply to the Court for an extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph XIV.C provides that, in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation, the Defendant must reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with that effort to enforce this Final Judgment, including the investigation of the potential violation.

Paragraph XIV.D states that the United States may file an action against a Defendant for violating the Final Judgment for up to four years after the Final Judgment has expired or been terminated. This provision is meant to address circumstances such as when evidence that a violation of the Final Judgment occurred during the term of the Final Judgment is not discovered until after the Final Judgment has expired or been terminated or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the Final Judgment has expired or been terminated. This provision, therefore, makes clear that, for four years after the Final Judgment has expired or been terminated, the United States may still challenge a violation that occurred during the term of the Final Judgment.

Finally, Section XV of the proposed Final Judgment provides that the Final Judgment will expire ten years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestiture has been completed and continuation of the Final Judgment is no longer necessary or in the public interest.

IV. Remedies Available to Potential Private Plaintiffs

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment neither impairs nor assists the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, the comments and the United States' responses will be published in the **Federal Register** unless the Court agrees that the United States instead may publish them on the U.S. Department of Justice, Antitrust Division's internet website.

Written comments should be submitted in English to: Owen M. Kendler, Chief, Financial Services, Fintech, and Banking Section, Antitrust Division, United States Department of Justice, 450 Fifth St. NW, Suite 4000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against S&P's merger with IHSM and the exclusivity and non-compete provisions of the Data License. The United States is satisfied, however, that the relief required by the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for spot-level PRA services for refined petroleum products, coal, and petrochemicals in the United States and promoting competition for retail gas price data in the United States. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation but avoids the time, expense, and uncertainty of a full trial on the merits.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

Under the Clayton Act and APPA, proposed Final Judgments, or ''consent decrees,'' in antitrust cases brought by the United States are subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the

violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States* v. *U.S. Airways Grp., Inc.,* 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the ''court's inquiry is limited'' in Tunney Act settlements); *United States* v. *InBev N.V./S.A.,* No. 08–1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a proposed Final Judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable'').

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's Complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not ''make de novo determination of facts and issues.'' *United States* v. *W. Elec. Co.,* 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Instead, ''[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General.'' *W. Elec. Co.,* 993 F.2d at 1577 (quotation marks omitted). ''The court should also bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is the one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest.'' *Microsoft,* 56 F.3d at 1460 (quotation marks omitted); *see also United States* v. *Deutsche Telekom AG,* No. 19–2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would ''have enormous practical consequences for the government's ability to negotiate future settlements,'' contrary to congressional intent. *Microsoft,* 56 F.3d at 1456. ''The Tunney Act was not intended to create a disincentive to the use of the consent decree.'' *Id.*

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g., Microsoft,* 56 F.3d at 1461 (recognizing courts should give ''due respect to the Justice Department's . . . view of the nature of its case''); *United States* v. *Iron Mountain, Inc.,* 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) (''In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' (internal citations omitted)); *United States* v. *Republic Servs., Inc.,* 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting ''the deferential review to which the government's proposed remedy is accorded''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (''A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case.''). The ultimate question is whether ''the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.' '' *Microsoft,* 56 F.3d at 1461 (*quoting W. Elec. Co.,* 900 F.2d at 309).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *see also U.S. Airways,* 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using judgments proposed by the United States in antitrust enforcement, Public Law 108–237 § 221, and added the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2); *see also U.S. Airways,* 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). ''A court can make its public interest determination based on the competitive impact statement and response to public comments alone.'' *U.S. Airways,* 38 F. Supp. 3d at 76 (citing *Enova Corp.,* 107 F. Supp. 2d at 17).

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: December 20, 2021.

Respectfully submitted,

For Plaintiff United States of America:

Travis Chapman,

United States Department of Justice, Antitrust Division, 450 5th St. NW, Suite 7100, Washington, DC 20530, Telephone: 202–598–8229, Email: travis.chapman@usdoj.gov.

[FR Doc. 2021–28484 Filed 1–3–22; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

[OMB Number 1110–0068]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Revision of a Currently Approved Collection

AGENCY: Criminal Justice Information Services Division, Federal Bureau of Investigation, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Criminal Justice Information Services Division, Federal Bureau of Investigation, Department of Justice, is submitting 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.

DATES: The Department of Justice encourages public comment and will accept input until February 3, 2022.

ADDRESSES: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Gerry Lynn Brovey, Supervisory Information Liaison Specialist, FBI, CJIS, Resources Management Section, Administrative Unit, Module C–2, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306; phone: 304–625–4320 or email *glbrovey@fbi.gov.* Written comments and/or recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the [Component or Office name], including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection:* Revision of a currently approved collection.

2. *The Title of the Form/Collection:* Records Modification Form.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* FD–1115. The applicable component within the Department of Justice is the Criminal Justice Information Services Division, Federal Bureau of Investigation.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: This form is utilized by criminal justice and affiliated judicial agencies to request appropriate modification of criminal history information from an individual's record.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 105 respondents are authorized to complete the form which would require approximately 5 minutes. The total number of respondents is reoccurring with an annual response of 79,756.

6. *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 6,646 total annual burden hours associated with this collection.

If additional information is required, contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: December 29, 2021.

Melody Braswell,

Department Clearance Officer for the PRA, U.S. Department of Justice.

[FR Doc. 2021–28498 Filed 1–3–22; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

[OMB Number 1110–0058]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension With Change of an Approved Collection; National Incident-Based Reporting System (NIBRS)

AGENCY: Federal Bureau of Investigation (FBI), Department of Justice (DOJ).

ACTION: 30-Day notice and request for comments.

SUMMARY: The DOJ, FBI, Criminal Justice Information Services (CJIS) Division, will be submitting the following information collection request to the Office of Management and Budget for review and approval in accordance with the Paperwork Reduction Act (PRA) of 1995.

DATES: Comments are encouraged and will be accepted for 30 days until March 7, 2022.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the FBI, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether, and if so, how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses).

Overview of This Information Collection

1. *Type of Information Collection:* Revision of an approved collection.

2. *The Title of the Form/Collection:* National Incident-Based Reporting System.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number is 1110–0058. The applicable component within the DOJ is the CJIS Division of the FBI.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Federal, state, local, and tribal law enforcement agencies (LEAs).

Abstract: Under Title 28, United States Code (U.S.C.), section (§) 534, subsections (a) and (c); the Uniform Federal Crime Reporting Act of 1988, 34 U.S.C. 41303; the Hate Crime Statistics Act, 34 U.S.C. 41305, modified by the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (2009), Public Law (Pub. L.) § 4708; the Anti-Arson Act of 1982, 18 U.S.C. 841 note; the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 34 U.S.C. 41309; the USA Patriot Improvement and Reauthorization Act of 2005, Public Law 109–177, 307, subsection (e) Reporting of Cargo Theft, 120 Statutes at Large 193, 240 (2006); and 34 U.S.C. 12532, this collection requests incident data from federal, state, local, and tribal LEAs in order for the FBI Uniform Crime Reporting (UCR) Program to serve as the national clearinghouse for the collection and dissemination of incident data and to release these statistics in the following publications: *Crime in the United States, Hate Crime Statistics, Law Enforcement Officers Killed and Assaulted,* and *National Incident-Based Reporting System.* NIBRS is a data collection which allows LEAs to collect information on each crime occurrence. The FBI designed NIBRS to generate data as a byproduct of federal, state, and local automated records management systems (RMS). NIBRS collects data on each incident and arrest within 28 crime categories comprised of 71 specific crimes called Group A offenses. For each of the offenses coming to the attention of law enforcement, various details about the crime are collected. In addition to the Group A offenses, arrest data only are reported for 13 Group B offense categories. When reporting data via the traditional Summary Reporting System (SRS), LEAs tally the occurrences of 10 Part I crimes.

The most significant difference between NIBRS and the traditional SRS is the degree of detail in reporting. NIBRS is capable of producing more detailed, accurate, and meaningful information because data are collected about when and where crime takes place, what form it takes, and the characteristics of its victims and perpetrators. Although most of the general concepts for collecting, scoring, and reporting the UCR data in the SRS apply in NIBRS (*e.g.,* jurisdictional rules), there are some important differences between the two data collection systems. The SRS employs the Hierarchy Rule, *i.e.,* in a multiple-offense incident, only the most serious offense is reported, and only 10 Part I offenses can be reported. The many advantages NIBRS has over the SRS include, but are not limited to, reports up to 10 offenses occurring during the incident; revised, expanded, and new offense definitions; more specificity in reporting and using offense and arrest data for 28 Group A offense categories encompassing 71 crimes; distinguishes between attempted and completed Group A crimes; provides crimes against society; includes victim-to-offender data, circumstance, drug-related offenses, offenders suspected use of drugs, and expanded computer crime; and provides updated reports tied directly to the original incident. The Group A offense categories include animal cruelty; arson; assault offenses; bribery; burglary/breaking and entering; commerce violations; * counterfeiting/forgery; destruction/damage/vandalism of property; drug/narcotic offenses; embezzlement; espionage; * extortion/blackmail; fraud offenses; fugitive offenses; * gambling offenses; homicide offenses; human trafficking; immigration violations; * kidnapping/abduction; larceny/theft offenses; motor vehicle theft; pornography/obscene material; prostitution offenses; robbery; sex offenses; stolen property offenses; treason; * and weapon law violations. The 13 Group B offense categories, for which only arrest data are collected, include bad checks; bond default; * curfew/loitering/vagrancy violations; disorderly conduct; driving under the influence; drunkenness; family offenses, nonviolent; federal resource violation; * liquor law violations; peeping tom; perjury; * trespass of real property; and all other offenses. (Offense categories followed by an asterisk (*) denote those reported by federal and tribal LEAs only.) In 2019, NIBRS began collecting additional data values to capture information on domestic violence, cargo theft, and negligent manslaughter.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The number of LEAs submitting data to the FBI UCR Program via NIBRS as of September 7, 2021 is 10,284. The FBI designed NIBRS to generate data as a byproduct of federal, state, and local automated RMS. Many LEAs have RMS capable of producing a myriad of statistics to meet their particular needs. LEAs forward only the data required by NIBRS to participate in the FBI UCR Program. Each month, it takes approximately two hours for an average respondent to respond, which is an annual burden of 24 hours. Two hours is the time required for a law enforcement agency's RMS to download NIBRS data and send the information to the state UCR program (if applicable). The state UCR program then forwards the data to the FBI.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with the NIBRS data collection is 237,000 hours (9,875 LEAs × 24 hours annually = 237,000 total annual hours).

If additional information is required, contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: December 29, 2021.

Melody Braswell,

Department Clearance Officer for the PRA, U.S. Department of Justice.

[FR Doc. 2021–28493 Filed 1–3–22; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

Corrected Notice of Lodging of Proposed Consent Decree Under the Oil Pollution and Clean Water Acts

On December 22, 2021, the United States' Department of Justice lodged a proposed Consent Decree with the U.S. District Court for the Eastern District of Louisiana in *United States* v. *Taylor Energy Company LLC,* Civil Case No. 20–2910 (E.D. La.). A previously published version of this notice incorrectly stated that the Consent Decree was lodged on December 20, 2021.

The Complaint in this civil action, filed on October 23, 2020, seeks removal costs, civil penalties, and natural resource damages (NRD) under Section 1002 and 1004 of the Oil Pollution Act (OPA), 33 U.S.C. 2702 and 2704, and Section 311 of the Clean Water Act, 33 U.S.C. 1321. These claims arise from the

discharge of oil from Taylor Energy Company LLC's (Taylor Energy's) former oil production facility on the Outer Continental Shelf in the Gulf of Mexico, which began when the facility was damaged during a hurricane in September 2004.

Under the proposed Consent Decree, Taylor Energy will pay approximately $43.5 million—all of the company's available remaining assets—allocated as $15 million to a civil penalty, $16.5 million to NRD, and over $12 million to the U.S. Coast Guard removal costs, to resolve the civil claims arising from the oil discharge. The State of Louisiana is a co-trustee for natural resources injured by the spill, and the NRD money is a joint recovery to be used for natural resource restoration projects selected by the federal and State trustees. Taylor Energy will also transfer to the U.S. Department of the Interior (DOI)'s Bureau of Ocean and Energy Management (BOEM) over $432 million currently held in a trust for plugging the seafloor oil wells and otherwise decommissioning the facility, and the company will be barred from interfering in any way with the Bureau of Safety and Environmental Enforcement's (BSEE's) decommissioning work. Likewise, Taylor Energy commits not to interfere with the Coast Guard's oil containment and removal actions and agrees to turn over to DOI and the Coast Guard documents (including data, studies, reports, etc.) relating to the site to assist in the decommissioning and response efforts. Upon liquidation, Taylor Energy will transfer the value of its remaining assets to the U.S. as its final payment.

In addition, the proposed Consent Decree requires the company to dismiss with prejudice its numerous lawsuits against the U.S., including challenges to the Coast Guard's decision to install a spill containment system and an appeal of the Coast Guard's denial of Taylor Energy's $353 million spill-cost reimbursement claim submitted to the U.S. Oil Spill Liability Trust Fund.

The United States Department of Justice filed the proposed Consent Decree on behalf of the Coast Guard, DOI, and the federal and State trustees for natural resources. The designated federal trustees for the natural resources impacted by Taylor Energy's oil spill are the U.S. Department of Commerce through the National Oceanic and Atmospheric Administration (NOAA) and DOI through the U.S. Fish and Wildlife Service. The designated State trustees are the Louisiana Oil Spill Coordinator's Office, Department of Public Safety & Corrections; Louisiana Department of Natural Resources; Louisiana Department of Environmental Quality; Louisiana Department of Wildlife and Fisheries; and the Louisiana Coastal Protection and Restoration Authority.

The publication of this corrected notice opens a 40-day period for public comment on the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Taylor Energy Company LLC,* DJ# 90–5–1–1–11008/2, Civil Case No. 20–2910 (E.D. La.). All comments must be submitted no later than 40 days after the publication date of this corrected notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the proposed Consent Decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the proposed Consent Decree upon written request and payment of reproduction costs. Please mail your request and enclose a check or money order for $14.50 (25 cents per page reproduction cost) payable to the United States Treasury to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Thomas Carroll,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2021–28497 Filed 1–3–22; 8:45 am]

BILLING CODE 4410–15–P

NUCLEAR REGULATORY COMMISSION

[NRC–2021–0221]

Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving Proposed No Significant Hazards Considerations and Containing Sensitive Unclassified Non-Safeguards Information and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment request; notice of opportunity to comment, request a hearing, and petition for leave to intervene; order imposing procedures.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) received and is considering approval of three amendment requests. The amendment requests are for Three Mile Island, Unit 2, Quad Cities Nuclear Power Station, Units 1 and 2, and Prairie Island Nuclear Generating Plant, Units 1 and 2. For each amendment request, the NRC proposes to determine that the request involves no significant hazards consideration (NSHC). Because each amendment request contains sensitive unclassified non-safeguards information (SUNSI), an order imposes procedures to obtain access to SUNSI for contention preparation by persons who file a hearing request or petition for leave to intervene.

DATES: Comments must be filed by February 3, 2022. A request for a hearing or petitions for leave to intervene must be filed by March 7, 2022. Any potential party as defined in section 2.4 of title 10 of the *Code of Federal Regulations* (10 CFR) who believes access to SUNSI is necessary to respond to this notice must request document access by January 14, 2022.

ADDRESSES: You may submit comments by any of the following methods however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *Federal rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2021–0221. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–

A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Rhonda Butler, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–8025, email: *Rhonda.Butler@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2021–0221, facility name, unit number(s), docket number(s), application date, and subject when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2021–0221.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, 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 (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. Eastern Time (ET), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2021–0221 facility name, unit number(s), docket number(s), application date, and subject, in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Pursuant to Section 189a.(2) of the Atomic Energy Act of 1954, as amended (the Act), the NRC is publishing this notice. The Act requires the Commission to publish notice of any amendments issued or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves NSHC, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This notice includes notices of amendments containing SUNSI.

III. Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve NSHC. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated, or (2) create the possibility of a new or different kind of accident from any accident previously evaluated, or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is further noted.

The Commission is seeking public comments on these proposed determinations. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendments until the expiration of 60 days after the date of publication of this notice. The Commission may issue any of these license amendments before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue any of these amendments prior to the expiration of the 30-day comment period if circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility. If the Commission takes action prior to the expiration of either the comment period or the notice period, it will publish a notice of issuance in the **Federal Register**. If the Commission makes a final no significant hazards consideration determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

A. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any persons (petitioner) whose interest may be affected by any of these actions may file a request for a hearing and petition for leave to intervene (petition) with respect to that action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309. The NRC's regulations are accessible electronically from the NRC Library on the NRC's website at *https://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a petition is filed, the Commission or a presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

As required by 10 CFR 2.309(d) the petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements for standing: (1) The name, address, and telephone number of the petitioner; (2) the nature of the petitioner's right to be made a party to the proceeding; (3) the nature and extent of the petitioner's

property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the petitioner's interest.

In accordance with 10 CFR 2.309(f), the petition must also set forth the specific contentions that the petitioner seeks to have litigated in the proceeding. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner must provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion that support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue. The petition must include sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact. Contentions must be limited to matters within the scope of the proceeding. The contention must be one that, if proven, would entitle the petitioner to relief. A petitioner who fails to satisfy the requirements at 10 CFR 2.309(f) with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene. Parties have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that party's admitted contentions, including the opportunity to present evidence, consistent with the NRC's regulations, policies, and procedures.

Petitions must be filed no later than 60 days from the date of publication of this notice. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii). The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document.

If a hearing is requested, and the Commission has not made a final determination on the issue of NSHC, the Commission will make a final determination on the issue of NSHC. The final determination will serve to establish when the hearing is held. If the final determination is that the amendment request involves NSHC, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of the amendment unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission no later than 60 days from the date of publication of this notice. The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document, and should meet the requirements for petitions set forth in this section, except that under 10 CFR 2.309(h)(2) a State, local governmental body, or Federally recognized Indian Tribe, or agency thereof does not need to address the standing requirements in 10 CFR 2.309(d) if the facility is located within its boundaries. Alternatively, a State, local governmental body, Federally recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

If a petition is submitted, any person who is not a party to the proceeding and is not affiliated with or represented by a party may, at the discretion of the presiding officer, be permitted to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of his or her position on the issues but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to the limits and conditions as may be imposed by the presiding officer. Details regarding the opportunity to make a limited appearance will be provided by the presiding officer if such sessions are scheduled.

B. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings including documents filed by an interested State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof that requests to participate under 10 CFR 2.315(c), must be filed in accordance with 10 CFR 2.302. The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases, to mail copies on electronic storage media, unless an exemption permitting an alternative filing method, as further discussed, is granted. Detailed guidance on electronic submissions is located in the Guidance for Electronic Submissions to the NRC (ADAMS Accession No. ML13031A056) and on the NRC website at *https://www.nrc.gov/site-help/e-submittals.html.*

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *Hearing.Docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* After a digital ID certificate is obtained and a docket created, the participant must submit adjudicatory documents in Portable Document Format. Guidance on submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. ET on the due date. Upon receipt of a transmission, the E-Filing system timestamps the document and sends the submitter an email confirming receipt of the document. The E-Filing system also distributes an email that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not

serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed to obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., ET, Monday through Friday, excluding government holidays.

Participants who believe that they have good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted in accordance with 10 CFR 2.302(b)–(d). Participants filing adjudicatory documents in this manner are responsible for serving their documents on all other participants. Participants granted an exemption under 10 CFR 2.302(g)(2) must still meet the electronic formatting requirement in 10 CFR 2.302(g)(1), unless the participant also seeks and is granted an exemption from 10 CFR 2.302(g)(1).

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket, which is publicly available at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the presiding officer. If you do not have an NRC-issued digital ID certificate as previously described, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information such as social security numbers, home addresses, or personal phone numbers in their filings unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants should not include copyrighted materials in their submission.

Exelon Generation Company, LLC; Quad Cities Nuclear Power Station, Units 1 and 2; Rock Island County, IL

Docket No(s)	50–254, 50–265.
Application Date	September 14, 2021, as supplemented by letter(s) dated November 3, 2021.
ADAMS Accession No	ML21257A419 (Package), ML21307A444.
Location in Application of NSHC	Pages 8–10 of Attachment 1.
Brief Description of Amendment(s)	The proposed amendment would revise the Technical Specifications 5.6.5, ''Core Operating Limits Report [COLR],'' paragraph b, to add a report that supports the General Electric Standard Application for Reactor Fuel analysis methodology to the list of approved methods to be used in determining the core operating limits in the COLR. The licensee also plans to utilize Framatome RODEX2A methodology with an additional thermal conductivity degradation penalty in mixed core thermal-mechanical calculations. Additionally, in support of the proposed transition to GNF3 fuel, Exelon Generation Company proposes to revise the alternative source term loss-of-coolant accident analysis to use a bounding core inventory.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Tamra Domeyer, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.
NRC Project Manager, Telephone Number	Booma Venkataraman, 301–415–2934.

Northern States Power Company—Minnesota; Prairie Island Nuclear Generating Plant, Units 1 and 2; Goodhue County, MN

Docket No(s)	50–282, 50–306.
Application Date	October 2, 2021.
ADAMS Accession No	ML21277A173.
Location in Application of NSHC	Pages 8 and 9 of Enclosure 1.
Brief Description of Amendment(s)	The proposed amendment would revise Technical Specification 3.3.1, ''Reactor Trip System (RTS) Instrumentation'' for the power range (PR) RTS instrumentation channels. The proposed change would allow the PR RTS instrumentation channels to be bypassed during surveillance testing. The proposed amendment would also allow the input relays for the PR RTS instrumentation channels to be excluded from the Channel Operation Test.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Peter M. Glass, Assistant General Counsel, Xcel Energy, 414 Nicollet Mall—401–8, Minneapolis, MN 55401.
NRC Project Manager, Telephone Number	Robert Kuntz, 301–415–3733.

TMI–2 Solutions, LLC; Three Mile Island Unit 2; Londonderry Township, Dauphin County, PA

Docket No(s)	50–320.
Application Date	September 21, 2021.
ADAMS Accession No	ML21267A510 (Package).
Location in Application of NSHC	Pages 1–4 of Attachment 1.
Brief Description of Amendment(s)	The amendment would revise the TMI–2 site security plan to one that is compliant with 10 CFR part 37.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Russ Workman, General Counsel, EnergySolutions, 299 South Main Street, Suite 1700, Salt Lake City, UT 84111.
NRC Project Manager, Telephone Number	Theodore Smith, 301–415–6721.

Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation

TMI–2 Solutions, LLC; Three Mile Island Unit 2; Londonderry Township, Dauphin County, PA

Exelon Generation Company, LLC; Quad Cities Nuclear Power Station, Units 1 and 2; Rock Island County, IL

Northern States Power Company—Minnesota; Prairie Island Nuclear Generating Plant, Units 1 and 2; Goodhue County, MN

A. This Order contains instructions regarding how potential parties to this proceeding may request access to documents containing SUNSI.

B. Within 10 days after publication of this notice of hearing and opportunity to petition for leave to intervene, any potential party who believes access to SUNSI is necessary to respond to this notice may request access to SUNSI. A ''potential party'' is any person who intends to participate as a party by demonstrating standing and filing an admissible contention under 10 CFR 2.309. Requests for access to SUNSI submitted later than 10 days after publication of this notice will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

C. The requestor shall submit a letter requesting permission to access SUNSI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Deputy General Counsel for Licensing, Enforcement and Hearings, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is: U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852. The email address for the Office of the Secretary and the Office of the General Counsel are *Hearing.Docket@nrc.gov* and *RidsOgcMailCenter.Resource@nrc.gov,* respectively.[1] The request must include the following information:

(1) A description of the licensing action with a citation to this **Federal Register** notice;

(2) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in C.(1); and

(3) The identity of the individual or entity requesting access to SUNSI and the requestor's basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. In particular, the request must explain why publicly available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention.

D. Based on an evaluation of the information submitted under paragraph C.(3) the NRC staff will determine within 10 days of receipt of the request whether:

(1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding; and

(2) The requestor has established a legitimate need for access to SUNSI.

E. If the NRC staff determines that the requestor satisfies both D.(1) and D.(2), the NRC staff will notify the requestor in writing that access to SUNSI has been granted. The written notification will contain instructions on how the requestor may obtain copies of the requested documents, and any other conditions that may apply to access to those documents. These conditions may include, but are not limited to, the signing of a Non-Disclosure Agreement or Affidavit, or Protective Order[2] setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI.

F. Filing of Contentions. Any contentions in these proceedings that are based upon the information received as a result of the request made for SUNSI must be filed by the requestor no later than 25 days after receipt of (or access to) that information. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.

G. Review of Denials of Access.

(1) If the request for access to SUNSI is denied by the NRC staff after a determination on standing and requisite need, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

(2) The requestor may challenge the NRC staff's adverse determination by filing a challenge within 5 days of receipt of that determination with: (a) The presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an Administrative Law Judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

(3) Further appeals of decisions under this paragraph must be made pursuant to 10 CFR 2.311.

H. Review of Grants of Access. A party other than the requestor may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed within 5 days of the notification by the NRC staff of its grant of access and must be filed with: (a) The presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an Administrative Law Judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[3]

I. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR part 2.

[1] While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's ''E-Filing Rule,'' the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

[2] Any motion for Protective Order or draft Non-Disclosure Affidavit or Agreement for SUNSI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 30 days of the deadline for the receipt of the written access request.

[3] Requestors should note that the filing requirements of the NRC's E-Filing Rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012) apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI request submitted to the NRC staff under these procedures.

The attachment to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

It is so ordered.

Dated: December 15, 2021.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION IN THIS PROCEEDING

Day	Event/activity
0	Publication of **Federal Register** notice of hearing and opportunity to petition for leave to intervene, including order with instructions for access requests.
10	Deadline for submitting requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) with information: Supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding.
60	Deadline for submitting petition for intervention containing: (i) Demonstration of standing; and (ii) all contentions whose formulation does not require access to SUNSI (+25 Answers to petition for intervention; +7 petitioner/requestor reply).
20	U.S. Nuclear Regulatory Commission (NRC) staff informs the requestor of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows need for SUNSI. (NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents).
25	If NRC staff finds no "need" or no likelihood of standing, the deadline for petitioner/requestor to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds "need" for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access.
30	Deadline for NRC staff reply to motions to reverse NRC staff determination(s).
40	(Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI.
A	If access granted: Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff.
A + 3	Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI consistent with decision issuing the protective order.
A + 28	Deadline for submission of contentions whose development depends upon access to SUNSI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of opportunity to request a hearing and petition for leave to intervene), the petitioner may file its SUNSI contentions by that later deadline.
A + 53	(Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI.
A + 60	(Answer receipt +7) Petitioner/Intervenor reply to answers.
>A + 60	Decision on contention admission.

[FR Doc. 2021–27492 Filed 1–3–22; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2020–15; MC2022–34 and CP2022–41; MC2022–35 and CP2022–42; MC2022–36 and CP2022–43]

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 filings, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* January 6, 2022.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*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 3011.301.[1]

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information,

Continued

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 3030, and 39 CFR part 3040, 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 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2020–15; *Filing Title:* USPS Notice of Amendment to Priority Mail Express, Priority Mail & First-Class Package Service Contract 67, Filed Under Seal; *Filing Acceptance Date:* December 28, 2021; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* January 6, 2022.

2. *Docket No(s).:* MC2022–34 and CP2022–41; *Filing Title:* USPS Request to Add Priority Mail & First-Class Package Service Contract 213 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 28, 2021; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* January 6, 2022.

3. *Docket No(s).:* MC2022–35 and CP2022–42; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & First-Class Package Service Contract 78 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 28, 2021; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* January 6, 2022.

4. *Docket No(s).:* MC2022–36 and CP2022–43; *Filing Title:* USPS Request to Add First-Class Package Service Contract 119 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 28, 2021; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* January 6, 2022.

This Notice will be published in the **Federal Register**.

Jennie L. Jbara,

Alternate Certifying Officer.

[FR Doc. 2021–28499 Filed 1–3–22; 8:45 am]

BILLING CODE 7710–FW–P

June 27, 2018, Attachment A at 19–22 (Order No. 4679).

POSTAL SERVICE

Sunshine Act Meetings

TIME AND DATE: Wednesday, January 12, 2022, at 9:30 a.m.; Wednesday, January 12, 2022, at 4:00 p.m.

PLACE: Washington, DC, at U.S. Postal Service Headquarters, 475 L'Enfant Plaza SW, in the Benjamin Franklin Room.

STATUS: Wednesday, January 12, 2022, at 9:30 a.m.—Closed. Wednesday, January 12, 2022, at 4:00 p.m.—Open.

MATTERS TO BE CONSIDERED:

Wednesday, January 12, 2022, at 9:30 a.m. (Closed)

1. Strategic Issues.
2. Financial and Operational Matters.
3. Administrative Items.

Wednesday, January 12, 2022, at 4:00 p.m. (Open)

1. Remarks of the Vice Chairman of the Board of Governors.
2. Remarks of the Postmaster General and CEO.
3. Board Leadership.

CONTACT PERSON FOR MORE INFORMATION: Michael J. Elston, Secretary of the Board of Governors, U.S. Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260–1000. Telephone: (202) 268–4800.

Michael J. Elston,

Secretary.

[FR Doc. 2021–28560 Filed 12–30–21; 4:15 pm]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 2:00 p.m. on Thursday, January 6, 2022.

PLACE: The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at *https://www.sec.gov.*

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

The subject matter of the closed meeting will consist of the following topics:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Resolution of litigation claims; and

Other matters relating to examinations and enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting agenda items that may consist of adjudicatory, examination, litigation, or regulatory matters.

CONTACT PERSON FOR MORE INFORMATION: For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Authority: 5 U.S.C. 552b.

Dated: December 30, 2021.

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2021–28559 Filed 12–30–21; 4:15 pm]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

Interest Rates

The Small Business Administration publishes an interest rate called the optional ''peg'' rate (13 CFR 120.214) on a quarterly basis. This rate is a weighted average cost of money to the government for maturities similar to the average SBA direct loan. This rate may be used as a base rate for guaranteed fluctuating interest rate SBA loans. This rate will be 1.75 percent for the January–March quarter of FY 2022.

Pursuant to 13 CFR 120.921(b), the maximum legal interest rate for any third party lender's commercial loan which funds any portion of the cost of a 504 project (see 13 CFR 120.801) shall be 6% over the New York Prime rate or,

if that exceeds the maximum interest rate permitted by the constitution or laws of a given State, the maximum interest rate will be the rate permitted by the constitution or laws of the given State.

John Wade,

Chief, Secondary Market Division.

[FR Doc. 2021–28467 Filed 1–3–22; 8:45 am]

BILLING CODE P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2021–0015]

Privacy Act of 1974; System of Records

AGENCY: Social Security Administration (SSA).

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, we are issuing public notice of our intent to modify an existing system of records entitled, Master Files of Social Security Number (SSN) Holders and SSN Applications (60–0058), last published on December 29, 2010. This notice publishes details of the modified system as set forth below under the caption, **SUPPLEMENTARY INFORMATION**.

DATES: The system of records notice (SORN) is applicable upon its publication in today's **Federal Register**, with the exception of the new routine uses, which are effective *February 3, 2022.* We invite public comment on the routine uses or other aspects of this SORN. In accordance with the Privacy Act of 1974, we are providing the public a 30-day period in which to submit comments. Therefore, please submit any comments by February 3, 2022.

ADDRESSES: The public, Office of Management and Budget (OMB), and Congress may comment on this publication by writing to the Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, SSA, Room G–401 West High Rise, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, or through the Federal e-Rulemaking Portal at *http://www.regulations.gov.* Please reference docket number SSA–2021–0015. All comments we receive will be available for public inspection at the above address and we will post them to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Melissa M. Bellitto, Government Information Specialist, Privacy Implementation Division, Office of Privacy and Disclosure, Office of the General Counsel, SSA, Room G–401 West High Rise, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, telephone: (410) 966–5855, email: *melissa.m.bellitto@ssa.gov.*

SUPPLEMENTARY INFORMATION: We are modifying routine uses and adding new routine uses to this SORN. We are modifying routine uses:

- Number 1 that permits disclosures to employees (or agents on their behalf) to complete records for reporting wages;
- Number 25 that permits disclosures to the Department of Education for postsecondary education purposes;
- Number 32 that permits disclosures to the Department of Homeland Security for administration of E-Verify; and
- Number 40 that permits disclosures to the Corporation for National and Community Service for administration of the National and Community Service Act.

We are clarifying the language in existing routine use numbers 3, 4, 5, 11, 15, 18, 20, 22, 23, 29, and 47 for easier reading.

We are adding routine uses that will permit disclosures to contractors, cooperative agreement awardees, Federal and State agencies, Federal congressional support agencies for research and statistical activities that increase knowledge of SSA programs; to State agencies or other local protective social service agencies, in situations involving suspected abuse, neglect, or exploitation of minor children or vulnerable adults; to State vital records agencies who have a contract with SSA, when necessary to inform the State vital records agency that death information it reported to SSA was determined to be erroneous; to the Department of Treasury for disclosure and verification of prisoner information for the purposes of tax administration, debt collections, and improper payments or collections of delinquent debts owed to the United States, as well as to State and Federal agencies for conducting statistical and research activities; to the Department of Health and Human Services Office of Child Support Enforcement for the administration of the Federal Parent Locator System; and to the Office of the President in response to an inquiry from that office made on behalf of, and at the request of, the subject of the record or a third party acting on the subject's behalf.

In addition, we are also deleting the following routine uses, from the prior version of the SORN, published in the **Federal Register** on December 29, 2010 at 75 FR 82121, as they are covered under existing routine uses or no longer necessary:

- Number 5—this routine use permitted disclosures to a contractor for the purpose of collating, evaluating, analyzing, aggregating, or otherwise refining records;
- Number 7—this routine use permitted disclosures to the Department of Energy, for its epidemiological research study of the long-term effects of low-level radiation exposure, as permitted by SSA Regulations 20 CFR 401.150(c);
- Number 26—this routine use permitted disclosures to DVA or third parties under contract to DVA to disclose SSNs and dates of birth for the purposes of conducting medical research and epidemiological studies;
- Number 38 that permits disclosure to Federal, State, or congressional support agencies for research, evaluation, or statistical studies;
- Number 39—this routine use permitted disclosure to State and Territory motor vehicle administration agency officials, and to State and Territory chief election officials to verify the accuracy of information the State Agency provides with response to applications for voter registration; and
- Number 44—this routine use permitted disclosures to the Department of Health and Human Services, the Department of Agriculture's National Finance Center, the Office of Personnel Management, the States, or the States' respective contractors or agents charged with administering the Pre-existing Condition Insurance Program (PCIP), to verify personal identification data (*e.g.,* name, SSN, and date of birth) and to confirm citizenship status information in our records to assist these agencies with determining applicants' entitlement to benefits under PCIP.

In addition, we are modifying the notice throughout to correct miscellaneous stylistic formatting and typographical errors of the previously published notice, and to ensure the language reads consistently across multiple systems. We are republishing the entire notice for ease of reference.

In accordance with 5 U.S.C. 552a(r), we have provided a report to OMB and Congress on this modified system of records.

Matthew Ramsey,

Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.

SYSTEM NAME AND NUMBER:

Master Files of Social Security Number (SSN) Holders and SSN Applications, 60–0058.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Social Security Administration, Office of Systems, Office of Systems Operations and Hardware Engineering, Robert M. Ball Building, 6401 Security Boulevard, Baltimore, MD 21235–6401.

SYSTEM MANAGER(S):

Social Security Administration, Deputy Commissioner for Retirement and Disability Policy, Office of Income Security Programs, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 966–5855.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Sections 205(a) and (c)(2) of the Social Security Act (42 U.S.C. 405(a) and (c)(2)).

PURPOSE(S) OF THE SYSTEM:

We use information in this system to assign SSNs and for a number of administrative and program purposes, including but not limited to: For various Old Age, Survivors, and Disability Insurance, Supplemental Security Income, and Medicare/Medicaid claims purposes; as a case control number; as a secondary beneficiary cross-reference control number for enforcement purposes; for verification of individual identity factors; and for other claims purposes related to establishing benefit entitlement. We use information in this system:

- For the general administration of the Social Security Act to ensure the accuracy of enumeration related information in other SSA systems;
- to prevent the processing of an SSN card application for a person whose application we identified was supported by evidence that either:
  - We suspect may be fraudulent and we are verifying evidence, or
  - we determined to be fraudulent information;
- to record accurate earnings information to the correct individual;
- to prevent issuance of multiple SSNs to a person;
- for resolution of earnings discrepancy cases; and
- for research and statistical activities.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system contains a record of each person who has applied for and to whom we have assigned an SSN. This system also contains records of each person who applied for an SSN, but to whom we did not assign one for one of the following reasons: (1) His or her application was supported by documents that we suspect may be fraudulent and we are verifying the documents with the issuing agency; (2) we have determined the person submitted fraudulent documents; (3) we do not suspect fraud but we need to further verify information the person submitted or we need additional supporting documents; or (4) we have not yet completed processing the application.

CATEGORIES OF RECORDS IN THE SYSTEM:

We collect applications for SSNs. This system contains all of the information we received on the applications for SSNs (*e.g.,* name, date and place of birth, sex, both parents' names, reference number, and alien registration number) and all information obtained during the processing of the SSN request. The system also contains:

- Changes in the information on the applications the SSN holders submit;
- information from applications supported by evidence we suspect or determine to be fraudulent, along with the mailing addresses of the persons who filed such applications and descriptions of the documentation they submitted;
- cross-references when multiple numbers have been issued to the same person;
- a form code that identifies the Form SS–5 (Application for a Social Security Card Number) as the application the person used for the initial issuance of an SSN, or for changing the identifying information (*e.g.,* a code indicating original issuance of the SSN, or that we assigned the person's SSN through our enumeration at birth program);
- a citizenship code that identifies the number holder's status as a U.S. citizen or the work authorization of a non-citizen;
- a special indicator code that identifies types of questionable data or special circumstances concerning an application for an SSN (*e.g.,* false identity; illegal alien; scrambled earnings);
- an indication that an SSN was assigned based on harassment, abuse, or life endangerment;
- an indication that a person has filed a benefit claim under a particular SSN; and
- other indicators needed to process SSN requests.

RECORD SOURCE CATEGORIES:

We obtain information in this system of records from SSN applicants (or persons acting on their behalf), as well as Federal, State, and local agencies.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

We will disclose records pursuant to the following routine uses; however, we will not disclose any information defined as ''return or return information'' under 26 U.S.C. 6103 of the Internal Revenue Code (IRC), unless authorized by a statute, the Internal Revenue Service (IRS), or IRS regulations.

1. To employers (or agents on their behalf) in order to complete their records for reporting wages to us pursuant to the Federal Insurance Contributions Act and section 218 of the Social Security Act.
2. To Federal, State, and local entities to assist them with administering income maintenance and health-maintenance programs, when a Federal statute authorizes them to use the SSN.
3. To the Department of Justice (DOJ) for investigating and prosecuting violations of the Social Security Act.
4. To Department of Homeland Security, upon request, to identify and locate aliens in the United States pursuant to section 290(b) of the Immigration and Nationality Act (8 U.S.C. 1360(b)).
5. To the Railroad Retirement Board (RRB), for the purpose of administering provisions of the Social Security Act relating to railroad employment and for administering the Railroad Unemployment Insurance Act.
6. To the Department of the Treasury, for:

(a) Tax administration as defined in section 6103 of the IRC (26 U.S.C. 6103);

(b) investigating the alleged theft, forgery, or unlawful negotiation of Social Security checks; and

(c) administering those sections of the IRC that grant tax benefits based on support or residence of children. As required by section 1090(b) of the Taxpayer Relief Act of 1997, Public Law 105–34, this routine use applies specifically to the SSNs of parents show on an application for an SSN for a person who has not yet attained age 18.

7. To a congressional office in response to an inquiry from that office made on behalf of, and at the request of, the subject of the record or third party acting on the subject's behalf.
8. To the Department of State for administering the Social Security Act in foreign countries through its facilities and services.
9. To the American Institute, a private corporation under contract to the Department of State, for administering the Social Security Act on Taiwan through facilities and services of that agency.

10. To the Department of Veterans Affairs (DVA), Regional Office, Manila, Philippines, for the administration of the Social Security Act in the Philippines and other parts of the Asia-Pacific region through services and facilities of that agency.

11. To the Department of Labor for administering provisions of Title IV of the Federal Coal Mine Health and Safety Act, as amended by the Black Lung Benefits Act, and for studies on the effectiveness of training programs to combat poverty.

12. To DVA:

(a) To validate SSNs of compensation recipients/pensioners so that DVA can release accurate pension/compensation data to us for Social Security program purposes; and

(b) upon request, for purposes of determining eligibility for, or amount of DVA benefits, or verifying other information with respect thereto.

13. To Federal agencies that use the SSN as a numerical identifier in their record-keeping systems for the purpose of validating SSNs.

14. To the Department of Justice (DOJ), a court or other tribunal, or another party before such court or tribunal, when:

(a) SSA, or any component thereof; or

(b) any SSA employee in his or her official capacity; or:

(c) Any SSA employee in his or her individual capacity where DOJ (or SSA, where it is authorized to do so) has agreed to represent the employee; or

(d) the United States or any agency thereof where we determine the litigation is likely to us or any of its components, is a party to the litigation or has an interest in such litigation, and SSA determines that the use of such records by DOJ, a court or other tribunal, or another party before the tribunal is relevant and necessary to the litigation, provided, however, that in each case, we determine that such disclosure is compatible with the purpose for which the records were collected.

15. To State audit agencies for the purpose of:

(a) Auditing State supplementation payments and Medicaid eligibility considerations; and

(b) expenditures of Federal funds by the State in support of the Disability Determination Services.

16. To the Social Security agency of a foreign country to carry out the purpose of an international social security agreement entered into between the United States and the other country, pursuant to section 233 of the Social Security Act.

17. To Federal, State, or local agencies (or agents on their behalf), for administering income or health maintenance programs including programs under the Social Security Act. Such disclosures include the release of information to the following agencies, but are not limited to:

(a) RRB, for administering provisions of the Railroad Retirement Act and Social Security Act, relating to railroad employment, and for administering provisions of the Railroad Unemployment Insurance Act;

(b) VA, for administering 38 U.S.C. 1312, and upon request, for determining eligibility for, or amount of, veterans' benefits or for verifying other information with respect thereto pursuant to 38 U.S.C. 5106;

(c) Department of Labor for administering provisions of Title IV of the Federal Coal Mine Health and Safety Act, as amended by the Black Lung Benefits Act.

18. To State welfare departments:

(a) Pursuant to agreements with us, for the administration of State supplementation payments;

(b) for enrollment of welfare beneficiaries for medical insurance under section 1843 of the Social Security Act; and

(c) for conducting independent quality assurance reviews of SSI beneficiary records, provided that the agreement for Federal administration of the supplementation provides for such an independent review.

19. To third party contacts (*e.g.,* State bureaus of vital statistics and the Department of Homeland Security) that issue documents to persons when the third party has, or is expected to have, information that will verify documents when we are unable to determine if such documents are authentic.

20. To the Department of Justice, Criminal Division, Human Rights and Special Prosecutions Section, upon receipt of a request for information pertaining to the identity and location of aliens for the purpose of detecting, investigating and, where appropriate, taking legal action against suspected participants in Nazi persecution, genocide, and torture or extra judicial killings in the United States.

21. To the Selective Service System for the purpose of enforcing draft registration pursuant to the provisions of the Military Selective Service Act (50 U.S.C. App. 462, as amended by section 916 of Pub. L. 97–86).

22. To contractors and other Federal agencies, as necessary, for assisting SSA in the efficient administration of its programs. We will disclose information under this routine use only in situations in which SSA may enter into a contractual or similar agreement with a third party to assist in accomplishing an agency function relating to this system of records.

23. To the National Archives and Records Administration (NARA) under 44 U.S.C. 2904 and 2906.

24. To the Office of Personnel Management (OPM) upon receipt of a request from that agency in accordance with 5 U.S.C. 8347(m)(3), to disclose SSN information when OPM needs the information to administer its pension program for retired Federal Civil Service employees.

25. To the Department of Education, upon request, to verify SSNs and to disclose citizenship status concerning applicants who apply to postsecondary educational institutions for financial assistance under Title IV of the Higher Education Act of 1965 (20 U.S.C. 1091).

26. To student volunteers, individuals working under a personal services contract, and other workers who technically do not have the status of Federal employees, when they are performing work for us, as authorized by law, and they need access to personally identifiable information (PII) in our records in order to perform their assigned agency functions.

27. To Federal, State, and local law enforcement agencies and private security contractors, as appropriate, information necessary:

(a) To enable them to ensure the safety of our employees and customers, the security of our workplace, and the operation of our facilities; or

(b) to assist investigations or prosecutions with respect to activities that affect such safety and security or activities that disrupt the operation of our facilities.

28. To recipients of erroneous Death Master File (DMF) information, to disclose corrections to information that resulted in erroneous inclusion of persons in the DMF.

29. To State vital records and statistics agencies, the SSNs of newborn children for administering public health and income maintenance programs, including conducting statistical studies and evaluation projects.

30. To State motor vehicle administration agencies (MVA) and to State agencies charged with administering State identification card programs for the public to verify names, dates of birth, and Social Security numbers on those persons who apply for, or for whom the State issues, driver's licenses or State identification cards.

31. To entities conducting epidemiological or similar research

projects, upon request, pursuant to section 1106(d) of the Social Security Act (42 U.S.C. 1306(d)), to disclose information as to whether a person is alive or deceased, provided that:

(a) We determine, in consultation with the Department of Health and Human Services, that the research may reasonably be expected to contribute to a national health interest;

(b) the requester agrees to reimburse us for the costs of providing the information; and

(c) the requester agrees to comply with any safeguards and limitations we specify regarding re-release or re-disclosure of the information.

32. To the Department of Homeland Security (DHS) and to employers for the administration of the E-Verify Program, pursuant to Public Law 104–208, section 404(e). We will inform DHS and the employer participating in the E-Verify Program that the identifying data (SSN, name, and date of birth) furnished by an employer concerning a particular employee matches, or does not match, the data maintained in this system of records, and when there is such a match, that information in this system of records indicates that the employee is, or is not, a citizen of the United States.

33. To a State Bureau of Vital Statistics (BVS) that is authorized by States to issue electronic death reports when the State BVS requests that we verify the SSN of a person on whom the State will file an electronic death report after we verify the SSN.

34. To the Department of Defense (DOD) to disclose validated SSN information and citizenship status information for the purpose of assisting DOD in identifying those members of the Armed Forces and military enrollees who are aliens or non-citizen nationals who may qualify for expedited naturalization or citizenship processing. These disclosures will be made pursuant to requests made under section 329 of the Immigration and Nationality Act, 8 U.S.C. 1440, as executed by Executive Order 13269.

35. To contractors, cooperative agreement awardees, State agencies, Federal agencies, and Federal congressional support agencies for research and statistical activities that are designed to increase knowledge about present or alternative Social Security programs; are of importance to the Social Security program or the Social Security beneficiaries; or are for an epidemiological project that relates to the Social Security program or beneficiaries. We will disclose information under this routine use pursuant only to a written agreement with us.

36. To State and Territory MVA officials (or agents or contractors on their behalf) and State and Territory chief election officials, under the provisions of section 205(r)(8) of the Social Security Act (42 U.S.C. 405(r)(8)), to verify the accuracy of information the State agency provides with respect to applications for voter registration for those persons who do not have a driver's license number:

(a) When the applicant provides the last four digits of the SSN, or

(b) when the applicant provides the full SSN, in accordance with section 7 of the Privacy Act (5 U.S.C. 552a note), as described in section 303(a)(5)(D) of the Help America Vote Act of 2002. (42 U.S.C. 15483(a)(5)(D)).

37. To the Secretary of Health and Human Services or to any State, any record or information requested in writing by the Secretary for the purpose of administering any program administered by the Secretary, if we disclosed records or information of such type under applicable rules, regulations, and procedures in effect before the date of enactment of the Social Security Independence and Program Improvements Act of 1994.

38. To appropriate agencies, entities, and persons when:

(a) SSA suspects or has confirmed that there has been a breach of the system of records;

(b) SSA has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, SSA (including its information systems, programs, and operations), the Federal Government, or national security; and

(c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with SSA's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

39. To State agencies charged with administering Medicaid and the Children's Health Insurance Program (CHIP) to verify personal identification data (*e.g.,* name, SSN, and date of birth) and to disclose citizenship status information to assist them in determining new applicants' entitlement to benefits provided by the CHIP.

40. To the Department of Health and Human Services/Centers for Medicare and Medicaid Services for the purpose of the administration of Insurance Affordability Programs (IAP) and to identify individuals who qualify for an exemption from the individual responsibility requirement in accordance with the Patient Protection and Affordable Care Act of 2010 (Pub. L. 111–148), as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152). IAPs include a Qualified Health Plan through the Exchange, Advance Payments of the Premium Tax Credit, Cost Sharing Reductions, Medicaid, the Children's Health Insurance Program, and the Basic Health Program.

41. To the Corporation for National and Community Service, upon request, to verify SSNs and to provide citizenship status as recorded in our records concerning individuals applying to serve in approved national service positions and those designated to receive national service education awards under the National and Community Service Act.

42. To another Federal agency or Federal entity, when SSA determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in:

(a) Responding to a suspected or confirmed breach; or

(b) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

43. To State and local government agencies, in situations involving suspected abuse, neglect, or exploitation of minor children or vulnerable adults, to report suspected abuse or determine a victim's eligibility for services.

44. To a State BVS, when it provided SSA information that an individual was deceased to notify the State of the error in the record so furnished.

45. To the Department of the Treasury, for purposes of tax administration, debt collection, and identifying, preventing, and recovering improper payments under federally funded programs and to Federal and State agencies for conducting statistical and research activities, pursuant to sections 202(x) and 1611(e) of the Social Security Act. We will disclose only verified prisoner information (*e.g.,* name, SSN, gender code, and date of birth) under this routine use.

46. To the Office of the President in response to an inquiry from that office made on behalf of, and at the request of, the subject of the record or a third party acting on the subject's behalf.

47. To the Department of Health and Human Services, Office of Child Support Enforcement, as required by section 453(e)(2) and (j)(1) of the Social

Security Act for the administration of the Federal Parent Locator System.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

We will maintain records in this system in paper and in electronic form.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

This system maintains information about individuals by SSN, name, date of birth, the agency's internal processing reference number, or alien registration number. If we deny an application because the applicant submitted fraudulent evidence, or if we are verifying evidence we suspect to be fraudulent, we will retrieve records either by the applicant's name plus month and year of birth, or by the applicant's name plus the eleven-digit reference number of the disallowed application.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

In accordance with NARA rules codified at 36 CFR 1225.16, we maintain records in accordance with an agency-specific records schedule, N1–47–09–02, Enumeration System, item 2, and the approved NARA General Records Schedule 4.2, items 020, 050, and 130.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

We retain electronic and paper files containing personal identifiers in secure storage areas accessible only by our authorized employees and contractors who have a need for the information when performing their official duties. Security measures include, but are not limited to, the use of codes and profiles, personal identification number and password, and personal identification verification cards. We restrict access to specific correspondence within the system based on assigned roles and authorized users. We keep paper records in cabinets within secure areas, with access limited to only those employees who have an official need for access in order to perform their duties. We use audit mechanisms to record sensitive transactions as an additional measure to protect information from unauthorized disclosure or modification.

We annually provide our employees and contractors with appropriate security awareness training that includes reminders about the need to protect PII and the criminal penalties that apply to unauthorized access to, or disclosure of, PII (5 U.S.C. 552a(i)(1)). Furthermore, employees and contractors with access to databases maintaining PII must annually sign a sanctions document that acknowledges their accountability for inappropriately accessing or disclosing such information.

RECORD ACCESS PROCEDURES:

Individuals may submit requests for information about whether this system contains a record about them by submitting a written request to the system manager at the above address, which includes their name, SSN, or other information that may be in this system of records that will identify them. Individuals requesting notification of, or access to, a record by mail must include: (1) A notarized statement to us to verify their identity; or (2) must certify in the request that they are the individual they claim to be and that they understand that the knowing and willful request for, or acquisition of, a record pertaining to another individual under false pretenses is a criminal offense.

Individuals requesting notification of, or access to, records in person must provide their name, SSN, or other information that may be in this system of records that will identify them, as well as provide an identity document, preferably with a photograph, such as a driver's license. Individuals lacking identification documents sufficient to establish their identity must certify in writing that they are the individual they claim to be and that they understand that the knowing and willful request for, or acquisition of, a record pertaining to another individual under false pretenses is a criminal offense.

These procedures are in accordance with our regulations at 20 CFR 401.40 and 401.45.

CONTESTING RECORD PROCEDURES:

Same as record access procedures. Individuals should also reasonably identify the record, specify the information they are contesting, and state the corrective action sought and the reasons for the correction with supporting justification showing how the record is incomplete, untimely, inaccurate, or irrelevant. These procedures are in accordance with our regulations at 20 CFR 401.65(a).

NOTIFICATION PROCEDURES:

Same as records access procedures. These procedures are in accordance with our regulations at 20 CFR 401.40 and 401.45.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

75 FR 82121, Master Files of Social Security Number (SSN) Holders and SSN Applications.

78 FR 40542, Master Files of Social Security Number (SSN) Holders and SSN Applications.

79 FR 8780, Master Files of Social Security Number (SSN) Holders and SSN Applications.

83 FR 31250, Master Files of Social Security Number (SSN) Holders and SSN Applications.

83 FR 31251, Master Files of Social Security Number (SSN) Holders and SSN Applications.

83 FR 54969, Master Files of Social Security Number (SSN) Holders and SSN Applications.

[FR Doc. 2021–28490 Filed 1–3–22; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2021–0052]

Privacy Act of 1974; System of Records

AGENCY: Social Security Administration (SSA).

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, we are issuing public notice of our intent to modify an existing system of records entitled, Reasonable Accommodation for Persons with Disabilities, Social Security Administration (60–0315), last published on October 25, 2005. This notice publishes details of the modified system as set forth below under the caption, **SUPPLEMENTARY INFORMATION**.

DATES: The system of records notice (SORN) is applicable upon its publication in today's **Federal Register**, with the exception of the new routine uses, which are effective February 3, 2022.

We invite public comment on the new routine uses or other aspects of the modifications to this SORN. In accordance with the Privacy Act of 1974, the public is given a 30-day period in which to submit comments. Therefore, please submit any comments by February 3, 2022.

ADDRESSES: The public, Office of Management and Budget (OMB), and Congress may comment on this publication by writing to the Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, SSA, Room G–401 West High Rise, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, or through the Federal e-Rulemaking Portal at *http://www.regulations.gov.* Please reference docket number SSA–2021–0052. All comments we receive will be

available for public inspection at the above address and we will post them to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Elizabeth Boorstein, Government Information Specialist, Privacy Implementation Division, Office of Privacy and Disclosure, Office of the General Counsel, SSA, Room G–401 West High Rise, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, telephone: (410) 966–5855, email: *Elizabeth.Boorstein@ssa.gov.*

SUPPLEMENTARY INFORMATION: We are modifying the system of records name from ''Reasonable Accommodation for Persons with Disabilities'' to ''Reasonable Accommodation Database'' to reflect the broadened scope of the system of records to cover the collection and use of reasonable accommodation requests for medical and religious exceptions, in accordance with Executive Order (E.O.) 14043 on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees (dated September 9, 2021). In addition to the E.O., we are also updating the authorities for this system to include the Title VII of the Civil Rights Act, 42 U.S.C. 2000e, and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb–1(a), *et seq.*

To support the implementation of E.O. 14043, we are modifying most sections of the SORN to reflect the added collection and use of information to provide medical and religious accommodations to federal employees, prospective employee applicants, and agency staff who are not federal employees but work on behalf of the agency who request an exception to vaccination requirements. In addition, due to an Agency reorganization, the system manager and locations have changed since the last version of the RA SORN was published. We are also publishing updated records retention schedules and administrative, technical and physical safeguards to reflect updated information. Finally, we are modifying the notice throughout to correct miscellaneous stylistic formatting and typographical errors of the previously published notice, and to ensure the language reads consistently across multiple systems. We are republishing the entire notice for ease of reference.

In accordance with 5 U.S.C. 552a(r), we provided a report to OMB and Congress on this modified system of records.

Matthew Ramsey,

Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.

SYSTEM NAME AND NUMBER:

Reasonable Accommodation (RA) Database, 60–0315.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

IN HEADQUARTERS:

Office of the Chief Actuary, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Office of the Inspector General, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Office of the General Counsel, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Office of Civil Rights and Equal Opportunity, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Office of Communications, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Office of Budget, Finance, and Management, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Office of Human Resources, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Office of Legislation and Congressional Affairs, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Office of Operations, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Office of Retirement and Disability Policy, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Office of Systems, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

FOR OFFICE OF CENTRAL OPERATIONS:

Manager, Civil Rights and Equal Opportunity Staff, Social Security Administration, Office of Central Operations, 1500 Woodlawn Drive, Security West Tower, Suite 7000, Baltimore, Maryland 21241.

REGIONAL ADDRESSES:

Civil Rights and Equal Opportunity Regional Manager, Boston Region, Social Security Administration, JFK Federal Building, Room 1900, Boston, Massachusetts 02203–1900.

Civil Rights and Equal Opportunity Regional Manager, New York Region, Social Security Administration, 26 Federal Plaza, Room 40–130, New York, New York 10278.

Civil Rights and Equal Opportunity Regional Manager, Philadelphia Region, Social Security Administration, 7th Floor, 300 Spring Garden Street, Philadelphia, Pennsylvania 19123.

Civil Rights and Equal Opportunity Regional Manager, Atlanta Region, Social Security Administration, Atlanta Region, 61 Forsyth Street SW, Suite 23T29, Atlanta, Georgia 30303.

Civil Rights and Equal Opportunity Regional Manager, Chicago Region, Social Security Administration, 600 West Madison Street, 10th Floor, Chicago, Illinois 60661.

Civil Rights and Equal Opportunity Regional Manager, Dallas Region, Social Security Administration, 1301 Young Street, Suite 525, Dallas, Texas 75202.

Civil Rights and Equal Opportunity Regional Manager, Kansas City Region, Social Security Administration, 601 East 12th Street, Suite 1028, Kansas City, Missouri 64106.

Civil Rights and Equal Opportunity Regional Manager, Denver Region, Social Security Administration, 1961 Stout Street, Denver, Colorado 80294.

Civil Rights and Equal Opportunity Regional Manager, San Francisco Region, Social Security Administration, 1221 Nevin Avenue, 6th Floor, Richmond, California 94804.

Civil Rights and Equal Opportunity Regional Manager, Seattle Region, Social Security Administration, 701 5th Avenue, Suite 2900, Mail Stop 291A, Seattle, Washington 98104–7075.

ServiceNow, 2225 Lawson Lane, Santa Clara, CA 95054.

SYSTEM MANAGER(S):

Office of Civil Rights and Equal Opportunity, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (410) 966–5855.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Rehabilitation Act of 1973 (29 U.S.C. 791, *et seq.*), as amended, and implementing regulations at 29 CFR 1614.203; the Americans with Disabilities Act of 1990 (42 U.S.C. 12101, *et seq.*), as amended; Executive Order 14043 on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees (dated September 9, 2021);

Executive Order 13164 on Requiring Federal Agencies To Establish Procedures To Facilitate the Provision of Reasonable Accommodation (dated July 26, 2000); Equal Employment Opportunity Commission's Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation, Directives Transmittal Number 915.003 (dated October 20, 2000); Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb–1(a), *et seq.;* and Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e, *et seq.*), as amended, and implementing regulations at 29 CFR 1600, *et seq.*

PURPOSE(S) OF THE SYSTEM:

The purpose of this system is to maintain information on individuals who request a reasonable accommodation (RA) and the processing of and decision on such requests. Examples of requests received include:

- A qualified employment applicant with a disability needs an accommodation to be considered for a job;
- A qualified employee with a disability needs an accommodation to enable the employee to perform the essential functions of the job or to gain access to the workplace;
- A qualified employee needs the assistance of a personal attendant service to perform activities of daily living that an individual with a targeted disability would typically perform, if he or she did not have a disability, and that is not otherwise required as a reasonable accommodation;
- A qualified employee with a disability needs an accommodation to enjoy equal benefits and privileges of employment; and
- A qualified employee who requests a medical or religious exception to vaccination requirements for federal employees (*e.g.,* E.O. 14043 Requiring Coronavirus Disease 2019 Vaccinations for Federal Employees).

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system maintains information on applicants for employment and employees who have requested a RA, agency staff who are not federal employees but work on behalf of the agency, and third parties who may make an accommodation request on behalf of an applicant or employee.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system maintains records relating to RA requests, such as:

- The requester's name, RA/ID number and type(s) of RA requests and whether those requests have been granted or denied;
- If requesting a reasonable accommodation for a medical diagnosis or disability, medical documentation to support the request;
- If requesting a reasonable accommodation for a sincerely held religious belief, practice, or observance, religious and medical documentation to support the request;
- Results of testing, when relevant to a request;
- Vaccination history, when relevant to a request;
- Number and types of RAs that have been requested in the application process and whether those requests have been granted or denied;
- Jobs (Occupational series, grade level and Agency component) for which RAs have been requested;
- Number and types of RAs for each job, by Agency component, that have been approved, and denied;
- Number and types of RA requests that relate to the benefits or privileges of employment, and whether those requests have been granted or denied;
- Reasons for denial of requests for RA;
- Amount of time taken to process each request for RA; and
- Sources of technical assistance that have been consulted in identifying possible RAs.

RECORD SOURCE CATEGORIES:

We obtain information in this system of records from requesting applicants, employees, agency staff who are not federal employees but work on behalf of the agency, third parties, and SSA officials.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

We will disclose records pursuant to the following routine uses; however, we will not disclose any information defined as ''return or return information'' under 26 U.S.C. 6103 of the Internal Revenue Code, unless authorized by a statute, the Internal Revenue Service (IRS), or IRS regulations.

1. To the Office of the President, in response to an inquiry received from that office made on behalf of, and at the request of, the subject of record or a third party acting on the subject's behalf.

2. To a congressional office in response to an inquiry from that office made on behalf of, and at the request of, the subject of a record or a third party acting on the subject's behalf.

3. To the Department of Justice (DOJ), a court or other tribunal, or another party before such tribunal when:

(a) SSA, or any component thereof; or

(b) any SSA employee in an official capacity; or

(c) any SSA employee in an individual capacity where DOJ (or SSA where it is authorized to do so) has agreed to represent the employee; or

(d) the United States or any agency thereof, where SSA determines that the litigation is likely to affect the operations of SSA or any of its components, is party to litigation or has an interest in such litigation, and SSA determines that the use of such records by DOJ, a court or other tribunal, or another party before the tribunal, is relevant and necessary to the litigation, provided, however, that in each case, SSA determines that such disclosure is compatible with the purpose for which the records were collected.

4. To the Equal Employment Opportunity Commission (Commission), when requested in connection with investigations into alleged or possible discriminatory practices in the Federal sector, examination of Federal affirmative employment programs, compliance by Federal agencies with Uniformed Guidelines on Employee Selection Procedures, or other functions vested in the Commission.

5. To the Federal Labor Relations Authority, its General Counsel, the Federal Mediation and Conciliation Service, the Federal Service Impasses Panel, or an arbitrator when information is requested in connection with investigations of allegations of unfair practices, matters before an arbitrator or the Federal Service Impasses Panel.

6. To the Office of Personnel Management or the Merit Systems Protection Board (including the Office of Special Counsel) when information is requested in connection with appeals, special studies of the civil service and other merit systems, review of those agencies' rules and regulations, investigation of alleged or possible prohibited personnel practices, and for such other functions of these agencies as may be authorized by law, (*e.g.,* 5 U.S.C. 1205 and 1206).

7. To contractors and other Federal agencies, as necessary, for the purpose of assisting SSA in the efficient administration of its programs. We will disclose information under this routine use only in situations in which SSA may enter into a contractual or similar agreement with a third party to assist in accomplishing an SSA function relating to this system of records.

8. To student volunteers, individuals working under a personal services

contract, and other workers who technically do not have the status of Federal employees, when they are performing work for SSA, as authorized by law, and they need access to personally identifiable information (PII) in SSA records in order to perform their assigned agency functions.

9. To the National Archives and Records Administration (NARA) under 4 U.S.C. 2904 and 2906.

10. To Federal, State, and local law enforcement agencies and private security contractors, as appropriate, information necessary:

(a) To enable them to protect the safety of SSA employees and customers, the security of the SSA workplace, the operation of SSA facilities, or

(b) to assist investigations or prosecutions with respect to activities that affect such safety and security or activities that disrupt the operation of SSA facilities.

11. To appropriate agencies, entities, and persons when:

(a) SSA suspects or has confirmed that there has been a breach of the system of records;

(b) SSA has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, SSA (including its information systems, programs, and operations), the Federal Government, or national security; and

(c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with SSA's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

12. To another Federal agency or Federal entity, when SSA determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in:

(a) Responding to a suspected or confirmed breach; or

(b) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

13. To third parties when an individual involved with a request needs assistance to communicate because of a hearing impairment or a language barrier exists (*e.g.,* interpreters, telecommunications relay system operators).

14. To federal, state, and local health departments, and other health, first aid and safety personnel, when appropriate, if an individual might require emergency treatment or to respond to exposures or reports of communicable diseases.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS IN THE SYSTEM:

We will maintain records in this system in electronic and paper form.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

We will retrieve records in this system by applicant name, employee's name, name of agency staff member who is not a federal employee but works on behalf of the agency, and/or RA/ID Number.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

In accordance with NARA rules codified at 36 CFR 1225.16, we maintain records in accordance with the approved NARA General Records Schedule 1, Section 24.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

We retain electronic and paper files containing personal identifiers in secure storage areas accessible only by our authorized personnel who have a need for the information when performing their official duties. Security measures include, but are not limited to, the use of codes and profiles, personal identification number and password, and personal identification verification cards. We restrict access to specific correspondence within the system based on assigned roles and authorized users. We use audit mechanisms to record sensitive transactions as an additional measure to protect information from unauthorized disclosure or modification. We keep paper records in locked cabinets within secure areas, with access limited to only those employees who have an official need for access in order to perform their duties.

We annually provide our employees and contractors with appropriate security awareness training that includes reminders about the need to protect PII and the criminal penalties that apply to unauthorized access to, or disclosure of, PII (5 U.S.C. 552a(i)(1)). Furthermore, employees and contractors with access to databases maintaining PII must annually sign a sanctions document that acknowledges their accountability for inappropriately accessing or disclosing information.

RECORD ACCESS PROCEDURES:

Individuals may submit requests for information about whether this system contains a record about them by submitting a written request to the system manager at the above address, which includes their name, RA/ID number, or other information that may be in this system of records that will identify them. Individuals requesting notification of, or access to a record by mail must include: (1) A notarized statement to us to verify their identity; or (2) must certify in the request that they are the individual they claim to be and that they understand that the knowing and willful request for, or acquisition of, a record pertaining to another individual under false pretenses is a criminal offense.

Individuals requesting notification of or access to, records in person must provide their name, RA/ID number, or other information that may be in this system of records that will identify them, as well as provide an identity document, preferably with a photograph, such as a driver's license. Individuals lacking identification documents sufficient to establish their identity must certify in writing that they are the individual they claim to be and that they understand that the knowing and willful request for, or acquisition of, a record pertaining to another individual under false pretenses is a criminal offense.

These procedures are in accordance with our regulations at 20 CFR 401.40 and 401.45.

CONTESTING RECORD PROCEDURES:

Same as record access procedures. Individuals should also reasonably identify the record, specify the information they are contesting, and state the corrective action sought and the reasons for the correction with supporting justification showing how the record is incomplete, untimely, inaccurate, or irrelevant. These procedures are in accordance with our regulations at 20 CFR 401.65(a).

NOTIFICATION PROCEDURES:

Same as records access procedures. These procedures are in accordance with our regulations at 20 CFR 401.40 and 401.45.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

70 FR 62157, Reasonable Accommodation for Persons with Disabilities.

72 FR 69723, Reasonable Accommodation for Persons with Disabilities.

83 FR 54969, Reasonable Accommodation for Persons with Disabilities.

[FR Doc. 2021–28495 Filed 1–3–22; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Opportunity for Public Comment on Surplus Property Release at Columbia Metropolitan Airport, Columbia, South Carolina

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: Notice is given that the Federal Aviation Administration (FAA) is considering a request from the Richland-Lexington Airport District to waive the requirement that 74 acres of surplus property, located at the Columbia Metropolitan Airport be used for aeronautical purposes. Currently, ownership of the property provides for protection of FAR Part 77 surfaces and compatible land use which would continue to be protected with deed restrictions required in the transfer of land ownership.

DATES: Comments must be received on or before February 3, 2022.

ADDRESSES: Documents are available for review by prior appointment at the following location: Atlanta Airports District Office, Attn: Joseph Robinson, South Carolina Planner, 1701 Columbia Ave., Suite 220, College Park, Georgia 30337–2747, Telephone: (404) 305–6749.

Comments on this notice may be mailed or delivered in triplicate to the FAA at the following address: Atlanta Airports District Office, Attn: Joseph Robinson, South Carolina Planner, 1701 Columbia Ave., Suite 220, College Park, Georgia 30337–2747.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mike Gula, Executive Director, Richland-Lexington Airport District at the following address: Columbia Metropolitan Airport, 3250 Airport Blvd.—Suite 10, West Columbia, South Carolina 29170.

FOR FURTHER INFORMATION CONTACT: Joseph Robinson, Airport Planner, Atlanta Airports District Office, 1701 Columbia Ave., Suite 220, College Park, Georgia 30337–2747, (404)305–6749. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: Under the provisions of Title 49, U.S.C. 47151(d), the FAA is reviewing a request by the Richland-Lexington Airport District to release 74 of surplus property at the Columbia Metropolitan Airport. This singular parcel was originally conveyed to the County of Lexington on April 7, 1947 under the powers and authority contained in the provisions of the Surplus Property Act of 1944 and subsequently transferred to the Richland-Lextington Airport District on July 12, 1962. Currently, this surplus property is located within the Columbia Metropolitan Airport Foreign Trade Zone #124.

Any person may inspect the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon request, inspect the request, notice and other documents germane to the request in person at the Columbia Metropolitan Airport.

Issued in Atlanta, Georgia on December 22, 2021.

Joseph Parks Preston,

Assistant Manager, Atlanta Airports District Office, Southern Region.

[FR Doc. 2021–28185 Filed 1–3–22; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Qualified Financial Contracts Recordkeeping Related to Orderly Liquidation Authority

AGENCY: Department of the Treasury.

ACTION: Notice of exemption.

SUMMARY: The Secretary of the Treasury (the ''Secretary''), as Chairperson of the Financial Stability Oversight Council, after consultation with the Federal Deposit Insurance Corporation (the ''FDIC''), is issuing a determination regarding a request for an exemption from certain requirements of the rule implementing the qualified financial contracts (''QFC'') recordkeeping requirements of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act'' or the ''Act'').

DATES: The exemption granted is applicable January 4, 2022.

FOR FURTHER INFORMATION CONTACT: Daniel Harty, Director, Office of Capital Markets, (202) 622–0509; Peter Nickoloff, Financial Economist, Office of Capital Markets, (202) 622–1692; or Stephen T. Milligan, Deputy Assistant General Counsel (Banking & Finance), (202) 622–4051.

SUPPLEMENTARY INFORMATION:

Background

On October 31, 2016, the Secretary published a final rule pursuant to section 210(c)(8)(H) of the Dodd-Frank Act requiring certain financial companies to maintain records with respect to their QFC positions, counterparties, legal documentation, and collateral that would assist the FDIC as receiver in exercising its rights and fulfilling its obligations under Title II of the Act (the ''rule'').[1]

Section 148.3(c)(3) of the rule provides that one or more records entities may request an exemption from one or more of the requirements of the rule by writing to the Department of the Treasury (''Treasury''), the FDIC, and the applicable primary financial regulatory agency or agencies, if any.[2] The written request for an exemption must: (i) Identify the records entity or records entities or the types of records entities to which the exemption would apply; (ii) specify the requirements from which the records entities would be exempt; (iii) provide details as to the size, risk, complexity, leverage, frequency and dollar amount of QFCs, and interconnectedness to the financial system of each records entity, to the extent appropriate, and any other relevant factors; and (iv) specify the reasons why granting the exemption will not impair or impede the FDIC's ability to exercise its rights or fulfill its statutory obligations under sections 210(c)(8), (9), and (10) of the Act.[3]

The rule provides that, upon receipt of a written recommendation from the FDIC, prepared in consultation with the primary financial regulatory agency or agencies for the applicable records entity or entities, that takes into consideration each of the factors referenced in section 210(c)(8)(H)(iv) of the Act[4] and any other factors the FDIC considers appropriate, the Secretary may grant, in whole or in part, a conditional or unconditional exemption from compliance with one or more of the requirements of the rule to one or more records entities.[5] The rule further provides that, in determining whether to grant an exemption, the Secretary will consider any factors deemed appropriate by the Secretary, including whether application of one or more requirements of the rule is not necessary to achieve the purpose of the rule.

Request for Exemption

On January 7, 2020, RBC US Group Holdings LLC (''RIHC'') submitted, on behalf of its subsidiary City National Securities Inc. (''CNS''), a request for an exemption from the rule to the Treasury, the FDIC, and, as the primary financial regulatory agency for CNS, the Securities and Exchange Commission

[1] 31 CFR part 148; 81 FR 75624 (Oct. 31, 2016).

[2] 31 CFR 148.3(c)(3). The term ''records entity'' is defined at 31 CFR 148.2(n).

[3] 12 U.S.C. 5390(c)(8), (9), and (10).

[4] *Id.* Sec. 5390(c)(8)(H)(iv).

[5] 31 CFR 148.3(c)(4)(i).

(''SEC''), which RIHC supplemented with information provided on March 18, 2020.[6] RIHC requested an exemption for CNS from compliance with sections 148.3 and 148.4 of the rule for the current and any future QFC portfolio of CNS. Such an exemption would in effect cover all QFCs that CNS may enter into, without any limitation as to the type of QFC, the nature of the counterparty, or any other factor. The request stated that CNS's current and anticipated future QFC portfolio consists predominantly of client activity QFCs, meaning cash market transactions CNS enters into on behalf of its retail customers and that are executed on standardized terms. Without an exemption, RIHC stated that CNS's cost of recordkeeping would impose an undue burden relative to the characteristics of its QFC portfolio, and submitted that, in the event the FDIC was appointed receiver of CNS under Title II of the Act, the records that CNS already maintains under current law and regulatory requirements should be sufficient to permit the FDIC to exercise its rights and fulfill its statutory obligations pursuant to its resolution authority under the Act. Further, RIHC stated that all of CNS's clients are ''customers'' as defined under the Securities Investor Protection Act of 1970 (''SIPA''). As such, RIHC stated that granting the requested exemption would not impair or impede the FDIC from exercising its rights or fulfilling its responsibilities under the Act and would be consistent with exemptions Treasury previously granted with respect to Morgan Stanley Smith Barney LLC (''MSSB'')[7] as well as with respect to Wells Fargo Clearing Services, LLC (''WFCS'') and Wells Fargo Advisors Financial Network, LLC (''FiNet,'' and together with WFCS, ''WFCS–FiNet'').[8]

In support of its request, RIHC submitted information pertaining to the QFCs to which CNS is a party. RIHC represented that CNS's QFC portfolio is relatively small, poses low risk, has little complexity, has low trading frequency, has no leverage, and entails limited interconnectedness with the financial system. The request stated that CNS's QFC portfolio consists primarily of three types of QFCs to which it is a party, each of which is analogous to a type of QFC covered by the previous exemptions with respect to MSSB and WFCS–FiNet. Specifically, CNS primarily engages in client brokerage agreements, cash market QFCs governed by the client brokerage agreements and entered into on behalf of retail customers, and a master clearing agreement with CNS's clearing firm, an unaffiliated broker-dealer. RIHC represented that the cash market QFCs offered by CNS are limited to standard cash products, including common and preferred stocks, municipal, corporate, and agency bonds, U.S. Treasuries, commercial paper, structured notes, brokered certificates of deposit, mutual funds, and options. The request stated that CNS does not offer as part of its brokerage investment options or otherwise make available to its brokerage clients the types of QFCs that would exclude its clients from meeting the SIPA definition of ''customer,'' namely, currency contracts, commodity or related contracts, futures contracts, or any warrants or rights to purchase or subscribe to such contracts. Similar to MSSB and WFCS–FiNet, CNS is not registered with the Commodity Futures Trading Commission (''CFTC'') as a swap dealer or futures commission merchant, thus restricting its ability to transact in certain types of QFCs. Finally, RIHC represented that CNS's interconnectedness to the rest of the financial system is limited based on its relatively small size and, like MSSB and WFCS–FiNet, its focus on non-institutional clients.

Evaluation of the Exemption Request

In evaluating the exemption request, Treasury considered the representations made by RIHC with respect to CNS's QFC portfolio in terms of its size, risk, and complexity; trading frequency and leverage; and interconnectedness to the financial system. Treasury also considered RIHC's statement that granting an exemption to CNS from the recordkeeping requirements of the rule would not impair or impede the ability of the FDIC to exercise its rights or fulfill its statutory obligations under Title II of the Act. RIHC's views in this regard centered on its representation that all of CNS's clients are ''customers'' as that term is defined under SIPA, and an assertion of how such customers and their QFCs would be handled by the FDIC in the event of a Title II resolution of CNS.

As discussed more fully in the preamble to the final rule,[9] as well as in the determinations of exemption Treasury provided to MSSB and WFCS–FiNet, if the FDIC is appointed receiver of a covered financial company that is a broker-dealer and the FDIC establishes a bridge financial company to assist with the resolution of that broker-dealer, the FDIC must, pursuant to section 210(a)(1)(O) of the Act,[10] unless certain conditions are met,[11] transfer to the bridge financial company all ''customer accounts'' of the broker-dealer and all associated ''customer name securities'' and ''customer property,'' as those terms are defined by reference to SIPA.[12] Treasury further discussed that the requirements of section 210(a)(1)(O) of the Act in combination with the ''all or none rule''[13] mean that, if the FDIC were to transfer a customer account that held QFCs between a covered broker-dealer and its client, the FDIC would be required to transfer (i) all QFCs between the broker-dealer and the client and, if the client is a non-natural person, (ii) all QFCs between the broker-dealer and any affiliates of such client. In the case of either (i) or (ii), the transfer would include, due to the all or none rule, any QFCs of the type that would not make the client a customer under SIPA, such as an FX spot agreement.

However, RIHC stated that CNS does not engage in the types of QFCs that would exclude its clients from the SIPA definition of customer. RIHC stated that CNS offers its retail customers only standard cash products as described above. Further, as CNS is not registered with the CFTC as a swap dealer or futures commission merchant, its ability to transact in certain types of QFCs is restricted. As represented by RIHC, CNS's QFCs with its retail customers are

[6] RIHC is a U.S. intermediate holding company subsidiary of Royal Bank of Canada, and is a records entity under the rule. CNS is registered with the SEC as a broker-dealer under the Securities Exchange Act of 1934 and as an investment adviser under the Investment Advisers Act of 1940.

[7] *See* 83 FR 66618 (Dec. 27, 2018).

[8] *See* 85 FR 1 (Jan. 2, 2020).

[9] *See* 81 FR at 75624–25.

[10] 12 U.S.C. 5390(a)(1)(O).

[11] Section 210(a)(1)(O)(i) of the Act stipulates two conditions under which the FDIC is permitted not to transfer all such customer accounts, customer name securities, and customer property to the bridge financial company: (i) If the FDIC determines, after consulting with the Securities Investor Protection Corporation and the SEC, that such customer accounts, customer securities, and customer property are likely to be promptly transferred to another registered broker-dealer; or (ii) if the transfer would materially interfere with the ability of the FDIC to avoid or mitigate serious adverse effects on financial stability or economic conditions in the United States. If neither such condition is met, the FDIC must transfer to a bridge financial company any QFCs entered into by the broker-dealer with its clients who are customers under SIPA.

[12] 15 U.S.C. 78aaa *et seq. See also* section 201(a)(10) of the Dodd-Frank Act (12 U.S.C. 5381(a)(10)) (providing that the terms ''customer,'' ''customer name securities,'' and ''customer property'' as used in Title II shall have the same meaning as provided in SIPA).

[13] Under the ''all or none rule'' of the Act, if the FDIC determines to transfer, disaffirm or repudiate any QFC with a particular counterparty, it must transfer, disaffirm or repudiate (i) all QFCs between the covered financial company and such counterparty and (ii) all QFCs between the covered financial company and any affiliate of such counterparty. *See,* 12 U.S.C. 5390(c)(9)(A) and 5390(c)(11).

of a small size, present little complexity and leverage, have low trading frequency, and impose little risk.

Treasury received a final recommendation from the FDIC regarding the exemption request, prepared in consultation with the SEC, and, after consultation with the FDIC, Treasury is making the determinations discussed below.[14]

Determination of Exemption

Given the above-discussed restrictions on the FDIC's discretion as to whether or not to transfer QFCs [15] from a broker-dealer, the limited nature of CNS's business, and the limited types of QFCs entered into by CNS with its clients, Treasury has determined to grant CNS an exemption from the recordkeeping requirements of the rule with respect to any QFCs of CNS with clients that are customers [16] of CNS under SIPA with respect to any transactions or accounts they have with CNS, subject to the terms and conditions stipulated below. Treasury does not expect that granting this conditional exemption will unduly hinder the FDIC as receiver in exercising its rights and fulfilling its obligations under the Act or interfere with the FDIC's ability to avoid or mitigate serious adverse effects on financial stability or economic conditions in the United States. In CNS's case, the size, risk, complexity, and leverage of its QFCs with its customers do not present a high likelihood that the financial stability exception to the transfer requirement of section 210(a)(1)(O) of the Act would be met. If the financial stability exception is not met, the FDIC would likely either transfer, pursuant to section 210(a)(1)(O), all of a broker-dealer's customer accounts, customer name securities, and customer property included in such customer accounts and any other QFCs with such customer to the bridge financial company or transfer all such accounts, securities, and property to another broker-dealer. In either case, the FDIC would not need the detailed records required by the rule with respect to QFCs to accomplish the transfer.

For the avoidance of doubt, Treasury is not granting the exemption request as presented in the RIHC request letter. There, RIHC requested an exemption for CNS from compliance with the rule for the current and any future QFC portfolio of CNS; that is, RIHC did not limit the exemption request only to QFCs with SIPA customers. If granted as requested, such an exemption would allow CNS to avoid recordkeeping for any and all QFCs that it may enter into now or in the future, without any limitation as to the type of QFC, the nature of the counterparty, or any other factor, including QFCs for its own account with counterparties who may be other broker-dealers or who may not otherwise qualify as customers under SIPA. Treasury is granting a narrower, limited and conditional exemption that applies only to QFCs with CNS customers; except as described in the next paragraph, CNS's QFCs for its own account or with non-customers, whether or not affiliated with CNS, are not covered by this exemption and remain subject to the recordkeeping requirements of the rule. Consistent with the determinations of exemption Treasury provided to MSSB and WFCS–FiNet, Treasury has determined not to provide an exemption with respect to CNS's QFCs for its own account or with non-customers because the FDIC would retain discretion as to whether to transfer or retain such QFCs and because the size and risks of such QFCs at the time could be such that the FDIC would need the records required by the rule to make a transfer determination.

Treasury is also granting an exemption for any QFC entered into by CNS as introducing broker with another broker-dealer as clearing broker and that relates to the clearing of any exempted QFCs with CNS customers as discussed above, subject to the terms and conditions stipulated below, and provided that CNS maintains documentation of any agreement between CNS and each such clearing broker. This exemption would cover QFCs, such as a master clearing agreement, between CNS and its clearing broker that relate to the clearing of any CNS customer QFCs. For purposes of this exemption, the term ''clearing broker'' means an SEC-registered broker-dealer that is a member of the Financial Industry Regulatory Authority (FINRA) and has authority to execute, settle, and clear transactions and carry accounts on a fully disclosed basis on behalf of CNS and CNS's customers pursuant to a master clearing agreement or similar agreement. If the FDIC were to transfer the customer QFCs to a bridge financial company or other financial institution, it would presumably also transfer any master clearing agreement or similar agreement entered into with a clearing broker that facilitates the clearance or settlement of such customer QFCs. Therefore, the records required by the rule regarding such QFCs with a clearing broker should not be needed by the FDIC to address the clearance of CNS's exempted customer QFCs.

Conditions of the Exemption

The exemption granted below is based on the factual representations made by RIHC on behalf of CNS to Treasury, the FDIC, and the SEC, in its submissions, including the factual representations regarding CNS's registration as a broker-dealer and investment adviser, the limitations on its business lines, the limitations on the types of clients it serves and the types of products and services it offers its clients, the frequency, size, and dollar amounts of QFCs with clients, the lack of complexity of the QFCs it has with clients, the number of client accounts it maintains, and the description of its activities as introducing broker on behalf of its customers with its clearing brokers.

Treasury reserves the right to rescind or modify the exemption at any time. Further, Treasury intends to reassess the exemption in five years. At that time, Treasury, in consultation with the FDIC and the SEC, would evaluate any material changes in the nature of CNS's business as well as any relevant changes to market structure or applicable law or other relevant factors that might affect the reasons for granting the exemptions. Treasury may request an updated submission from CNS as to its business at that time. Treasury expects that it would provide notice to CNS prior to any modification or rescission of the exemption and that, in the event of a rescission or modification, Treasury would grant CNS a limited period of time in which to come into compliance with the applicable recordkeeping requirements of the rule.

Terms and Conditions of the Exemption

CNS is hereby granted an exemption from the requirements of 31 CFR 148.3 and 148.4 for (i) any QFC entered into by CNS with or on behalf of any customer of CNS that is booked and carried in accounts at CNS maintained for the benefit of such customer; and (ii)

[14] All exemptions to the recordkeeping requirements of the rule are made at the discretion of the Secretary and the Secretary's discretion is not limited by any recommendations received from other governmental agencies. Exemptions to the FDIC's recordkeeping rules under 12 CFR part 371 (Recordkeeping Requirements for Qualified Financial Contracts) are at the discretion of the board of directors of the FDIC and entail a separate request, process, and policy considerations. References to the FDIC in this notice should not be taken to imply that the FDIC has determined that similar exemptions under Part 371 would be available.

[15] As used in the remainder of this notice of exemption, the term ''QFC'' means a qualified financial contract as defined for purposes of Title II of the Act. *See,* 12 U.S.C. 5390(c)(8)(D).

[16] As used in the remainder of this notice of exemption, the term ''customer'' means a person who is a customer as defined in SIPA with respect to any transaction or account it has with CNS.

any QFC entered into by CNS with a clearing broker that relates to the clearing of any QFC referenced in clause (i), provided that CNS maintains documentation of any agreement between CNS and each such clearing broker. For purposes of the exemption, ''customer'' means a person who is a customer as defined in 15 U.S.C. 78lll(2) with respect to any transactions or accounts it has with CNS, and ''clearing broker'' means an SEC-registered broker-dealer that is a member of FINRA and has authority to execute, settle, and clear transactions and carry accounts on a fully disclosed basis on behalf of CNS and CNS's customers pursuant to a master clearing agreement or similar agreement.

This exemption is subject to modification or revocation at any time the Secretary determines that such action is necessary or appropriate in order to assist the FDIC as receiver for a covered financial company in being able to exercise its rights and fulfill its obligations under sections 210(c)(8), (9), or (10) of the Act. The exemption extends only to CNS and to no other entities.

Nandini Ajmani,

Deputy Assistant Secretary for Capital Markets.

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Part II

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Guidance Related to the Foreign Tax Credit; Clarification of Foreign-Derived Intangible Income; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9959]

RIN 1545–BP70

Guidance Related to the Foreign Tax Credit; Clarification of Foreign-Derived Intangible Income

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the foreign tax credit, including the disallowance of a credit or deduction for foreign income taxes with respect to dividends eligible for a dividends-received deduction; the allocation and apportionment of interest expense, foreign income tax expense, and certain deductions of life insurance companies; the definition of a foreign income tax and a tax in lieu of an income tax; the definition of foreign branch category income; and the time at which foreign taxes accrue and can be claimed as a credit. This document also contains final regulations clarifying rules relating to foreign-derived intangible income (FDII). The final regulations affect taxpayers that claim credits or deductions for foreign income taxes, or that claim a deduction for FDII.

DATES:

Effective date: These regulations are effective on March 7, 2022.

Applicability dates: For dates of applicability, see §§ 1.164–2(i), 1.245A(d)–1(f), 1.336–5, 1.338–9(d)(4), 1.367(b)–7(h), 1.367(b)–10(e), 1.861–3(e), 1.861–9(k), 1.861–10(h), 1.861–14(k), 1.861–20(i), 1.901–1(j), 1.901–2(h), 1.903–1(e), 1.904–6(g), 1.905–1(h), 1.905–3(d), 1.951A–7, and 1.960–7.

FOR FURTHER INFORMATION CONTACT: Concerning §§ 1.245A(d)–1, 1.336–2, 1.338–9, 1.861–3, 1.861–20, 1.904–6, 1.960–1, and 1.960–2, Suzanne M. Walsh, (202) 317–4908; concerning §§ 1.250(b)–1, 1.861–8, 1.861–9, and 1.861–14, Jeffrey P. Cowan, (202) 317–4924; concerning § 1.250(b)–5, Brad McCormack, (202) 317–6911; concerning §§ 1.164–2, 1.901–1, 1.901–2, 1.903–1, 1.905–1, and 1.905–3, Tianlin (Laura) Shi, (202) 317–6987; concerning §§ 1.367(b)–3, 1.367(b)–4, and 1.367(b)–10, Logan Kincheloe, (202) 317–6075; concerning §§ 1.367(b)–7, 1.861–10, and 1.904–4, Jeffrey L. Parry, (202) 317–4916; concerning §§ 1.951A–2 and 1.951A–7, Jorge M. Oben and Larry Pounders, (202) 317–6934 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

On December 7, 2018, the Treasury Department and the IRS published proposed regulations (REG–105600–18) relating to foreign tax credits in the **Federal Register** (83 FR 63200) (the ''2018 FTC proposed regulations''). Those regulations addressed several significant changes that the Tax Cuts and Jobs Act (Pub. L. 115–97, 131 Stat. 2054 (2017)) (the ''TCJA'') made with respect to the foreign tax credit rules and related rules for allocating and apportioning deductions in determining the foreign tax credit limitation. Certain portions of the 2018 FTC proposed regulations were finalized as part of TD 9866, published in the **Federal Register** (84 FR 29288) on June 21, 2019. The remaining portions of the 2018 FTC proposed regulations were finalized in TD 9882, published in the **Federal Register** on December 17, 2019 (84 FR 69022) (the ''2019 FTC final regulations''). On the same date, new proposed regulations (REG–105495–19) addressing changes made by the TCJA as well as other related foreign tax credit rules were published in the **Federal Register** (84 FR 69124) (the ''2019 FTC proposed regulations''). Correcting amendments to the 2019 FTC final regulations and the 2019 FTC proposed regulations were published in the **Federal Register** on May 15, 2020. See 85 FR 29323 (2019 FTC final regulations) and 85 FR 29368 (2019 FTC proposed regulations). The 2019 FTC proposed regulations were finalized as part of TD 9922, published in the **Federal Register** (85 FR 71998) on November 12, 2020 (the ''2020 FTC final regulations''). On the same date, the Treasury Department and the IRS published proposed regulations (REG–101657–20) in the **Federal Register** (85 FR 72078) (the ''2020 FTC proposed regulations''). The 2020 FTC proposed regulations addressed changes made by the TCJA and other foreign tax credit issues. Correcting amendments to the 2020 FTC final regulations were published in the **Federal Register** on October 1, 2021. See 86 FR 54367. A public hearing on the 2020 FTC proposed regulations was held on April 7, 2021.

On July 15, 2020, the Treasury Department and the IRS finalized regulations under section 250 (the ''section 250 regulations'') in TD 9901, published in the **Federal Register** (85 FR 43042). The 2020 FTC proposed regulations also included revisions to the section 250 regulations.

This document contains final regulations (the ''final regulations'') addressing the following: (1) The determination of foreign income taxes subject to the credit and deduction disallowance provisions of section 245A(d); (2) the determination of oil and gas extraction income from domestic and foreign sources and of electronically supplied services under the section 250 regulations; (3) the impact of the repeal of section 902 on certain regulations issued under section 367(b); (4) the sourcing of inclusions under sections 951, 951A, and 1293; (5) the allocation and apportionment of interest deductions of certain regulated utilities; (6) a revision to the controlled foreign corporation (''CFC'') netting rule; (7) the allocation and apportionment of section 818(f)(1) items of life insurance companies that are members of consolidated groups; (8) the allocation and apportionment of foreign income taxes, including taxes imposed with respect to disregarded payments; (9) the definitions of a foreign income tax and a tax in lieu of an income tax, including changes to the net gain requirement, the replacement of the jurisdictional nexus rule with an attribution rule contained in the net gain requirement, the treatment of certain tax credits, the treatment of foreign tax law elections for purposes of the noncompulsory payment rules, and the substitution requirement under section 903; (10) the allocation of the liability for foreign income taxes in connection with certain mid-year transfers or reorganizations; (11) the foreign branch category rules in § 1.904–4(f); and (12) the time at which credits for foreign income taxes can be claimed pursuant to sections 901(a) and 905(a).

This rulemaking finalizes, without substantive change, certain provisions in the 2020 FTC proposed regulations with respect to which the Treasury Department and IRS did not receive any comments. See §§ 1.164–2(d), 1.250(b)–1(c), 1.250(b)–5, 1.336–2(g)(3), 1.338–9(d), 1.367(b)–2, 1.367(b)–3, 1.367(b)–4, 1.367(b)–7, 1.367(b)–10, 1.461–1, 1.861–3(d), 1.861–8(e)(4), 1.861–8(e)(8)(v), 1.861–9(g)(3), 1.861–10(e)(8)(v), 1.861–10(f), 1.901–1, 1.901–2(e)(4), 1.901–2(f), 1.904–4(b), 1.904–4(c), 1.904–6, 1.905–3, 1.954–1, 1.960–1, and 1.960–2. These provisions are generally not discussed in this preamble.

No comments were received with respect to the transition rules contained in the 2020 FTC proposed regulations to account for the effect on loss accounts of net operating loss carrybacks to pre-2018 taxable years that are allowed under the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136, 134 Stat. 281 (2020). Section 1.904(f)–12(j) was finalized without

change in TD 9956, published in the **Federal Register** (86 FR 52971) on September 24, 2021.

Comments that do not pertain to the 2020 FTC proposed regulations, or that are otherwise outside the scope of this rulemaking, are generally not addressed in this preamble but may be considered in connection with future guidance projects.

The rules contained in proposed § 1.861–9(k) (election to capitalize certain expenses in determining tax book value of assets), § 1.861–10(g) (requiring the direct allocation of interest expense in the case of certain foreign banking branches), and §§ 1.904–4(e)(1)(ii) and 1.904–5(b)(2) (relating to the definition of financial services income) are not finalized in this document. The Treasury Department and the IRS are continuing to study the comments received in connection with those provisions.

Summary of Comments and Explanation of Revisions

I. Disallowance of Foreign Tax Credit or Deduction for Foreign Income Taxes Under Section 245A(d)

Proposed § 1.245A(d)–1(a) generally provided that neither a credit under section 901 nor a deduction is allowed for foreign income taxes (as defined in § 1.901–2(a)) paid or accrued by a domestic or foreign corporation that are attributable to a specified distribution or specified earnings and profits of a foreign corporation. The proposed rule defined a specified distribution—in the case of a distribution to a domestic corporation—as the portion of a dividend for which a deduction under section 245A(a) is allowed, a hybrid dividend, or a distribution of certain previously taxed earnings (''PTEP'') related to section 245A(d) (''section 245A(d) PTEP''). In the case of a distribution to another foreign corporation, a specified distribution included the portion of the distribution attributable to section 245A(d) PTEP, or a tiered hybrid dividend that gives rise to a U.S. shareholder inclusion by reason of section 245A(e)(2) and § 1.245A(e)–1(c)(1). Specified earnings and profits included the portion of the earnings and profits of a foreign corporation that would give rise to a specified distribution if an amount equal to the entire earnings and profits of the foreign corporation were distributed. Specified earnings and profits also included an amount equal to the portion of a U.S. return of capital amount, as that term is defined in § 1.861–20(b), that is treated as arising in a section 245A subgroup, after the application of the asset method in § 1.861–9. Proposed § 1.245A(d)–1(a) relied upon the rules in § 1.861–20 to associate gross income included in the foreign tax base (''foreign gross income'') with these amounts and to allocate foreign income taxes to the foreign gross income. The proposed regulations also included an anti-avoidance rule to, for example, prevent taxpayers from using successive foreign law distributions to inappropriately associate withholding tax on the distributions with PTEP arising from inclusions under sections 951(a) and 951A(a). See proposed § 1.245A(d)–1(b)(2). The Treasury Department and the IRS requested comments on possible revisions to § 1.861–20 to address these concerns, including rules to require the maintenance of separate accounts that would reflect the effect of foreign law transactions on the earnings and profits of a foreign corporation. 85 FR at 72079.

A comment noted that proposed § 1.245A(d)–1(a) explicitly treated as specified earnings and profits the portion of a U.S. return of capital amount that is deemed to arise pursuant to § 1.861–20(d)(3)(i) in a section 245A subgroup under the asset method of § 1.861–9, yet did not explicitly treat any amount as specified earnings and profits when the asset method of § 1.861–9 applies under proposed § 1.861–20(d)(3)(v) to characterize a disregarded payment that is a remittance as made from a section 245A subgroup. The comment also expressed concerns that proposed § 1.245A(d)–1 did not adequately clarify the treatment of foreign tax imposed on a distribution received by a domestic or foreign corporation with respect to its interest in a partnership, or on the proceeds of a disposition of such an interest.

The comment also noted the uncertainty in proposed § 1.245A(d)–1(a) over the use of the asset method of § 1.861–9 to characterize foreign taxable income of a CFC and apply the disallowance rules of section 245A(d), including when a CFC receives a distribution that is a U.S. return of capital amount. The comment stated that, if the U.S. return of capital amount is treated as made from earnings in a section 245A subgroup of the distributing CFC, the disallowance under section 245A(d) of foreign taxes associated with the portion of the specified earnings and profits attributable to tested income of the recipient CFC not included by a United States shareholder has the inappropriate effect of double-counting the inclusion percentage of section 960(d).

With respect to the anti-avoidance rule of proposed § 1.245A(d)–1(b)(2), the comment acknowledged the need to address successive foreign law distributions and discussed three alternative approaches. One approach would revise § 1.861–20(d)(2)(ii)(A) to treat a foreign law distribution as made ratably out of all of a foreign corporation's earnings and profits, including PTEP, if the amount of its earnings and profits exceeds the foreign gross income arising from the foreign law distribution. The second approach would maintain separate E&P accounts to track the effect of foreign law distributions; the comment viewed this option as overly complex and burdensome. The third approach would maintain the anti-avoidance rule of proposed § 1.245A(d)–1(b)(2) and make no substantive changes to the operative rules. The comment indicated that a flexible, well-articulated anti-avoidance rule could be more effective at policing attempts to avoid section 245A(d) than a series of potentially manipulable mechanical rules.

The Treasury Department and the IRS agree that proposed § 1.245A(d)–1 did not clearly describe the income under Federal income tax law to which foreign gross income should be treated as corresponding for purposes of allocating and apportioning foreign income taxes under § 1.860–20. This lack of clarity resulted in uncertainty in determining the extent to which foreign income taxes on a U.S. return of capital amount, which can arise in a variety of transactions involving both stock and partnership interests, should be treated as attributable to income of a foreign corporation that would give rise to a deduction under section 245A(a) when distributed.

In response to these comments, § 1.245A(d)–1(a) is revised to eliminate references to specified distributions and specified earnings and profits. Instead, § 1.245A(d)–1(a) of the final regulations provides that no credit or deduction is allowed for foreign income taxes attributable to (1) ''section 245A(d) income'' of a domestic corporation, a successor of a domestic corporation, or a foreign corporation (see § 1.245A(d)–1(a)(1)(i)–(ii) and (a)(2)), or (2) ''non-inclusion income'' of a foreign corporation (see § 1.245A(d)–1(a)(1)(iii)).

Section 245A(d) income means, in the case of a domestic corporation, dividends or inclusions for which a deduction under section 245A(a) is allowed, a distribution of section 245A(d) PTEP, and hybrid dividends and inclusions related to tiered hybrid dividends under section 245A(e). In the case of a successor of a domestic corporation, section 245A(d) income

means a distribution of section 245A(d) PTEP. In the case of a foreign corporation, section 245A(d) income means an item of subpart F income that gives rise to an inclusion for which a deduction under section 245A(a) is allowed, a tiered hybrid dividend, and a distribution of section 245A(d) PTEP. Under § 1.245A(d)–1(b)(1), foreign income taxes are attributable to section 245A(d) income if the taxes are allocated and apportioned under § 1.861–20 to the statutory grouping within each section 904 category (the ''section 245A(d) income group'') to which section 245A(d) income is assigned.

Accordingly, the disallowance under § 1.245A(d)–1(a) applies not only to foreign income taxes that are paid or accrued with respect to certain distributions and inclusions, but also to taxes paid or accrued by reason of the receipt of a foreign law distribution with respect to stock, a foreign law disposition, ownership of a reverse hybrid, a foreign law inclusion regime, or the receipt of a disregarded payment described in § 1.861–20(d)(3)(v)(B), to the extent the foreign income taxes are attributable to section 245A(d) income. The disallowance also applies where a foreign corporation pays or accrues foreign income taxes that are attributable to section 245A(d) income of the foreign corporation, in which case such taxes are not eligible to be deemed paid under section 960 in any taxable year. For example, the disallowance applies to foreign income taxes paid or accrued by reason of the receipt by the foreign corporation of a tiered hybrid dividend.

These revised rules ensure that § 1.861–20, including the rules of § 1.861–20(d)(2) for allocating and apportioning foreign income tax to a statutory or residual grouping in a year in which there is no income for Federal income tax purposes in the grouping, apply consistently to allocate and apportion foreign income taxes to the section 245A(d) income group. The rules of § 1.861–20(d)(3) apply to determine the circumstances under which foreign gross income included by reason of a dividend or other distribution with respect to stock, a partnership distribution, a sale or exchange of stock, or a sale or exchange of a partnership interest is assigned to the section 245A(d) income group.

Non-inclusion income is defined as income other than subpart F income, tested income, or income described in section 245(a)(5), without regard to section 245(a)(12), (items of income constituting post-1986 undistributed U.S. earnings) of a foreign corporation. Section 1.245A(d)–1(b)(2)(ii) attributes foreign income taxes to non-inclusion income of a foreign corporation to the extent the foreign income taxes are allocated and apportioned to the domestic corporation's section 245A subgroup category of stock when applying § 1.861–20 for purposes of section 904 as the operative section. The final rules also attribute foreign income taxes to the non-inclusion income of a reverse hybrid or foreign law CFC to the extent that they are allocated and apportioned to the non-inclusion income group under § 1.861–20. See § 1.245A(d)–1(b)(2)(iii).

The disallowance under § 1.245A(d)–1(a)(1)(iii) therefore applies to foreign income taxes paid or accrued by a domestic corporation that are attributable to non-inclusion income of a foreign corporation in which the domestic corporation is a United States shareholder. For example, paragraph (a)(1)(iii) applies to foreign income taxes that a domestic corporation that is a United States shareholder of a foreign corporation pays or accrues by reason of its receipt from the foreign corporation of a distribution that is a U.S. return of capital amount to the extent the foreign income taxes are attributable to non-inclusion income of the foreign corporation. The final regulations at § 1.245A(d)–1(b)(2)(ii) clarify that this rule extends to foreign income taxes the domestic corporation pays or accrues by reason of a remittance, a distribution that is a U.S. return of partnership basis amount, or a disposition that gives rise to a U.S. return of capital amount or a U.S. return of partnership basis amount. The disallowance under paragraph (a)(1)(iii) also applies to foreign income taxes that a domestic corporation that is a United States shareholder pays or accrues by reason of its ownership of a reverse hybrid or foreign law CFC, to the extent the foreign income taxes are attributable to non-inclusion income of the reverse hybrid or foreign law CFC and not otherwise disallowed under paragraph (a)(1)(i) or (ii).

The proposed anti-avoidance rule in § 1.245A(d)–1(b)(2) is finalized without substantive change at § 1.245A(d)–1(b)(3). While revising § 1.861–20(d)(2)(ii)(A) to treat a foreign law distribution as made ratably out of all of a foreign corporation's earnings and profits would be a potentially feasible alternative approach, the Treasury Department and the IRS have determined that on balance the anti-avoidance rule provides an appropriate framework and the necessary flexibility to address section 245A(d) avoidance.

Finally, for the avoidance of doubt, the final regulations clarify that section 245A(d) operates to deny the credit or deduction for foreign taxes paid or accrued with respect to dividends for which a domestic corporation could claim a deduction under section 245A, regardless of whether the corporation claims the deduction on its return. See § 1.245A(d)–1(c)(19) and (21) (defining section 245A(d) income and section 245A(d) PTEP). See also H.R. Rep. No. 115–466, at 600 (2017) (Conf. Rep.) (''No foreign tax credit or deduction is allowed for any taxes paid or accrued with respect to any portion of a distribution treated as a dividend that qualifies for the DRD.''); *id.* at 598 (describing section 245A as ''an exemption for certain foreign income by means of a 100-percent deduction'').

II. Section 250 Regulations—Definition of Electronically Supplied Service

Section 1.250(b)–5 provides rules for determining whether a service is provided to a person, or with respect to property, located outside the United States and therefore gives rise to foreign-derived deduction eligible income (''FDDEI service''). The rules identify specific enumerated categories, including a category for general services provided to either consumers or business recipients. For purposes of determining whether such a general service constitutes a FDDEI service, the rules require the location of the recipient to be identified.

The regulations contain special rules in § 1.250(b)–5(d)(2) and § 1.250(b)–5(e)(2)(iii) for determining the location at which ''electronically supplied services'' are provided. Section 1.250(b)–5(c)(5) defines the term ''electronically supplied service'' to mean a general service (other than an advertising service) that is delivered primarily over the internet or an electronic network, and provides that such services include cloud computing and digital streaming services. Proposed § 1.250(b)–5(c)(5) revised that definition to clarify that, to qualify as an electronically supplied service, the value of the service to the end user must be derived primarily from the service's automation and electronic delivery and would not include, for example, legal, accounting, medical or teaching services ''delivered electronically and synchronously.'' No comments were received on the proposed revised definition of an electronically supplied service.

By providing the example of professional or teaching services provided in real time (synchronously) as not constituting electronically supplied services, proposed § 1.250(b)–5(c)(5) was intended to illustrate cases where

the primary value of the service was not in its automation and electronic delivery. However, this example may have implied that the temporal aspect of when the service is rendered, relative to when the end user accesses that service, is a determinative factor in constituting an ''electronically supplied service.'' The Treasury Department and the IRS had intended that services accessed by an end user outside of real time (asynchronously) also will not constitute an ''electronically supplied service'' if, under all the facts and circumstances, they primarily involve human effort. Therefore, the final regulations remove the reference to ''and synchronously'' from the fourth sentence of § 1.250(b)–5(c)(5) to clarify that the definition does not depend on whether the services are rendered synchronously or asynchronously but rather depend on whether the services primarily involve human effort.

III. Allocation and Apportionment of Expenses Under Section 861 Regulations

A. Treatment of Section 818(f)(1) Items for Consolidated Groups

Proposed § 1.861–14(h) provided that certain items of life insurance companies described in section 818(f)(1) that are members of a consolidated group are allocated and apportioned on a life subgroup basis but provided a one-time election to allocate and apportion these items on a separate company basis. The one comment received endorsed the approach in the 2020 FTC proposed regulations, which are finalized without change.

B. Allocation and Apportionment of Foreign Income Taxes

1. In General

The 2020 FTC proposed regulations provided more detailed and comprehensive guidance regarding the assignment of foreign gross income, and the allocation and apportionment of the associated foreign income taxes, to the statutory and residual groupings in certain cases. This guidance included rules for dispositions of stock and partnership interests, and rules for transactions that are distributions with respect to a partnership interest, under Federal income tax law. It also included new rules addressing the allocation and apportionment of foreign income taxes imposed by reason of disregarded payments.

2. Dispositions of Stock

Proposed § 1.861–20(d)(3)(i)(D) provided that the foreign gross income arising from a transaction that is treated as a sale, exchange, or other disposition of stock for Federal income tax purposes is assigned first to the statutory and residual groupings to which any U.S. dividend amount is assigned under Federal income tax law, to the extent thereof. Foreign gross income is next assigned to the grouping to which the U.S. capital gain amount is assigned, to the extent thereof. Any excess of the foreign gross income over the sum of the U.S. dividend amount and the U.S. capital gain amount is assigned to the statutory and residual groupings in the same proportions in which the tax book value of the stock is (or would be if the taxpayer were a United States person) assigned to the groupings under the rules of § 1.861–9(g) in the U.S. taxable year in which the disposition occurs.

A comment recommended that, to the extent of any basis in the stock attributable to a previous increase under section 961, foreign gross income in excess of the U.S. dividend amount be assigned to the same statutory grouping as the PTEP that gave rise to the basis increase. The comment noted that assigning foreign gross income in excess of the U.S. dividend amount to the grouping that produced the underlying PTEP would better conform the tax attribution consequences of a disposition of stock with the tax attribution consequences of a pre-sale distribution with respect to the stock.

Under § 1.861–20(d)(1), Federal income tax law applies to characterize the transaction that gives rise to foreign gross income. The sale of stock may result in a U.S. dividend amount, a U.S. return of capital amount, and a U.S. capital gain amount for U.S. tax purposes. As noted in the preamble to the 2020 FTC proposed regulations, when a controlled foreign corporation has retained PTEP, the usual consequence will be to increase the portion of the amount realized on the sale of the corporation's stock that is treated as a return of capital for U.S. tax purposes, as a result of the basis adjustments under section 961. Accordingly, it is reasonable to conceive of foreign gross income in the amount of the basis attributable to retained PTEP as a timing difference associated with the earnings represented by the PTEP, just as an amount of foreign gross income equal to a section 1248 amount that is included in the U.S. dividend amount is treated as a timing difference associated with those non-previously taxed earnings.

However, the approach suggested in the comment would create an additional compliance burden for taxpayers and administrative burdens for the IRS by requiring the separate tracking of basis in the stock attributable to a previous increase under section 961, which is not otherwise required for U.S. tax purposes. Additional rules would be required to associate PTEP with the particular shares of stock being sold, such as in the case of a taxpayer with PTEP in different statutory groupings who sells one class of stock but retains a different class of stock. The Treasury Department and the IRS have determined that the groupings to which the tax book value of the stock is assigned is an administrable and reasonably accurate surrogate for both the PTEP and the future, unrealized earnings of the corporation with which the foreign gross income is properly associated when foreign tax is imposed on a U.S. return of capital amount. For these reasons, the final regulations retain the rule in proposed § 1.861–20(d)(3)(i)(D).

3. Partnership Transactions

Proposed § 1.861–20(d)(3)(ii)(B) assigned foreign gross income arising from a partnership distribution in excess of the U.S. capital gain amount by reference to the asset apportionment percentages of the tax book value of the partner's distributive share of the partnership's assets (or, in the case of a limited partner with less than a 10 percent interest, the tax book value of the partnership interest), which are a surrogate for the partner's distributive share of earnings of the partnership that are not recognized in the year in which the distribution is made for U.S. tax purposes. This approach is based on principles similar to those underlying the rule in proposed § 1.861–20(d)(3)(i)(D) for allocating and apportioning foreign tax imposed on an amount that is a return of capital with respect to stock for Federal income tax purposes. Similarly, the 2020 FTC proposed regulations associated foreign gross income from the disposition of a partnership interest in excess of the U.S. capital gain amount with a hypothetical distributive share that is determined by reference to the tax book value of the partnership's assets (or, in the case of a limited partner with less than a 10 percent interest, the tax book value of the partnership interest). See proposed § 1.861–20(d)(3)(ii)(C).

A comment recommended that, in the case of either a distribution with respect to a partnership or a disposition of a partnership interest, foreign gross income in excess of the U.S. capital gain amount be characterized instead by reference to the statutory and residual groupings of amounts maintained in partner-level accounts that track the partners' distributive shares of

partnership earnings in prior years. According to the comment, the tax book value method potentially distorts the allocation of tax to U.S. income items in cases in which the amount of income produced by the asset is disproportionate to its basis. For this reason, the comment recommended tracing foreign gross income to amounts in the partner's cumulative distributive share account in order to provide for more accurate matching of foreign gross income to partners' distributive shares of partnership income for the current and prior years. The comment recommended that these new partner-level accounts be increased as a partner includes a distributive share of partnership income and decreased as the partnership makes distributions. Under this multi-year account approach, foreign gross income arising from partnership distributions would be characterized by reference to the earnings in the account out of which the distribution is made, and foreign gross income arising from a disposition of a partnership interest would be characterized by reference to the earnings in the account at the time of disposition. In either case, additional rules (such as providing for the use of a pro rata, last-in-first-out, or other approach) would be required to determine the earnings in the account out of which a distribution is considered to be made, and for cases in which the amount in the partner-level account exceeds the foreign gross income arising from a disposition of that partner's partnership interest.

Recognizing the additional record-keeping requirements and complexity required by this approach, the comment suggested in the alternative that foreign gross income in excess of a U.S. capital gain amount recognized by reason of a partnership distribution or disposition of a partnership interest be characterized based on the partner's distributive share of the partnership's current year income, to the extent thereof, with any excess assigned based on the tax book value method provided for in the 2020 FTC proposed regulations.

The final regulations retain the approach from the 2020 FTC proposed regulations for characterizing foreign gross income arising from a partnership distribution or disposition. The Treasury Department and the IRS do not agree that it is appropriate to treat a partnership distribution as made out of a partner's distributive share of partnership income. Contrary to the ordering rules that apply to distributions by a corporation, under Federal income tax law partnership distributions are not sourced from current or accumulated partnership income. Similarly, under Federal income tax law, a partnership distribution reduces a partner's basis in its partnership interest without differentiating between basis from capital contributions and basis from a partner's distributive share of partnership income.

A common principle of the rules in § 1.861–20 is that Federal income tax law applies to characterize foreign gross income. To the extent a partnership distribution or disposition is treated as a return of basis for Federal income tax purposes, § 1.861–20(d)(3)(ii)(B) and (C) appropriately reflect this principle by allocating and apportioning any foreign tax imposed on the partnership distribution in the same manner as foreign tax on a return of capital with respect to stock. Furthermore, this approach to characterizing foreign gross income arising from a partnership distribution is consistent with the approach in § 1.861–20(d)(3)(v)(C)(*1*) that applies to a distribution that is a remittance by a taxable unit.

As acknowledged by the comment, characterizing foreign gross income by reference to a partner's distributive share of partnership income in prior years would require creating new partner-level accounts to track the partner's aggregate distributive share of unremitted partnership income. That type of partner-level account is not otherwise required to be maintained to characterize partnership distributions for Federal income tax purposes and would be unduly burdensome for both taxpayers and the IRS, as well as being generally inconsistent with the Federal income tax rules for characterizing partnership distributions. In addition, the Treasury Department and the IRS have determined that the suggested alternative approach of characterizing foreign gross income by reference to a partner's distributive share of current year partnership income would be susceptible to manipulation by timing partnership distributions to maximize foreign tax credit benefits. Therefore, the comment is not adopted.

4. Disregarded Payments

The 2020 FTC proposed regulations addressed the allocation and apportionment of foreign income taxes that are imposed by reason of a disregarded payment between taxable units. In the case of foreign income taxes paid or accrued by an individual or domestic corporation, the rules defined a taxable unit as a foreign branch, foreign branch owner, or non-branch taxable unit as defined in proposed § 1.904–6(b)(2)(i)(B). In the case of foreign income taxes paid by a foreign corporation, the rules defined a taxable unit by reference to the tested unit definition in proposed § 1.954–1(d)(2), as contained in proposed regulations (REG–127732–19) addressing the high-tax exception under section 954(b)(4), published in the **Federal Register** (85 FR 44650) on July 23, 2020 (the ''2020 HTE proposed regulations''). See proposed § 1.861–20(d)(3)(v)(E)(*9*).

In general, the 2020 FTC proposed regulations characterized a disregarded payment as either a payment out of the current income attributable to a taxable unit (a ''reattribution payment''), a contribution to a taxable unit, or a remittance out of accumulated earnings of a taxable unit. See proposed § 1.861–20(d)(3)(v). The rules assigned foreign gross income arising from a reattribution payment to the statutory and residual groupings of the recipient taxable unit based on the groupings to which the current income out of which the reattribution payment was made is assigned. See proposed § 1.861–20(d)(3)(v)(B). The rules assigned foreign gross income arising from a contribution received by a taxable unit to the residual grouping, and assigned foreign gross income arising from a remittance by reference to the statutory and residual groupings to which the assets of the payor taxable unit were assigned for purposes of apportioning interest expense, which served as a proxy for the accumulated earnings of the payor taxable unit. See proposed § 1.861–20(d)(3)(v)(C). For this purpose, the assets of a payor taxable unit were determined under the rules of § 1.987–6(b), modified to include in a taxable unit's assets any stock that it owned, and in certain circumstances reattributed another taxable unit's assets to the taxable unit or reattributed the taxable unit's assets to another taxable unit. See proposed § 1.861–20(d)(3)(v)(C)(*1*)(*ii*).

Comments criticized the tax book value method as an inaccurate surrogate for accumulated earnings of a taxable unit in the case of an asset with a basis that is disproportionate to the income produced by the asset and requested that foreign gross income arising from a remittance be assigned to the statutory and residual groupings based on the current earnings of a taxable unit. In addition, comments requested that, rather than trace foreign gross income arising from disregarded payments to current or accumulated earnings of a taxable unit, the definition of which generally includes disregarded entities, the rules should only trace such foreign

gross income to current or accumulated income of a qualified business unit (''QBU'') to reduce the complexity and compliance burden of the rules. Finally, a comment suggested that the modifications to the rules of § 1.987–6(b) for purposes of determining the assets of a taxable unit should be expanded to include not only stock, but any interest of a taxable unit in another taxable unit, including a partnership.

The Treasury Department and the IRS do not agree that current earnings of a taxable unit, rather than the tax book value of its assets, should be the basis for characterizing foreign gross income included by reason of a remittance. The Treasury Department and the IRS have determined that, although the tax book value of the assets of a taxable unit may not be a perfect surrogate for the accumulated earnings of that taxable unit, it is a better surrogate than current-year earnings of the taxable unit. The use of current-year earnings is rejected because the current-year earnings may already have been accounted for through reattribution payments, may not reflect all of a taxable unit's assets, and could be subject to manipulation through the timing of disregarded payments, depending on the character of the earnings attributed to a taxable unit for a particular taxable year. Although a more accurate matching of foreign gross income to accumulated income for Federal income tax purposes could be achieved through the maintenance of multi-year accounts tracking accumulated earnings of a taxable unit, characterizing the accumulated earnings of a taxable unit by reference to the tax book value of its assets appropriately balances concerns about administrability, compliance burdens, manipulability, and accuracy.

The Treasury Department and the IRS do not agree that foreign gross income should be traced to income only when disregarded payments are made by a QBU, rather than a taxable unit. The purpose of this rule in the 2020 FTC proposed regulations was to implement a tracing regime for foreign income tax imposed on disregarded payments that more accurately distinguished payments made out of current income from those made out of accumulated income, rather than treating all disregarded payments as either remittances or contributions. Tracing cannot achieve the policy goal of improved accuracy in matching disregarded payments to the current or accumulated earnings out of which the payment is made if it does not fully account for all disregarded payments. Accordingly, this recommendation is not adopted.

The Treasury Department and the IRS agree that for purposes of § 1.861–20 the assets of a taxable unit should include not only stock that it owns, but also its interests in other taxable units. Asset tax book values serve as a surrogate for the accumulated earnings from which a taxable unit made a remittance; including a taxable unit's interests in all other taxable units appropriately reflects all of the income-producing assets of a taxable unit that could produce earnings. Accordingly, § 1.861–20(d)(3)(v)(C)(*1*)(*ii*) of the final regulations provides that a taxable unit's assets include its pro rata share of the assets of another taxable unit in which it owns an interest.

The definitions of the terms ''contribution'' and ''remittance'' in § 1.861–20(d)(3)(v)(E) of the final regulations are revised so that, together, they describe all payments that are not reattribution payments. The proposed regulations defined a ''contribution'' as a transfer of property to a taxable unit that would be treated as a contribution to capital described in section 118 or a transfer described in section 351 if the taxable unit were a corporation under Federal income tax law, or the excess of a disregarded payment made by a taxable unit to another taxable unit that the first taxable unit owns over the portion of the disregarded payment that is a reattribution payment. The proposed regulations defined a ''remittance'' as a transfer of property that would be treated as a distribution by a corporation to a shareholder with respect to its stock if the taxable unit were a corporation for Federal income tax law, or the excess of a disregarded payment made by a taxable unit to a second taxable unit over the portion of the disregarded payment that is a reattribution payment, other than an amount treated as a contribution. The proposed definition of ''contribution'' did not encompass a disregarded payment that is neither a reattribution payment nor a transfer that would be described in section 351, such as, in some circumstances, disregarded interest payments. To fill this gap, § 1.861–20(d)(3)(v)(E) of the final regulations defines a ''contribution'' as the excess of a disregarded payment made by a taxable unit to another taxable unit that the first taxable unit owns over the portion of the disregarded payment, if any, that is a reattribution payment. This definition encompasses a transfer of property to a taxable unit that would be treated as a contribution to capital described in section 118 or a transfer described in section 351 if the taxable unit were a corporation. In addition, § 1.861–20(d)(3)(v)(E) of the final regulations defines a ''remittance'' as a disregarded payment that is neither a contribution nor a reattribution payment. This definition encompasses a transfer of property that would be treated as a distribution by a corporation to a shareholder with respect to its stock if the taxable unit were a corporation. These changes ensure that the final regulations provide rules for allocating foreign income taxes attributable to all disregarded payments.

In addition, the final regulations define a ''taxable unit'' by reference to the tested unit definition in § 1.951A–2(c)(7)(iv)(A), a final regulation, instead of by reference to the definition of a taxable unit in proposed § 1.954–1(d)(2). See § 1.861–20(d)(3)(v)(E)(*9*).

The final regulations provide a special rule at § 1.861–20(d)(3)(vi) for allocating and apportioning foreign income tax on foreign gross income included by a taxpayer by reason of its ownership of a U.S. equity hybrid instrument (defined in § 1.861–20(b)(22) as an instrument that is stock or a partnership interest under Federal income tax law but that is debt or otherwise gives rise to the accrual of income that is not treated as a dividend or a distributive share of partnership income under foreign law). This special rule, which generally allocates foreign income tax on foreign gross interest income with respect to a U.S. equity hybrid instrument to the grouping to which distributions with respect to the instrument are assigned, clarifies how section 245A(d) and § 1.245A(d)–1 apply to foreign income tax that is attributable to a hybrid dividend. As discussed in part I of this Summary of Comments and Explanation of Revisions, § 1.245A(d)–1 relies upon the rules of § 1.861–20 to determine whether foreign income tax is attributable to income described in section 245A, including a hybrid dividend described in section 245A(e), in which case a credit or deduction for the foreign income tax is disallowed.

Section 1.861–20(d)(3)(vi)(A) treats foreign gross income included by reason of an accrual of income with respect to a U.S. equity hybrid instrument as a distribution. Accordingly, it assigns the foreign gross income to the statutory and residual groupings as though the accrual were a foreign law distribution that was made on the date of the accrual. Section 1.861–20(d)(3)(vi)(B) provides an identical rule for a payment of interest under foreign law with respect to the U.S. equity hybrid instrument; therefore, withholding tax on the payment is also attributed to income (determined under Federal income tax law) from the instrument.

Finally, as part of finalizing the rules in § 1.861–20(d)(3)(v), conforming changes are made to § 1.951A–2(c)(7) and (8). In particular, § 1.951A–2(c)(7)(iii)(B) is deleted and Examples 1 and 3 in § 1.951A–2(c)(8)(iii)(A) and (C) are revised accordingly while Example 2 in § 1.951A–2(c)(8)(iii)(B) is removed as obsolete. Section 1.951A–2(c)(7)(iii)(B) is removed from the final regulations because the special rules in that paragraph for allocating and apportioning current year taxes imposed by reason of a disregarded payment are rendered obsolete by the final rules in § 1.861–20(d)(3)(v). Under § 1.951A–2(c)(7)(iii)(A), deductible expenses (including expenses for current year taxes) are allocated and apportioned under the principles of § 1.960–1(d)(3) and the rules in § 1.861–20.

5. Applicability Date

Section 1.861–20 (other than § 1.861–20(h)) applies to taxable years that begin after December 31, 2019, and end on or after November 2, 2020. Section 1.861–20(h) applies to taxable years beginning on or after December 28, 2021. In addition, the revisions to § 1.951A–2(c)(7) and (8) apply to taxable years that begin after December 28, 2021; however, taxpayers may choose to apply the final rules to taxable years that begin after December 31, 2019, and on or before December 28, 2021, consistent with the applicability date of § 1.861–20(d)(3)(v).

Several comments asked the Treasury Department and the IRS to provide a delayed applicability date for § 1.861–20. The rules in proposed § 1.861–20 revised the corresponding provisions in the 2019 FTC proposed regulations, which were not finalized with the 2020 FTC final regulations to provide an additional opportunity for comment. Because the regulations are finalized substantially as proposed, with primarily clarifying changes in response to comments, the Treasury Department and the IRS have determined that it is not appropriate to modify the proposed applicability date.

IV. Creditability of Foreign Taxes Under Sections 901 and 903

A. Jurisdictional Nexus Requirement

1. In General

The 2020 FTC proposed regulations added a jurisdictional nexus requirement for determining whether a foreign tax qualifies as a foreign income tax for purposes of section 901. Proposed § 1.901–2(a)(3) and (c) generally required that, for a foreign tax to be a foreign income tax, the foreign country imposing the tax must have sufficient nexus to the taxpayer's activities or investment of capital or other assets that give rise to the income base on which the foreign tax is imposed. In the case of a foreign tax imposed by a foreign country on nonresident taxpayers, the 2020 FTC proposed regulations provided that a foreign tax satisfies the jurisdictional nexus requirement if it meets one of three nexus tests.

First, under proposed § 1.901–2(c)(1)(i), a foreign tax meets the jurisdictional nexus requirement if it is imposed only on income that is attributable, under reasonable principles, to the nonresident's activities located in the foreign country (for this purpose, the nonresident's activities include its functions, assets, and risks) (''activities-based nexus''). To meet the activities-based nexus test, the allocation of a nonresident's income to the nonresident's activities in the foreign country cannot take into account, as a significant factor, the location of customers, users, or any similar destination-based criterion. Proposed § 1.901–2(c)(1)(i) further provided that reasonable principles for determining income attributable to a nonresident's activities include rules similar to those for determining effectively connected income under section 864(c).

Second, under proposed § 1.901–2(c)(1)(ii), a foreign tax imposed on the nonresident's income arising in the foreign country meets the jurisdictional nexus requirement only if the foreign tax law sourcing rules are reasonably similar to the sourcing rules that apply for Federal income tax purposes (''source-based nexus'').

Third, under proposed § 1.901–2(c)(1)(iii), a foreign tax imposed on income or gain from sales or other dispositions of property that is subject to tax in the foreign country on the basis of the situs of real or movable property meets the jurisdictional nexus requirement only if it is imposed with respect to income or gain from the disposition of real property situated in the foreign country or movable property forming part of the business property of a taxable presence in the foreign country (or from interests in certain entities holding such property) (''property-based nexus'').

In the case of a foreign tax imposed by a foreign country on its residents, proposed § 1.901–2(c)(2) provided that in determining whether the foreign tax meets the jurisdictional nexus requirement, any allocation of income, gain, deduction or loss between a resident taxpayer and a related or controlled entity under the foreign country's transfer pricing rules must follow arm's length principles, without taking into account as a significant factor the location of customers, users, or any other similar destination-based criterion.

Under the 2020 FTC proposed regulations, the jurisdictional nexus requirement also applied to determine whether a foreign levy is a tax in lieu of an income tax under section 903 (an ''in lieu of tax''). Specifically, the 2020 FTC proposed regulations modified the substitution requirement to add proposed § 1.903–1(c)(1)(iv), which required that the generally-imposed net income tax would either continue to qualify as a net income tax under proposed § 1.901–2(a)(3), or would itself constitute a separate levy that is a net income tax if it were to be imposed on the excluded income that is covered by the tested in lieu of tax. This modification was intended to ensure that a foreign tax can qualify as an in lieu of tax only if the foreign country imposing the tax could instead have subjected the excluded income to a tax on net gain that would satisfy the jurisdictional nexus requirement in proposed § 1.901–2(c). In addition, proposed § 1.903–1(c)(2)(iii) provided that, to satisfy the substitution requirement, a withholding tax must meet the source-based jurisdictional nexus requirement in proposed § 1.901–2(c)(1)(ii) to qualify as a ''covered withholding tax.'' Comments regarding the jurisdictional nexus test of the substitution requirement are discussed in this part IV.A of this Summary of Comments and Explanation of Revisions; other comments regarding the proposed modifications to the in lieu of tax provisions are discussed in part IV.C of this Summary of Comments and Explanation of Revisions.

2. Reasonableness of Jurisdictional Nexus Requirement

i. Text and History of the Relevant Statutory Provisions

a. Income Tax in the U.S. Sense

Comments questioned the validity of the jurisdictional nexus requirement, stating that the requirement is inconsistent with the plain language, structure, and legislative history of the statutory foreign tax credit provisions. Comments stated that the plain meaning of ''income tax'' refers solely to whether the base of the tax is net income and does not require a justification (nexus) for the imposition of the tax. Some comments stated that the term ''income tax'' should not be interpreted to encompass U.S. rules or international norms regarding jurisdiction to tax

because, according to those comments, when the foreign tax credit provisions were first enacted there were limited source rules in the Code and international norms for determining the source of income were still developing. Other comments stated that the inclusion of a jurisdictional nexus requirement would require Congressional action and noted that other exceptions to creditability have been enacted by Congress (see, for example, section 901(f), (i) and (m)). Some comments stated that the Supreme Court in *Biddle* v. *Comm'r,* 302 U.S. 573 (1938), made only a passing reference to ''an income tax in the U.S. sense,'' and that neither *Biddle* nor any other case has interpreted the statute to include a jurisdictional nexus requirement.

The Treasury Department and the IRS have determined that the addition of a jurisdictional nexus requirement is a valid exercise of the government's rulemaking authority. The Treasury Department and the IRS have determined that it is reasonable and appropriate to interpret the terms ''income tax'' and ''tax in lieu of an income tax'' in sections 901 and 903, respectively, to incorporate a jurisdictional nexus requirement. Judicial decisions and administrative guidance over the past century have interpreted the term ''income, war profits, and excess profits tax,'' which is not defined in section 901 or by the limited initial explanation in the early legislative history. These interpretations have consistently followed the principle, introduced by the *Biddle* court, that the determination of whether a foreign tax is creditable under section 901 is made by evaluating whether such tax, if enacted in the United States, would be an income tax (in other words, whether the foreign tax is ''an income tax in the U.S. sense''). See *PPL Corp.* v. *Comm'r,* 569 U.S. 329, 335 (2013). See also *Inland Steel Co.* v. *United States,* 230 Ct. Cl. 314, 325 (1982) (''Whether a foreign tax is an income tax under I.R.C. § 901(b)(1) is to be decided under criteria established by United States revenue laws and court decisions.''). It is well-settled that U.S. tax provisions should generally be interpreted with reference to domestic tax concepts absent a clear Congressional expression that foreign concepts control. *United States* v. *Goodyear Tire & Rubber Co.,* 493 U.S. 132, 145 (1989). The jurisdictional nexus requirement is consistent with the principle that U.S. tax principles, not varying foreign tax law policies, should control the determination of whether a foreign tax is an income tax (or a tax in lieu of an income tax) that is eligible for a U.S. foreign tax credit.

U.S. tax law has long incorporated a jurisdictional nexus limitation in taxing income of foreign persons. For example, the United States only taxes income of foreign persons that have income that is effectively connected with a U.S. trade or business or attributable to U.S. real property, or have income that is fixed or determinable, annual or periodic (FDAP) income sourced in the United States. See sections 871, 881, 882, and 897. In addition, U.S. foreign tax credit rules reflect international norms of taxing jurisdiction that assign the primary right to tax to the source country, the secondary right to tax to the country where the taxpayer is a resident or engaged in a trade or business, and the residual right to tax to the country of citizenship or place of incorporation. See sections 904(a) (limiting foreign tax credits to U.S. tax on foreign source income) and 906(b)(1) (limiting foreign tax credits allowed to foreign persons engaged in a U.S. trade or business to foreign taxes on foreign source effectively connected income). In keeping with these traditional U.S. taxing rules, international taxing norms (such as provisions included in the OECD Model Tax Convention), and the longstanding approach of the courts to apply U.S. tax principles in determining whether a foreign tax is an income tax in the U.S. sense, it is appropriate for the definition of a creditable tax to incorporate the concept of jurisdictional nexus from the U.S. tax law. The fact that U.S. tax rules have changed since the foreign tax credit provisions were first enacted does not preclude an interpretation of the term ''income tax'' to reflect U.S. norms, because the principle of ''an income tax in the U.S. sense'' incorporates an evolving standard of what constitutes an income tax in the U.S. sense.

In addition, the net gain requirement in existing § 1.901–2(b), which prescribes the elements of gross receipts and costs that must comprise the base of a foreign income tax, has historically reflected jurisdictional norms in limiting creditable taxes to those imposed on net income. The jurisdictional nexus requirement clarifies the limits on the scope of the items of gross receipts and costs that may properly be taken into account in computing the taxable base of a creditable foreign income tax. Absent this rule, U.S. tax on net income could be reduced by credits for a foreign levy whose taxable base was improperly inflated by unreasonably assigning income to a taxpayer, or by not appropriately taking into account significant costs that are attributable to gross receipts properly included in the taxable base.

Existing § 1.901–2(b)(4)(i)(A) has long contained a form of a nexus rule, by requiring recovery of significant costs and expenses that are ''attributable, under reasonable principles'' to gross receipts included in the foreign tax base. A rule providing the extent to which gross receipts and costs are within the scope of a jurisdiction's right to tax is therefore necessary to determine which items of gross receipts and costs a foreign levy must include to satisfy the net gain rules.

To better reflect the role of the jurisdictional nexus rule as an element of the net gain requirement, the rule in proposed § 1.901–2(c) is incorporated in the net gain requirement as new paragraph § 1.901–2(b)(5). In addition, the term ''jurisdictional nexus requirement'' is replaced with ''attribution requirement'' to more clearly reflect that the rule provides limits on the scope of gross receipts and costs that are attributable to a taxpayer's activities and thus appropriately included in the foreign tax base for purposes of applying the other components of the net gain requirement.

b. Relationship to Foreign Tax Credit Limitation

Some comments asserted that Congress explicitly removed a jurisdictional nexus requirement from the predecessor to section 901 in 1921, and since then, Congress has addressed concerns regarding jurisdiction to tax through the foreign tax credit limitation under section 904 (and its predecessor provisions). The comments pointed out that the foreign tax credit provision, when first enacted under the Revenue Act of 1918, provided that U.S. tax was ''credited with . . . the amount of any income, war-profits and excess-profits taxes paid during the taxable year to any foreign country, *upon income derived from sources therein,* or to any possession of the United States.'' Public Law 65–254, § 222(a)(1) and 238(a), 40 Stat. 1057, 1073, 1080–81 (emphasis added). The comments stated that the phrase ''upon income derived from sources therein'' served as a jurisdictional nexus limit, which Congress eliminated and replaced by enacting the foreign tax credit limitation in the Revenue Act of 1921. The comments asserted that this legislative history shows that Congress has rejected including a jurisdictional nexus requirement in section 901. The comments also stated that the only concern regarding jurisdiction to tax

discussed in the legislative history to the 1918 and 1921 Revenue Acts was Congress' desire to preserve U.S. primary taxing rights over U.S. source income.

The Treasury Department and the IRS disagree with the comments' conclusion that Congress has expressly rejected a jurisdictional nexus requirement for creditable foreign taxes. Although source-based taxing rights are an appropriate element of jurisdictional nexus, tax residence and conducting business in a foreign country also provide jurisdictional nexus. The Treasury Department and the IRS view the introduction of the foreign tax credit limitation in 1921 as merely refining the 1918 Revenue Act's limitation of credits to tax imposed upon foreign source income. The legislative history does not explain why Congress removed the phrase ''upon income from sources therein'' in 1921, nor does it suggest that Congress believed it was removing a jurisdictional nexus requirement and replacing it with a foreign tax credit limitation.

The Treasury Department and the IRS also disagree with the comments' assertion that statutory policy regarding jurisdiction to tax is confined to the section 904 foreign tax credit limitation. Congress has not explicitly addressed jurisdictional nexus with respect to the foreign tax credit. There is no statutory provision that addresses whether the foreign tax credit should be allowed for taxes imposed outside of traditional U.S. taxing norms. Section 904 does not address the threshold question of whether a foreign tax is an income tax in the U.S. sense. It only limits the allowable credit to the amount of pre-credit U.S. tax on particular categories of foreign source income, as revised by Congress from time to time. The foreign tax credit limitation preserves residual U.S. tax on foreign source income subject to a foreign rate of tax that is lower than the U.S. rate, but does not ensure that the foreign tax has an appropriate jurisdictional basis. The statute is silent with respect to jurisdictional nexus, and it is reasonable and appropriate for regulations to apply U.S. tax concepts in addressing the creditability of extraterritorial foreign levies that Congress could not have anticipated when the foreign tax credit provisions were first enacted.

c. Legislative Re-Enactment Doctrine

Some comments argued that the addition of a jurisdictional nexus requirement is precluded by the legislative re-enactment doctrine. These comments noted that the 1980 temporary and proposed section 901 regulations, which contained similar nexus requirements, drew numerous adverse comments and were the subject of Congressional hearings, and that the Treasury Department and the IRS did not finalize those provisions in TD 7918 (48 FR 46276) (''the 1983 regulations''). These comments asserted that in passing the Tax Reform Act of 1986, Public Law 99–514, 100 Stat. 2085 (1986), and the Tax Cuts and Jobs Act, Public Law 115–97, 131 Stat 2054 (2017) (''TCJA''), Congress was aware of the 1983 regulations (which do not contain a jurisdictional nexus requirement) and did not amend the statute to add one, with the result that Congress implicitly endorsed the 1983 regulations and precluded the Treasury Department and the IRS from modifying them.

The Treasury Department and the IRS disagree with these comments. The legislative re-enactment doctrine does not preclude an agency from changing its regulatory interpretation of a statute if Congress amends related provisions. See *Helvering* v. *Reynolds,* 313 U.S. 428, 432 (1941) (''[The doctrine of legislative reenactment] does not mean that the prior construction has become so imbedded in the law that only Congress can effect a change.''). See also *Helvering* v. *Wilshire Oil Co.,* 308 U.S. 90, 100 (1939) (holding that the legislative reenactment doctrine applies where ''it does not appear that the rule or practice has been changed by the administrative agency through exercise of its continuing rule-making power''); *McCoy* v. *U.S.,* 802 F.2d 762 (4th Cir. 1986); *Interstate Drop Forge Co.* v. *Com.,* 326 F2d 743 (7th Cir. 1964).

Additionally, while a purported legislative re-enactment may indicate that Congress was aware of, and implicitly endorsed, the prior regulatory interpretation, a regulation or administrative ruling promulgated under a re-enacted statute is not treated as binding unless other evidence clearly manifests such a purpose. See *Oklahoma Tax Com.* v. *Texas Co.,* 336 U.S. 342 (1949); *Jones* v. *Liberty Glass Co.,* 332 U.S. 524 (1947). There is no indication that Congress intended to preclude the amendment of the section 901 and 903 regulations to add a jurisdictional nexus requirement. None of the comments identified any aspect of either the Tax Reform Act of 1986 or the TCJA that suggests that Congress intended to limit future regulations addressing the definition of creditable foreign taxes under sections 901 and 903. Therefore, the Treasury Department and the IRS have determined that the legislative re-enactment doctrine does not preclude the adoption of prospective regulations that include a jurisdictional nexus requirement.

ii. Policy and Purpose of the Statutory Foreign Tax Credit Provisions

Comments stated that adding a jurisdictional nexus requirement is contrary to the policy of the foreign tax credit, which is to mitigate double taxation of foreign source income. These comments asserted that double taxation results when the United States imposes tax on income that is taxed by another country, regardless of whether the other country had a proper jurisdictional basis for imposing the tax, and unrelieved double taxation could discourage foreign investment. The comments asserted that Congress enacted the foreign tax credit to enhance the competitiveness of American companies operating abroad, and the jurisdictional nexus requirement in the 2020 FTC proposed regulations would impede this competitiveness. The comments asserted that the policy goal of sections 901 and 903 is not to influence international norms or change the behavior of foreign governments.

However, another comment stated that the jurisdictional nexus requirement may reasonably be viewed as consistent with the underlying principles and purposes of the foreign tax credit regime. This comment asserted that the allowance of a foreign tax credit for a tax levied on amounts that do not have a significant connection to the foreign jurisdiction taxing such income, particularly U.S. source income, could effectively convert the foreign tax credit regime into a means of subsidizing foreign jurisdictions at the expense of the U.S. fisc. Similarly, one comment that questioned the government's authority to include a jurisdictional nexus requirement also acknowledged that taxes that have no nexus whatsoever to the taxing jurisdiction would not properly be considered taxes.

The Treasury Department and the IRS agree with the comment that the jurisdictional nexus requirement is consistent with the policy goals of the foreign tax credit. The foreign tax credit is not intended to subsidize foreign jurisdictions at the expense of the U.S. fisc. The legislative history to the predecessor provisions to section 901, as well as subsequent statutory amendments, reflect Congress' consistent concern that foreign tax credits should not be allowed to offset U.S. tax on income that does not have a significant connection to the foreign jurisdiction taxing such income. See, for example, S. Rep. No. 67–275, at 17 (1921) (describing the need to avoid

allowing a foreign tax credit to ''wipe out'' tax properly attributable to U.S. source income); Senate Comm. on Finance, 98th Cong., 2d Sess., Deficit Reduction Act of 1984, Explanation of Provisions Approved by the Committee on March 21, 1984, at 392 (Comm. Print 1984) (describing the need for separate foreign tax credit limitation categories to prevent the U.S. Treasury from inappropriately ''bear[ing] the burden'' of foreign taxes).

The 2020 FTC proposed regulations are also consistent with the statutory purpose of the foreign tax credit to relieve double taxation of income through the United States ceding its own taxing rights only where the foreign country has the primary right to tax income. See *Bowring* v. *Comm'r,* 27 B.T.A. 449, 459 (1932) (''In the case of the citizen and resident alien, the United States recognizes the primary right of the foreign government to tax income from sources therein . . . and accordingly, grants a credit.''). To ensure that the United States provides a foreign tax credit only where the foreign country appropriately asserts jurisdiction to tax income, creditable foreign levies must incorporate norms similar to those in U.S. tax law that limit the scope of income subject to the tax.

Some comments asserted that double taxation meriting relief exists in every case in which a foreign tax is not allowed as a foreign tax credit against U.S. tax. However, that assertion is inconsistent not only with the foreign tax credit limitation in section 904, but with the plain text of section 901. Section 901 allows a credit only for income, war profits, and excess profits taxes, and not for all foreign taxes that may be imposed by a foreign jurisdiction (such as value added taxes or sales taxes, which may qualify for a deduction under section 164), or for other levies such as tariffs. As explained in part IV.A.2.i.a of this Summary of Comments and Explanation of Revisions, determining which items of gross receipts and costs are properly included in a foreign taxable base is inherent to the determination of whether the foreign tax is an income tax in the U.S. sense.

As noted in the preamble to the 2020 FTC proposed regulations, the fundamental purpose of the foreign tax credit—to mitigate double taxation with respect to taxes imposed on income—is served most appropriately if there is substantial conformity in the principles used to calculate the base of the foreign tax and the base of the U.S. income tax. This conformity extends not just to ascertaining whether the foreign tax base approximates U.S. taxable income determined on the basis of realized gross receipts reduced by allocable costs and expenses, but also to whether there is a sufficient nexus between the income that is subject to tax and the foreign jurisdiction imposing the tax. Therefore, the final regulations retain the requirement in the 2020 FTC proposed regulations that for a foreign tax to qualify as an income tax, the tax must conform with established international jurisdictional norms, reflected in the Internal Revenue Code and related guidance, for allocating profit between associated enterprises, for allocating business profits of nonresidents to a taxable presence in the foreign country, and for taxing cross-border income based on source or the situs of property.

Recently, many foreign jurisdictions have disregarded international taxing norms to claim additional tax revenue, resulting in the adoption of novel extraterritorial taxes that diverge in significant respects from U.S. tax rules and traditional norms of international taxing jurisdiction. These extraterritorial assertions of taxing authority often target digital services, where countries seeking additional revenue have chosen to abandon international norms to assert taxing rights over digital service providers.[1]

The Treasury Department and the IRS have determined that it is necessary and appropriate to adapt the regulations under sections 901 and 903 to address this change in circumstances, especially in relation to the taxation of the digital economy—a sector that did not exist when the foreign tax credit provisions were first enacted. Accordingly, regulations are necessary and appropriate to more clearly delineate the circumstances in which a tax does not qualify as an income tax in the U.S. sense due to the foreign jurisdiction's unreasonable assertion of jurisdictional taxing authority.

Some comments asserted that the jurisdictional nexus requirement in the 2020 FTC proposed regulations is inconsistent with Congressional policy reflected in the repeal of the per-country foreign tax credit limitation in favor of an overall foreign tax credit limitation. These comments suggested that the proposed jurisdictional nexus requirement would effectively revert to the more limited per-country limitation and, more generally, that the repeal of the per-country limitation reflects a general policy favoring broader availability of foreign tax credits. The Treasury Department and the IRS disagree with these comments. The jurisdictional nexus requirement does not prevent cross-crediting within a particular separate category described in section 904, which has been amended numerous times by Congress. For example, the nexus requirement does not preclude a foreign tax credit against U.S. tax on foreign source general category income derived from one country for a foreign tax imposed by another country that is assigned to the general category, whereas under the former per-country limitation, such cross-crediting would not be allowed.

Additionally, while comments frame the per-country limitation as more restrictive than the overall limitation, the debate concerning the limitation also highlighted circumstances in which the overall limitation is in fact the more restrictive of the two.[2] In 1960, when adding back the overall limitation, but retaining the per-country limitation, Congress explained that the overall limitation may not be appropriate based on the business model of a particular taxpayer. See S. Rep. No. 86–1393, at 3773–74 (1960). Thus, the Treasury Department and the IRS do not agree with the comments' assertion that Congress' choice in 1976 to retain only the overall limitation supports the broadest allowance of foreign tax credits, because either the per-country or overall limitation may more significantly restrict the amount of foreign tax credit, depending on the circumstances of a particular taxpayer.

Similarly, the choice in 1976 to add back the overall limitation and make it the only limitation did not represent Congress's definitive choice to allow unlimited cross-crediting of high-rate foreign taxes against U.S. tax on foreign source income subject to a lower rate of foreign tax. S. Rep. No. 86–1393, at 3773–74. Rather, Congress has continually amended and debated the appropriate scope of the foreign tax

[1] See OECD Inclusive Framework on BEPS, *Tax Challenges Arising from Digitalisation—Report on Pillar One Blueprint,* at 10 (Oct. 14, 2020) (''Globalisation and digitalisation have challenged fundamental features of the international income tax system, such as the traditional notions of permanent establishment and the arm's length principle (ALP), and brought to the fore the need for higher levels of enhanced tax certainty through more extensive multilateral tax co-operation. These transformational developments have taken place against a background of increasing public attention on the taxation of highly digitalised global businesses.'').

[2] For example, both houses of Congress, in retreating from the overall limitation in 1954, explained that ''[t]he effect of the [overall] limitation is unfortunate because it discourages a company operating profitably in one foreign country from going into another country where it may expect to operate at a loss for a few years. Consequently your committee has removed the overall limitation.'' H.R. Rep. No. 83–1337, at 4103 (1954); see also S. Rep. No. 83–1622, at 4739 (1954).

credit limitation since 1962. The ongoing Congressional amendments to the foreign tax credit limitation show that Congress had not definitively resolved the permissible scope of cross-crediting when it enacted the predecessor provision to section 901.

In addition, Congress did not repeal the per-country limitation in 1976 primarily as a policy choice to allow cross-crediting. Rather, Congress repealed the per-country limitation because it allowed a taxpayer to reduce U.S. tax on U.S. source income by application of a foreign source loss, and later to reduce U.S. tax on foreign source income through a foreign tax credit. See S. Rep. No. 94–938, at 236 (1976); H.R. Rep. No. 94–658, at 225 (1975); Joint Comm. on Taxation, General Explanation of the Tax Reform Act of 1976, at 236 (1976). In conclusion, the comments' claim that the jurisdictional nexus requirement in the 2020 FTC proposed regulations is inconsistent with the Congressional policy reflected in the repeal of the per-country limitation is not supported by the legislative history and is contradicted by subsequent amendments to section 904.

Comments also stated that section 904(d)(2)(H)(i), which provides a rule for assigning to a separate category foreign tax imposed by a foreign country on an amount that does not constitute income under U.S. tax principles, provides further support for the view that foreign tax credit provisions should be construed broadly, with limited reference to U.S. rules. One comment pointed to cases, including *Schering Corp.* v. *Comm'r,* 69 T.C. 579 (1978) and *Helvering* v. *Campbell,* 139 F.2d 865 (1944), in which courts allowed a credit for foreign taxes on amounts that the U.S. does not tax due to timing or base differences, for example, as a result of characterization differences.

The Treasury Department and the IRS find these comments unpersuasive, because the jurisdictional nexus requirement in the 2020 FTC proposed regulations would not preclude a credit for foreign taxes imposed on an amount of taxable income that exceeds taxable income computed under U.S. tax law rules due to base or timing differences. The nexus rule requires that the activity subject to the tax have sufficient connection to the foreign country imposing the tax. It does not require that every item included in the foreign tax base conform in timing or amount to items included in U.S. taxable income. Consistent with section 904(d)(2)(H)(i), the jurisdictional nexus requirement in the 2020 FTC proposed regulations does not preclude a credit for foreign income taxes imposed on base difference amounts.

3. Other Policy Considerations

Several comments questioned the policy reasons discussed in the preamble to the 2020 FTC proposed regulations that motivated the Treasury Department and the IRS to add the jurisdictional nexus requirement. Comments disagreed with the notion that destination-based taxing rights lack sufficient connection to a jurisdiction. They noted that Congress's deliberations of alternative approaches to the U.S. corporate income tax and the current multilateral negotiations by the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (''Inclusive Framework'') with respect to reallocating taxing rights under the ''Pillar 1'' proposal demonstrate that there is a legitimate debate about claims to destination-based taxing rights. This ongoing debate, the comments stated, indicates that market-based or destination-based taxes are income taxes. As such, some comments asserted that the jurisdictional nexus rule in the 2020 FTC proposed regulations is inconsistent with changes that have occurred in how income can be generated through technology and changes that various taxing jurisdictions, including U.S. states, have made to their taxing regimes in response to those changes. The comments recommended that if the jurisdictional nexus requirement is not eliminated in the final regulations, the requirement should be modified such that it is more flexible and takes into account evolving jurisdictional norms. One comment asked that the requirement be expansive enough to allow credits for taxes imposed on income sourced to a jurisdiction based on the situs of users or customers, as well as taxes imposed on a taxpayer that generates income from customers in a jurisdiction without having a physical presence in that jurisdiction.

One comment pointed out that U.S. income tax principles incorporate destination-based taxing rights. As an example, the comment noted that proposed § 1.861–18(f)(2)(ii) provided that when a copyrighted article is sold and transferred through an electronic medium, the sale is deemed to have occurred at the location of download or installation onto the end-user's device. As another example, the comment cited § 1.250(b)–4(d)(1)(ii)(D), which provides that a sale of certain property that primarily contains digital content is for a foreign use if the end user downloads, installs, receives, or accesses the purchased digital content on the end user's device outside the United States. Another comment noted that Congress considered imposing a destination-based income tax as part of the 2017 tax reform.

In addition, comments stated that over half of U.S. states with a corporate income tax determine the amount of a taxpayer's income subject to the state's corporate income tax by apportioning the taxpayer's federal taxable income using sales as the single factor. The comments stated that under the proposed jurisdictional nexus requirements, these state income taxes would fail to be an ''income tax'' in the U.S. sense even though the income subject to the state corporate income taxes is based in significant respects on the taxpayer's taxable income determined under the Code. The comments also questioned whether this policy means that a foreign country can deny a foreign tax credit for otherwise eligible U.S. state corporate income taxes simply because the states rely on sales-based apportionment factors to source income and a market-based jurisdictional nexus standard.

In general, the Treasury Department and the IRS disagree with these comments. As explained in part IV.A.2 of this Summary of Comments and Explanation of Revisions, whether a foreign tax is creditable under section 901 depends on whether the tax is an ''income tax in the U.S. sense.'' Neither prior unenacted legislative proposals nor potential future (yet undetermined) changes to the Code with respect to U.S. jurisdictional limits are determinative of what constitutes an income tax in the U.S. sense under current law.

The Treasury Department and the IRS acknowledged in the preamble to the 2020 FTC proposed regulations that future changes in U.S. law may necessitate rethinking the rules for determining creditable foreign income taxes. It is nevertheless important that these final regulations be issued promptly to address novel extraterritorial taxes. Existing law is unclear on the extent to which foreign taxes that are inconsistent with existing jurisdictional norms meet the definition of an income tax under section 901, and the Treasury Department and the IRS had previously received comments requesting guidance on this matter.[3] In addition, to the extent these novel extraterritorial taxes, which many foreign jurisdictions have already adopted, are being paid by taxpayers

[3] See New York State Bar Association Tax Section, *Report on Issues Relating to the Definition of a Creditable tax for Purposes of Sections 901 and 903 of the Code,* Rep't No. 1332 (Nov. 24, 2015).

and claimed as a foreign tax credit, this would have an immediate and detrimental impact on the U.S. fisc. Therefore, the Treasury Department and the IRS disagree with the suggestion in comments that the potential for future law changes necessitates a delay in the issuance of these necessary and appropriate regulations.

The Treasury Department and the IRS also disagree that the manner in which U.S. states determine the amount of income that is taxable in a particular state has any bearing on whether a foreign tax is an income tax in the U.S. sense. See, for example, *Heiner* v. *Mellon,* 304 U.S. 271, 279 (1937) (''It is well settled that in the interpretation of the words used in a federal revenue act, local law is not controlling unless the federal statute by express language or necessary implication, makes its own operation dependent upon state law.''). Nothing in the Code, legislative history, or case law suggests that whether a tax is an income tax in the U.S. sense should be determined by reference to state, as opposed to Federal, income tax principles. Furthermore, it is immaterial whether a foreign country would provide a foreign tax credit under its own law for U.S. state income taxes.

In addition, U.S. tax law imposing U.S. tax on income of nonresidents is not based on notions of destination or customer location. See sections 864(c), 871, 881, and 882. Moreover, the comment citing section 250 is inapposite, as that provision merely defines the scope of sales and services that constitute income from export activity that qualifies for a special U.S. tax deduction; it does not operate to assert taxing jurisdiction over income of nonresidents. Similarly, while proposed § 1.861–18(f)(2)(ii) interprets the place of sale as being the place of download solely for the purpose of determining the source of certain types of income from the sale or exchange of digital property in cases where the statutory source rule looks to the place where the sale occurs, this rule does not expand the scope of U.S. tax on income derived by nonresidents. U.S. law does not tax income from the sale or exchange of property by a nonresident unless the nonresident conducts a trade or business in the United States (if applicable, through a U.S. permanent establishment) or disposes of a United States real property interest as provided under section 897.

One comment stated that the jurisdictional nexus requirement may be reasonably viewed as consistent with the policy of the foreign tax credit regime, which, as discussed in part IV.A.2 of this Summary of Comments and Explanation of Revisions, is not intended to subsidize foreign jurisdictions at the expense of the U.S. fisc. However, the comment also asserted that defining what are acceptable standards of taxing jurisdiction based upon U.S. principles may be unduly restrictive and may result in non-creditability of foreign taxes even when the foreign tax law is mostly aligned with U.S. principles. As an example, the comment posited that if a foreign country's generally-imposed net income tax on its residents could in certain instances apply in a manner that is inconsistent with traditional arm's length principles, that tax would be non-creditable with respect to all resident taxpayers, even for taxpayers to which income would be allocated in a manner consistent with arm's length principles.

Comments also pointed out that the jurisdictional nexus requirement that was included in the 1980 temporary and proposed regulations at § 4.901–2(a)(1) (flush language) was a more flexible standard because it required only that the foreign tax follow reasonable rules regarding source of income, residence, or other bases for tax jurisdiction, and did not require specific rules that are similar to Federal income tax rules. In addition, one comment noted that the 1980 temporary regulations also provided that a foreign tax may satisfy the definition of an income tax even if the foreign tax law differs substantially from the income tax provisions of the Code. That comment recommended that the final regulations should provide flexibility to accommodate the continued evolution of international tax policy consensus, which may diverge from the U.S. view of traditional taxing norms.

Comments also asserted that certain U.S. sourcing rules reflect domestic policies other than jurisdiction to tax. As an example, one comment noted that the title passage rule for inventory in sections 861(a)(6) and 862(a)(6) reflects administrative simplification concerns, and former section 863(b) served as an incentive for certain activities. The comments argued that foreign countries that adopt a rule different from U.S. source rules due to different choices among competing policies should not cause the foreign tax to be non-creditable. One comment argued that diverging views of taxing rights, especially as between developed and developing countries, have long existed outside the context of novel extraterritorial taxes. The comment asserted that diverging views on taxing rights is what makes relief from double taxation necessary; it is not a reason to deny creditability of a foreign tax.

The Treasury Department and the IRS generally agree that different countries may diverge in their approach to asserting jurisdictional taxing rights, just as countries may have different approaches in determining the amounts of realized gross receipts and recoverable costs and expenses included in the foreign taxable base. As a result, the net gain requirement in existing § 1.901–2, as well as in these final regulations, does not require strict conformity between foreign and U.S. tax law. However, the final regulations do require that a foreign tax must be consistent with the general principles of income taxation reflected in the Code for it to be an ''income tax in the U.S. sense.'' These principles include not only those related to determining realization, gross receipts, and cost recovery, but also principles related to assertion of taxing rights. The purpose of section 901 is not to provide double tax relief in all cases in which foreign tax is imposed on income of a U.S. taxpayer, but rather, to relieve double taxation only in the case of foreign taxes that are ''*income,* war profits, and excess profits taxes''. Accordingly, the purpose of the regulations under section 901 is to provide clarity and certainty as to which income tax principles reflected in the Code the foreign tax law must have for a tax to be an income tax in the U.S. sense within the meaning of section 901. However, the Treasury Department and the IRS agree with the comments asserting that certain aspects of the source requirement can appropriately be revised to be more flexible; these changes are described in part IV.A.4 of this Summary of Comments and Explanation of Revisions.

Several comments recommended that the Treasury Department and the IRS address the policy concerns regarding extraterritorial taxes through alternative approaches. These comments recommended that the Treasury Department utilize international forums, such as the Inclusive Framework and bilateral treaty negotiations, to dissuade foreign jurisdictions from enacting or imposing these taxes. Comments argued that the denial of foreign tax credits is unlikely to prevent foreign jurisdictions from imposing extraterritorial taxes and will instead harm the U.S. taxpayers operating in those foreign jurisdictions.

One comment asserted that the foreign tax credit regulations should not be used as a tool to further U.S. foreign policy goals. Another comment recommended that, instead of adopting the jurisdictional nexus requirement, the Treasury Department and the IRS consider an alternative approach for defining what exceeds appropriate taxing jurisdiction by reference to the criteria that the U.S. Trade Representative has used to evaluate whether these taxes are discriminatory and burden U.S. commerce. Finally, one comment asserted that the jurisdictional nexus requirement would disproportionately disallow credits for taxes imposed by developing countries, which are more likely to assert taxing rights in a manner that is inconsistent with international norms, as compared to taxes imposed by developed countries.

The Treasury Department and the IRS agree that international forums can be an effective way of discouraging foreign jurisdictions from enacting extraterritorial taxes; indeed, the Treasury Department is actively engaged in and supporting negotiations under the auspices of the Inclusive Framework that would result in their elimination.[4] However, contrary to the comments' assertion, the Treasury Department and the IRS's determination that regulations are necessary and appropriate to ensure that the U.S. fisc does not bear the costs of such taxes derives from the text, purpose, and policy of section 901, and not from any foreign policy goals. The Treasury Department and the IRS have concluded that these novel extraterritorial taxes (some of which are currently in force and being levied on U.S. taxpayers) are contrary to the text and purpose of section 901 and therefore must be addressed now. Furthermore, nothing in the text, structure, or history of section 901 suggests that the Treasury Department or the IRS should consider the level of economic development of a country in determining whether a foreign tax imposed by that country meets the standards in section 901. Lastly, the Treasury Department and the IRS have considered the recommendation to use the criteria used by the U.S. Trade Representative but have determined that those criteria are designed for a different purpose (that of evaluating whether the foreign tax is unreasonable or discriminatory and burdens or restricts U.S. commerce under U.S. trade laws), and are not suitable for purposes of defining whether a tax is an income tax in the U.S. sense for purposes of U.S. tax laws.

Finally, one comment recommended that the Treasury Department and the IRS develop a list of per se creditable and non-creditable taxes to provide taxpayers certainty and reduce compliance burdens. A per se list of creditable and non-creditable taxes would require significant government resources to analyze foreign taxes and maintain such a list, which would need to be updated every time foreign tax laws change. Therefore, the final regulations do not adopt this comment.

4. Modifications to the Source-Based Nexus Requirement

Comments argued that the determination of whether foreign sourcing rules are reasonably similar to U.S. sourcing rules would be complex and result in significant uncertainty because U.S. sourcing rules are not sufficiently well-defined. Comments pointed out that the preamble to the 2020 FTC proposed regulations acknowledged that the U.S. rules for determining income effectively connected with a U.S. trade or business have been developed through case law, are not strictly delineated, and thus were not used as the standard for the activities-based nexus requirement. The comments suggested that the U.S. sourcing rules for royalties and services are similarly addressed only in case law and not well-developed. They contended that it would be difficult to apply the sparse and inconsistent U.S. case law on royalty sourcing to determine if a foreign tax law's sourcing rules for royalties are reasonably similar to U.S. rules. In addition, comments asserted that the U.S. sourcing rules are designed to distinguish between U.S. and foreign source income, and are not well-suited for determining, for example, whether a royalty paid from one CFC to another is specifically sourced to the payor CFC's jurisdiction of residence. With respect to services income, one comment noted that it is unclear whether services should be sourced solely based on the source of the labor or by also taking into account the location of capital, especially when significant intangible property is involved. Another comment asked for clarification on how to evaluate whether a foreign withholding tax that is imposed both on services performed in the country imposing the tax and on technical service fees paid by a resident of such foreign country (regardless of where the services are performed) meets the source-based nexus requirement; this comment asked whether the determination of ''reasonably similar'' would depend on how important technical services are relative to that foreign country's economy.

In response to these comments, the final regulations modify the source-based nexus requirement to provide additional flexibility and clarity. Section 1.901–2(b)(5)(i)(B) continues to require that the foreign sourcing rules must be reasonably similar to the sourcing rules under the Code. However, in recognition that the Code does not provide detailed sourcing rules addressing every category of income, or every type of income within that category, and that the interpretation and application of the Code sourcing rules are sometimes addressed only in case law and sub-regulatory guidance, § 1.901–2(b)(5)(i)(B) also provides that the foreign tax law's application of sourcing rules need not conform in all respects to the interpretation that applies for Federal income tax purposes. Thus, for example, the final regulations require that in the case of gross income arising from gross receipts from royalties, the foreign tax law must impose tax on such royalties based on the place of use of, or the right to use, the intangible property. However, the final regulations do not require that the foreign law, in determining the place of use of an intangible in a particular transaction or fact pattern, reach the same conclusion as the IRS in a particular revenue ruling or a U.S. court in a particular case.

The final regulations provide additional certainty by specifying the source principles that foreign tax law must apply to be considered reasonably similar to U.S. source rules. With respect to income from services, § 1.901–2(b)(5)(i)(B)(*1*) provides that gross income arising from services must be sourced based on where the services are performed, as determined under reasonable principles, which do not include determining the place of performance based on the location of the service recipient. Thus, a withholding tax that is imposed on payments for services performed in the country imposing the tax would meet the source-based nexus requirement, but a withholding tax on fees for technical services performed outside of that country would not meet the source-based nexus requirement. In addition, the separate levy rules at § 1.901–2(d)(1)(iii) are modified to provide that withholding taxes that apply different

[4] See OECD/G20 Base Erosion and Profit Shifting Project, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (October 8, 2021) (describing agreement reached by 136 countries to ''remove all Digital Services Taxes and other relevant similar measures with respect to all companies, and to commit not to introduce such measures in the future.'').

sourcing rules to subsets of a single class of gross income of nonresidents are treated as separate levies. Therefore, a withholding tax that applies a nonqualifying source rule to a subset of service income would not be creditable, but because it is treated as a separate levy the nonqualifying source rule would not prevent a withholding tax on other services that satisfies the source-based nexus requirement from qualifying as a creditable tax.

Several comments also pointed out that the United States and the foreign jurisdiction may disagree on how to characterize the income from a particular transaction, making it more difficult to determine whether the foreign tax meets the jurisdictional nexus requirement. The comments noted that issues of characterization are particularly prevalent with respect to cross border payments for digital goods. The comments stated that in respect of software transactions that are treated as sales of copyrighted articles under § 1.861–18, some foreign countries regard some or all payments by their resident taxpayers for software copies as royalties, and accordingly, impose a royalty withholding tax on those payments. The comments also asserted that even in cases where a foreign country may not consider the payment subject to royalty withholding tax, the foreign country may nonetheless tax other copyrighted article transactions as royalties. As such, the comments argued, cross border payments for digital goods should be excepted from the jurisdictional nexus requirement. Another comment noted that similar characterization questions may arise when distinguishing between technical service fees and royalties; the comment queried whether a foreign withholding tax imposed on royalties that the United States would view as a payment for services would be determined to be non-creditable or would require an evaluation of the magnitude of the services relative to the royalty.

Comments also argued that the United States lacks guidance on the classification and sourcing of income from cloud computing transactions, noting that the Treasury Department and the IRS have not yet finalized the proposed cloud computing regulations that were issued in 2019. The comments asserted that given the evolving U.S. guidance on the character and source of cloud computing transactions, the creditability of a foreign tax imposed on such transactions should not depend on whether foreign law is reasonably similar to U.S. law.

In response to these comments, the final regulations provide that, in general, foreign tax law applies for purposes of determining the character of the gross income or gross receipts that arise from a transaction. See § 1.901–2(b)(5)(i)(B). The determination of whether the foreign law source rule is reasonably similar to the source rules under the Code will follow from the foreign law characterization of that income. If there is no statutory source rule in the Code for a particular amount that is subject to foreign tax, then the foreign law source rule will satisfy the source-based nexus requirement if it is reasonably similar to the U.S. source rule that applies by closest analogy. However, the final regulations also clarify that in the case of copyrighted articles, to satisfy the source-based nexus requirement, the foreign tax law must treat a transaction that is considered the sale of a copyrighted article under § 1.861–18 (where the acquirer receives only the right to use a copyrighted article and not, for example, the right to duplicate and publicly distribute, or the right to publicly display the article) as a sale of tangible property and not as a license. See § 1.901–2(b)(5)(i)(B)(*3*). This rule is consistent with established U.S. law and international norms. See § 1.861–18(c); see also OECD Model Tax Convention (2017), commentary to art. 12. The Treasury Department and the IRS have determined that this rule is necessary to ensure that foreign jurisdictions cannot reclassify income from sales of copyrighted articles as royalties to assert taxing rights that are extraterritorial in nature and outside the scope of what is an income tax in the U.S. sense.

Comments recommended that, if the jurisdictional nexus requirement is not withdrawn entirely in the final regulations, then payments for services and payments for digital goods should be excepted from the source-based nexus requirement. With respect to payment for services, the comments argued that the U.S. source rule for services is not the international norm; many countries impose withholding tax on payment for services made by a resident in the country (or by a nonresident with a permanent establishment in the country). Comments noted that the UN Model Tax Convention allows contracting states to impose withholding taxes on a variety of services fees, and that the United States has income tax treaties with foreign jurisdictions that allow the foreign country to withhold tax on payments for services not performed in that country. Several comments also asserted that withholding taxes on payments for services are not novel taxes, but rather are long-standing taxes that are also creditable under existing § 1.903–1. Specifically, comments pointed to Example 3 of existing § 1.903–1(b)(3), which concludes that a gross basis tax imposed on a nonresident for technical services performed outside the country imposing the tax are creditable. As such, the comments stated, these withholding taxes are consistent with international norms and the final regulations should continue to allow these taxes to be creditable.

In addition, comments expressed concern about the increased incidence of unrelieved double taxation in respect of cross-border payments for digital services. The comments suggested that under proposed § 1.861–19, essentially all cloud transactions, as defined in those proposed regulations, will be classified as services for Federal income tax purposes. As such, foreign withholding taxes imposed on payments for those services, if not imposed on the basis that the services are performed in the country, would be non-creditable under the proposed source-based nexus requirement. Comments also pointed out that the effect of the source-based nexus requirement in the 2020 FTC proposed regulations is to create disparate treatment for software suppliers based on the approach a supplier adopts to commercializing the software. As an example, comments pointed out that a software supplier that makes software available through limited time subscription is treated under Federal income tax rules as receiving payments of service fees, whereas a software supplier that provides software to users through downloads under limited-time licenses is treated as receiving payments of rents. If a foreign country imposes withholding taxes on both payments, the withholding tax paid by the first software supplier would not be creditable (because the U.S. source rules would not permit the service payment to be sourced based on the location of the user) whereas the taxes paid by the second supplier would be creditable (because U.S. source rules would permit the rental payment to be sourced based on where the user installs the software copy). The comments argued that there is no policy justification for such disparate results.

The Treasury Department and the IRS have determined that it is necessary and appropriate to narrow the circumstances under existing law (for example, as illustrated in Example 3 of § 1.901–1(b)(3)) in which withholding taxes on payment for services are creditable. The taxation of services performed by

nonresidents, under U.S. tax law, is clearly limited to cases in which the services are performed in the United States. Nothing in the Code, legislative history, or case law indicates that a different approach is appropriate for technical or digital services. The Treasury Department and the IRS have determined that the assertion of foreign withholding taxes on income from services that are not performed within the foreign jurisdiction is not consistent with an income tax in the U.S. sense and therefore should not qualify for a credit under section 901.

Furthermore, the Code provides for disparate treatment of classes of income depending on whether the transaction that gives rise to the income is characterized as a service, license, sale, or something else. This different treatment is also reflected in existing international norms, including the OECD Model Tax Convention. Seeking to conform the treatment of digital transactions under the Code, or to anticipate possible future changes to the treatment or classification of digital transactions, is beyond the scope of these regulations. Instead, the Treasury Department and the IRS have determined that analyzing whether a foreign tax is an income tax based on how such income is characterized under foreign law and comparing the foreign tax law sourcing rule to U.S. tax principles, provides adequate flexibility to account for differences between U.S. and foreign law, while adhering to the requirement that a foreign tax be an income tax in the U.S. sense to be creditable. Thus, the final regulations do not adopt the recommendation to except digital services from the jurisdictional nexus requirement.

One comment noted that the 2020 FTC proposed regulations could create different results for sales of software, depending on whether the software is delivered on tangible media or delivered by way of digital download because there are different U.S. source rules for such transactions. As an example, the comment explained that a sale of a software copy that is delivered on tangible media is sourced, under U.S. income tax principles, based on title passage, whereas the sale of a copyrighted article delivered through an electronic medium is deemed to occur, under proposed § 1.861–18(f)(2)(ii), at the location of download or installation. The comment further noted that if proposed § 1.861–18(f)(2)(ii) is not finalized, and the title passage rule continues to apply to digital deliveries, then for U.S. income tax purposes, the source of the income would be determined based upon where the servers from which the software copy is made available is located. The comment argued that these distinctions should not be the basis for causing the supplier of the software to be eligible or ineligible for a foreign tax credit.

The Treasury Department and the IRS have determined that it is unnecessary to require a foreign tax law's sourcing rule for income derived from the sale or other disposition of property to conform with U.S. source rules. This is because under the Code, the United States imposes tax on such income of a nonresident only if the nonresident conducts a U.S. trade or business (if applicable, through a U.S. permanent establishment) or the income is derived from real or movable property situated in the United States. Thus, the final regulations provide that, with respect to foreign tax imposed on income derived from the sale or other disposition of property, including copyrighted articles sold through an electronic medium, the tax meets the attribution requirement only if the inclusion of the income in the foreign tax base meets the activities-based nexus requirement in § 1.901–2(b)(5)(i)(A) or the property-based nexus requirement in 1.901–2(b)(5)(i)(C).

5. Activities-Based Nexus Requirement

One comment stated that the physical presence and permanent establishment standard is not an inherent part of the U.S. tax system; rather, it is a political invention in the 1920s that was the result of bargaining between the United States and its treaty partners. The comment stated that by adopting this standard in the 2020 FTC proposed regulations, the Treasury Department and the IRS ignored the economic realities of digital economies and lacked reasoned decision-making. The comment recommended that the final regulations provide that the jurisdictional nexus requirement is satisfied when consumers of a service rendered by a foreign corporation are located in the taxing jurisdiction.

The Treasury Department and the IRS disagree with the comment's assertion that the physical presence and permanent establishment standard is not an appropriate measure for nexus. The permanent establishment standard is a critical part of the U.S. Model Income Tax Convention, existing U.S. bilateral tax treaties, and the OECD Model Tax Convention. Furthermore, a physical presence standard is consistent with the nexus rules in section 864, which provide that only income effectively connected with a trade or business that a foreign resident conducts in the United States is subject to U.S. tax. Contrary to the comment's contention, the 2020 FTC proposed regulations did not ignore the economic realities of digital economies; rather, they adopted a standard based on the existing Code and traditional international taxing norms. The Treasury Department and the IRS have determined that the income tax principles in the Code do not allow for the assertion of taxing rights based solely on the existence of consumers in a jurisdiction.

One comment asserted that, where the foreign law includes elements in common with the effectively connected income standard under section 864(c), a broader standard for attributing income to nonresidents on the basis of the nonresidents' activities as well as activities of the nonresident's related parties should satisfy the activities-based nexus requirement of the 2020 FTC proposed regulations. The Treasury Department and the IRS disagree with this comment. Taking into account activities of the nonresident's related parties would be inconsistent with the principles reflected in the U.S. Model Income Tax Convention, and the OECD Model Tax Convention, as well as in section 864 (unless the other party is acting on behalf of the nonresident). Accordingly, the final regulations at § 1.901–2(b)(5)(i)(A) clarify that the activities-based attribution requirement is not met when the nonresident is deemed to have a trade or business in the taxing jurisdiction by reason of activities conducted by another person, or when the foreign tax law attributes profits to the nonresident based upon the activities of another person, other than in the case of a party acting on behalf of the nonresident or in the case of a pass-through entity of which the nonresident is an owner. In addition, the final regulations clarify in § 1.901–2(b)(5)(i)(A) that foreign tax law that attributes income to a nonresident by taking into account as a significant factor the mere location of persons from which a nonresident makes purchases does not meet the activities-based nexus requirement.

Comments requested that taxes paid to Puerto Rico be exempted from the application of the jurisdictional nexus requirement because, as a U.S. territory, its taxes should not be treated in the same manner as taxes imposed by a foreign country. For Federal income tax purposes, a credit is allowed for income taxes paid or accrued to any foreign country or United States territory. See section 901(b)(1); see also section 903. As no distinction is made between taxes imposed by foreign countries and those imposed by U.S. territories, the final regulations follow the 2020 FTC

proposed regulations in applying the same standards in defining what is a creditable income tax regardless of whether the tax is imposed by a foreign country or a U.S. territory. However, as described in more detail in part IV.F.2 of this Summary of Comments and Explanation of Revisions, a special transition rule applies to defer for one year the applicability date of the final regulations under section 903 with respect to certain taxes paid to Puerto Rico.

Another comment recommended that the example in proposed § 1.901–2(c)(3) (§ 1.901–2(b)(5)(iii) of the final regulations) be expanded to illustrate the application of the attribution requirement in the case where a nonresident taxpayer is earning income from electronically supplied services in a country that imposes tax on such services (ESS tax) and the taxpayer either (1) maintains its own branch in the foreign country imposing the tax, with employees of the branch conducting routine sales, marketing, and customer support functions or (2) uses a related party disregarded entity resident in that country to perform local marketing, customer support, and other routine functions. With respect to the second scenario, the comment noted that where the ESS tax is imposed on the resident disregarded entity, if the entity's tax base is determined under arm's length principles, without taking into account as a significant factor the location of customers, users, or any other similar destination-based criterion, then the ESS tax would meet the residence-based nexus requirement and would be creditable. The comment suggested that in the first scenario, although the ESS tax is not imposed on the basis of a nonresident's activities located in the country, the portion of the ESS tax that corresponds to the portion of a separate nonresident corporate income tax imposed on the branch's effectively-connected income that would meet the activities-based requirement (based on the actual activities performed by the branch) should be considered to meet the activities-based nexus requirement if the country does not impose the tax on the branch's effectively-connected income.

The Treasury Department and the IRS agree with the comment's analysis and conclusion in the second scenario but disagree with the analysis and conclusion in the first scenario. Whether a foreign tax meets the requirements of § 1.901–2(b), including the attribution requirement, is determined based solely on the terms of the foreign tax law, and not on a taxpayer's specific facts. Thus, the fact that a separate levy that the foreign country could have imposed on nonresident taxpayers with respect to their branch operations in the foreign country could meet the attribution requirement in a particular factual circumstance does not mean that a different tax that is an ESS tax, or any portion of an ESS tax, would be deemed to meet the attribution requirement.

6. Property-Based Nexus Requirement

One comment requested clarification on whether a foreign tax law similar to the U.S. Foreign Investment in Real Property Tax Act (FIRPTA) regime under section 897 would satisfy the proposed property-based nexus requirement. It noted that under the 2020 FTC proposed regulations, a foreign tax law identical to FIRPTA may not meet the proposed property-based nexus rule if (consistent with section 897) it included in the tax base a portion of the gain from the sale of shares in a foreign real property holding corporation (within the meaning of section 897(c)(2)) that does not correspond to foreign real property interests. The comment further noted that a foreign levy imposed on a nonresident's gain from the sale of shares of a corporation attributable to real property in the taxing jurisdiction would be creditable under the proposed property-based nexus rule, even if (inconsistent with section 897) the corporation is not a resident of the taxing jurisdiction.

In response to this comment, the final regulations at § 1.901–2(b)(5)(i)(C) clarify that a foreign tax may include in its base gross receipts that are attributable to the sale or disposition of real property situated in the foreign country, or to the disposition of an interest in a corporation or other entity that is a resident of the foreign country that owns real property situated in the foreign country, under rules reasonably similar to those in section 897. In addition, a foreign tax imposed on the basis of the situs of property may include in its base gains derived from the sale or other disposition of property forming part of the business property of a taxable presence in the foreign country as well as gains from the disposition of an interest in a partnership or other passthrough entity that has a taxable presence in the foreign country to the extent the gains are attributable to the entity's business property in that foreign country, under rules that are reasonably similar to those in section 864(c). A foreign tax on any other gains of a nonresident will not satisfy the property-based attribution requirement.

7. Interaction With Income Tax Treaties

The preamble to the 2020 FTC proposed regulations confirmed that the proposed regulations in §§ 1.901–2 and 1.903–1, when finalized, would not affect the application of existing income tax treaties to which the United States is a party with respect to covered taxes (including any specifically identified taxes) that are creditable under the treaty.

One comment recommended that the final regulations expressly provide that the regulations will not affect the creditability of foreign taxes covered by an existing income tax treaty. The comment also argued, however, that relying on the U.S. treaty network as the sole mechanism for relieving double tax for companies operating in foreign countries with source or other jurisdictional taxing norms that differ from U.S. taxing norms is not equitable. It noted that the United States only has income tax treaties with 68 countries, and that the United States has few treaties with countries in South America and Africa. The comment stated that the treaty negotiation process is laborious and that the Treasury Department considers the level of trade and investment between the countries in determining with which countries it engages in treaty negotiations, with the result being that the United States has historically declined to negotiate treaties with countries that have smaller economies, including developing countries.

Another comment requested that the Treasury Department and the IRS specifically address the interaction of the jurisdictional nexus requirement with U.S. income tax treaties that have allowed the treaty partner to impose a capital gains tax on a nonresident taxpayer on the sale of stock of a corporation resident in the treaty country regardless of whether the shares constitute a real property interest or are attributable to a permanent establishment in the treaty country. The comment noted that, despite the statement in the preamble to the 2020 FTC proposed regulations, it is unclear how the double taxation articles of U.S. income tax treaties, which often provide that the United States agrees to allow a foreign tax credit subject to the limitations of U.S. law, would be interpreted in light of these regulations. The comment recommended that the Treasury Department and the IRS modify the jurisdictional nexus requirement such that foreign taxes imposed on gains from the disposition of stock of a corporation sourced on the

basis of residence of the corporation continue to be creditable.

Comments also asked for clarification regarding the effect the final regulations would have on a foreign tax that is a covered tax under an existing U.S. income tax treaty if the foreign tax is paid by a CFC, which is not eligible for the benefits given to U.S. residents under the treaty. One comment noted that because CFCs are not U.S. residents, taxes paid by the CFC on a foreign-to-foreign payment would not be creditable under the U.S. income tax treaty with the source country. The comment questioned whether this means that a foreign tax would not be creditable when paid or accrued by a CFC even though it would be creditable if paid or accrued directly by a U.S. taxpayer.[5] The comment pointed out that in this case, the United States has already acknowledged the legitimacy of the treaty partner's claim to taxing rights, even if it conflicts with U.S. principles; thus, the tax should be creditable even if paid by a CFC. Another comment similarly noted that, in respect of foreign taxes imposed on gains from the disposition of stock of a resident corporation that are creditable under certain U.S. treaties, such treaties would ensure creditability of those taxes only when paid by U.S. persons, and not, for example, when paid by an upper-tier CFC upon the disposition of lower-tier CFC stock.

In response to these comments, the final regulations clarify in § 1.901–2(a)(1)(iii) that a foreign tax that is treated as an income tax under the relief from double taxation article of an income tax treaty that the United States has entered into with the country imposing the tax meets the definition of a foreign income tax as to U.S. citizens and residents of the United States that elect to claim benefits under that treaty. However, as the comments noted, CFCs are not treated as U.S. residents under U.S. income tax treaties, so CFCs resident in a third country do not qualify for benefits under U.S. income tax treaties. Because U.S. income tax treaties do not limit the application of the treaty partner's taxes imposed on third-country CFCs, the final regulations clarify that taxes paid to a U.S. treaty partner by a third-country CFC are treated as a separate levy that must independently satisfy the requirements of section 901 or 903 to be creditable.

However, the final regulations clarify that any limitations that a foreign country has agreed to under its treaties with other jurisdictions that apply to nonresident CFCs would be taken into account in determining whether such levy meets the requirements of § 1.901–2(b) or § 1.903–1(b) when paid by the CFC. See § 1.901–2(a)(1)(iii). Thus, for example, in determining whether a foreign country's nonresident corporate income tax meets the activities-based jurisdictional requirement of § 1.901–2(b)(5)(i)(A), when the tax is paid by a CFC that is resident in a third country, any limitations or modifications that the first foreign country has agreed to under the permanent establishment and business profits articles of an income tax treaty with the third country are taken into account. The final regulations make corresponding modifications to the separate levy rules to provide that a foreign levy that is modified by a particular treaty is treated as a separate levy. See § 1.901–2(d)(1)(iv).

B. Net Gain Requirement

1. In General

The 2020 FTC proposed regulations modified the net gain requirement to limit the role of the predominant character analysis in determining whether a tax meets each of the components of the net gain requirement—the realization requirement, the gross receipts requirement, and the net income requirement (which under the 2020 FTC proposed regulations is referred to as the cost recovery requirement). The 2020 FTC proposed regulations also limited the prevalence of the empirical analysis required by the existing regulations, which asks whether a foreign tax is likely to reach net gain in the ''normal circumstances'' in which it applies. Instead, the 2020 FTC proposed regulations generally provided that the determination of whether a tax satisfies each of the realization, gross receipts, and cost recovery requirements under the net gain requirement is based on the terms of the foreign tax law governing the computation of the tax base. See proposed § 1.901–2(a)(3). The preamble to the 2020 FTC proposed regulations explained that reduced reliance on empirical analysis would allow taxpayers and the IRS to evaluate the nature of the foreign tax based on objective and readily available information and would lead to more consistent and predictable outcomes.

Several comments recommended that instead of finalizing the proposed modifications to the net gain requirement, the Treasury Department and the IRS should either retain the predominant character test of the existing regulations or propose less extensive changes to the net gain requirement and provide transition rules. Some of these comments stated that the proposed rules would create too rigid a standard that would lead to increased instances of double taxation, putting U.S. companies at a competitive disadvantage. One comment stated that under the proposed standard, a credit may not be allowed for a foreign tax that is an income tax in the U.S. sense based on the actual operation of the foreign tax. Another comment asserted that the proposed standard would place U.S. multinationals operating in developing countries at a significant competitive disadvantage compared with foreign competitors operating in the same developing countries that do not face the same risk of double taxation because they are subject to a participation exemption or a less restrictive foreign tax credit regime.

Comments stated that the predominant character and facts and circumstances analysis of the existing regulations is a better approach because there is a lack of uniformity in the income tax systems across different jurisdictions and because a particular country's tax system can regularly change over time. Comments stated that the existing regulations provide the necessary flexibility to allow a credit to be claimed for foreign taxes that are calculated with variations from U.S. tax principles. In addition, several comments questioned whether administrative difficulties with applying the predominant character test of the existing regulations was a legitimate or sufficient justification for removing the test, noting that the controversies over creditability of foreign taxes have not been pervasive or unresolved enough to justify the new more objective standard.[6] Several comments stated that instead of reducing administrative burdens the proposed changes add complexity and reduce certainty

[5] Another comment made a similar point in connection with recommending that all proposed revisions to the net gain requirement be withdrawn. That comment noted that taxpayers that are operating in a country with which the United States has an income tax treaty may not be insulated from uncertainty regarding the creditability of foreign taxes because the treaties are unclear as to the creditability of foreign taxes listed in the treaty that are incurred by foreign subsidiaries and deemed paid by U.S. taxpayers under section 960. That comment is addressed in this part IV.A.7. of the Summary of Comments and Explanation of Revisions.

[6] One comment made this assertion specifically with respect to the removal of the alternative gross receipts test of the existing regulation, noting that there have been only three court cases involving the gross receipts test over the past four decades. That comment is addressed in this part IV.B.1 of the Summary of Comments and Explanation of Revisions; other comments regarding the gross receipts requirement are discussed in part IV.B.2 of the Summary of Comments and Explanation of Revisions.

because they require taxpayers to compare foreign and U.S. tax law, including statutes, regulations, case law, rulings, and pronouncements, with any subsequent changes to either foreign or U.S. law requiring re-evaluation of whether there is sufficient conformity.

Comments also asserted that it is not realistic for the Treasury Department and the IRS to expect foreign tax law to conform substantially to U.S. tax law. These comments noted that different jurisdictions use different means to protect their tax base and that some countries may have a relatively simple tax regime and choose to protect their base through disallowance of deductions. Comments suggested that a foreign tax should not have to strictly conform to U.S. rules; it should be creditable if it has the essential elements of an income tax in the U.S. sense. Comments also asserted that the Code definition of gross income and allowable deductions reflect evolving priorities of Congress and should not serve as the determinative standard of a model income tax that other countries should follow. Finally, another comment stated that the significant changes made by the 2020 FTC proposed regulations would fundamentally change existing U.S. tax laws and policies to a degree that only Congress can implement through legislation.

As explained in part IV.A.2 of this Summary of Comments and Explanation of Revisions, Congress did not prescribe a fixed definition of the term ''income tax'' for purposes of section 901 or 903. As a result, the meaning of the term has been developed and refined through administrative guidance and case law since 1919. This body of law has followed the guiding principle that the determination of whether a foreign tax is an income tax for purposes of sections 901 and 903 is made by reference to U.S. tax law. The 1983 final regulations followed this principle and, influenced by court opinions decided in the years preceding those regulations, adopted an approach that required a foreign tax to be examined in the normal circumstances in which the tax is applied to determine whether the predominant character of the tax is that of an income tax in the U.S. sense. As explained in the preamble to the 2020 FTC proposed regulations, the IRS's experience over the past 40 years has highlighted the significant administrative difficulties with applying the predominant character test, the ambiguities inherent in the empirical analysis required to apply the test, and the inconsistent outcomes that may result from applying the predominant character test. See 85 FR 72089–72092. In addition, the courts that applied the 1983 regulations further brought into focus the type of quantitative empirical evidence, such as private financial data on the extent of disallowed expenses, that the IRS and the taxpayer may need to obtain and analyze to determine whether a foreign tax is an income tax under the empirical tests of the existing regulations. See, for example, *Texasgulf Inc.* v. *Comm'r,* 172 F.3d 209, 216 (2d Cir. 1999) (court examined statistics for claimed processing allowances and for nonrecoverable expenses across a 13-year period derived from a study conducted by taxpayer's expert to determine if alternative allowance provided under the Ontario Mining Tax effectively compensated for nonrecovery of significant expenses); *Exxon Corp.* v. *Comm'r,* 113 T.C. 338 (1999) (both parties relied heavily on expert witnesses from the petroleum industry, the U.K. government, and from legal, tax, accounting, and economic professions).

The comments that recommended against the approach in the 2020 FTC proposed regulations did not suggest any alternative approaches that would not require the empirical analysis necessitated by the existing regulations. Due to the difficulty that taxpayers and the IRS face in properly applying the existing regulations, the Treasury Department and the IRS have determined that it is necessary and appropriate to finalize the rule in the 2020 FTC proposed regulations that the determination of whether a foreign tax meets the net gain requirement is primarily based on the terms of the foreign tax law governing the computation of the tax base. This approach allows taxpayers and the IRS to evaluate the nature of the foreign tax based on more objective and readily available information.

The Treasury Department and the IRS disagree with the comments that suggested that the existing regulations entail minimal administrative burdens or that the rules in the 2020 FTC proposed regulations will increase administrative burdens. Although the final regulations require a comparison of foreign law to U.S. law, that comparison is generally done by examining the terms of the foreign tax law, which taxpayers must do in any case in order to compute their foreign tax liability, rather than by examining difficult-to-obtain foreign tax return and private financial data to determine the effect of the tax (as is required under the existing regulations).

In addition, the Treasury Department and the IRS disagree that the final regulations will add complexity or create more disputes. The fact that relatively few court cases have addressed the definition of an income tax under § 1.901–2 does not suggest that the existing regulations are clear and easy to apply, but rather that they are challenging for the IRS to administer. It is unclear whether taxpayers are correctly applying the existing requirements in § 1.901–2 by performing the empirical analysis required by the regulations. Because the existing regulations are difficult for taxpayers to apply and for the IRS to administer, there is potential for the requirements in existing § 1.901–2 to be applied incorrectly, a result that is detrimental to sound tax administration.

The Treasury Department and the IRS have determined that the changes made in the final regulations will increase certainty and will prevent the need for the IRS to gather and evaluate data that are not readily available in order to ensure that taxpayers are appropriately applying the relevant empirical analysis—particularly in the case of novel extraterritorial taxes that are generally imposed on a gross basis (such as digital services taxes) and that would meet the requirements of the existing regulations only if the nonrecoverable costs and expenses attributable to that gross income, together with the tax paid by all persons subject to the tax, can empirically be proven almost never to result in a loss. The Treasury Department and the IRS disagree with comments that suggest that administrative concerns are not a sufficient reason for revising the regulations. Having clear, administrable rules that can be consistently applied is critical to sound tax administration.

The Treasury Department and the IRS also disagree with the comments suggesting that the 2020 FTC proposed regulations reflect a fundamental change to existing foreign tax credit policies or that the existing regulations do not require taxpayers to compare foreign and U.S. tax law (including statutes, regulations, case law, rulings, and pronouncements) to determine whether a tax is creditable. In fact, for a foreign taxable base that deviates from the U.S. computational norm of realized gross receipts reduced by significant costs and expenses, the predominant character test by its terms requires taxpayers to perform an empirical analysis every year to determine whether a tax is creditable, such that changes in the empirical impact of a foreign tax (despite no change in the terms of the tax) could impact the creditability analysis. The final regulations will simplify the determination of whether a

foreign levy is an income tax in the U.S. sense by eliminating this burdensome inquiry.

Furthermore, the Treasury Department and the IRS disagree that the final regulations will result in additional double taxation in a manner that is inconsistent with the statute, or that they inappropriately place U.S. multinationals at a competitive disadvantage compared to foreign competitors from a country with a participation exemption regime or a less-restrictive foreign tax credit system. Section 901 allows credits only for foreign taxes that are income taxes in the U.S. sense, and this standard is met only if there is substantial conformity in the principles used to calculate the foreign tax base and the U.S. tax base. Absent such conformity, no credit is appropriate under section 901. Finally, the manner in which foreign countries relieve double taxation for its resident taxpayers does not have any bearing on the appropriate interpretation of section 901, which provides a credit only for foreign income taxes, not all foreign taxes.

In addition, some comments stated that the proposed rules, which focus on the terms of the foreign law in determining whether the net gain requirement is met, inappropriately shift the analysis from the substance to the form of a foreign levy. In particular, some comments asserted that this is inconsistent with court cases, including *PPL Corp.* v. *Comm'r,* 569 U.S. 329 (2013), in which courts have stated that the substantive effects of a tax should be considered when determining whether a tax constitutes a foreign income tax. Other comments stated that the predominant character analysis of the existing regulations better reflects the guidance from cases such as *Biddle* and *Keasbey & Mattison Co.* v. *Rothensies,* 133 F.2d 894 (3rd Cir. 1943), which confirm that whether a foreign tax is creditable should be determined on the basis of its substantive resemblance to an income tax in the U.S. sense.

The Treasury Department and the IRS disagree with comments suggesting that the approach adopted in the 2020 FTC proposed regulations to minimize the role of empirical analysis is inconsistent with the principles applied by the courts in *PPL, Biddle,* or *Keasbey* to determine whether a foreign tax is an income tax in the U.S. sense. The Supreme Court in *Biddle* established that statutory terms such as ''income tax'' are properly interpreted to have the meaning understood under U.S. tax law; the *Keasbey* court, citing *Biddle,* stated that ''a tax paid [to] a foreign country is not an income tax within the meaning of [section 901] unless it conf[o]rms in its substantive elements to the criteria established under our revenue laws.'' *Keasbey,* 133 F.2d at 897. The Supreme Court in *PPL* determined the creditability of the U.K. windfall tax by applying the predominant character test of the existing regulations, which evaluates the substantive effect of the tax by resort to empirical analysis of the effect of alternative methods of determining gross receipts and deductible expenses. Citing *Biddle,* the Supreme Court stated that ''instead of the foreign government's characterization of the tax, the crucial inquiry is the tax's economic effect. In other words, foreign tax creditability depends on whether the tax, if enacted in the U.S., would be an income, war profits, or excess profits tax.'' *PPL,* 569 U.S. at 335.

Consistent with the guiding principle that a creditable tax must be an income tax in the U.S. sense, the 2020 FTC proposed regulations required a comparison of the foreign tax law to the U.S. tax law to determine whether the provisions for computing the base on which the foreign tax is imposed conforms with U.S. criteria for an income tax (that is, a tax imposed on realized gross receipts reduced by allocable costs and expenses). Under the 2020 FTC proposed regulations, the foreign government's characterization of the tax or the name given to the tax do not control the determination of creditability; rather, the determination involves an examination of the substantive provisions of the foreign tax law that govern the computation of the income that is subject to tax. The Supreme Court in *PPL* was applying the predominant character test in the existing regulations and was not interpreting the statute. Because the final regulations modify the standard for determining whether a foreign levy is an income tax in the U.S. sense, the final regulations do not conflict with the *PPL* decision. Thus, the Treasury Department and the IRS disagree with the comments' contentions that the 2020 FTC proposed regulations have inappropriately shifted the inquiry away from the substance, or the substantive economic effect, of the foreign tax.

2. Alternative Gross Receipts Test

The 2020 FTC proposed regulations removed the ''alternative gross receipts test'' in existing § 1.901–2(b)(3), which provided that a foreign tax meets the gross receipts requirement if it is computed under a method that is likely to produce an amount that is not greater than the fair market value of actual arm's length gross receipts. Under proposed § 1.901–2(b)(3)(i), a foreign tax meets the gross receipts tests only if the tax is imposed on actual gross receipts, or is imposed on deemed gross receipts arising from pre-realization timing difference events (for example, a mark-to-market regime, tax on the physical transfer, processing, or export of readily marketable property, or a deemed distribution or inclusion), or is imposed on the basis of gross receipts from an insignificant non-realization event. In addition, proposed § 1.901–2(b)(3)(i) provided that, for purposes of the gross receipts test, amounts that are properly allocated to a taxpayer under the jurisdictional nexus rules in proposed § 1.901–2(c), such as pursuant to transfer pricing rules that properly allocate income to a taxpayer on the basis of costs incurred by that entity, are treated as the taxpayer's actual gross receipts.

Several comments criticized the removal of the alternative gross receipts test and asked that it be retained. Comments stated that eliminating the alternative gross receipts test creates an overly restrictive gross receipts requirement that can cause foreign taxes to not qualify as income taxes due to small or formalistic differences in how foreign law measures gross receipts as compared to U.S. law. One comment noted that it is not unusual for taxing jurisdictions to provide alternate measures of gross receipts to avoid compliance difficulties. The comment also noted that U.S. tax law uses alternative gross receipts, such as using the applicable Federal rate (determined by the IRS) to determine interest deemed to be received by certain lenders. Other comments noted that the U.S. standards for measuring gross receipts and gross income have changed over time, and there is no static view of gross receipts against which to measure foreign law. One such comment pointed to realized cash receipts, the accrual method, financial statement income, and in limited instances mark-to-market as examples of varying ways to compute gross receipts. Another comment pointed to the changes to the rules for determining the taxable year for income inclusions under section 451 from 2012 to 2018.

One comment asserted that the proposed regulation's treatment of alternative measures of gross receipts determined by applying a markup to costs (which does not meet the gross receipts requirement) is irreconcilable with the rule in proposed § 1.901–2(b)(3)(i) that treated allocations of gross income under transfer pricing methods to a taxpayer as actual gross receipts. The comment contended that there is no

logical reason for treating a foreign law that allows taxpayers to use a cost-plus transfer pricing methodology as meeting the gross receipts test, but not a foreign law that uses a measurement of gross receipts based on costs, and that the 2020 FTC proposed regulations will result in significant controversy in distinguishing the two situations. The comment recommended that the Treasury Department and the IRS continue to treat foreign income taxes based on alternative measurements of gross receipts as meeting the gross receipts test, so long as the taxpayer can show that the alternative is likely to produce an amount not greater than fair market value.

One comment requested clarification on how the proposed rules would apply in situations where the foreign jurisdiction imposes a levy on a combination of actual gross receipts and receipts computed based on some other method.

In addition, comments pointed out that the Treasury Department and the IRS previously proposed to eliminate the alternative gross receipts test in the 1980 proposed and temporary regulations under sections 901 and 903, but after extensive consideration decided to retain it in the 1983 final regulations. The comments asked the Treasury Department and the IRS to justify the reconsideration of the elimination of the alternative gross receipts test, given that such elimination was previously rejected.

The Treasury Department and the IRS have determined that it is necessary and appropriate to remove the alternative gross receipts test because, in general, a tax that is imposed on an amount greater than actual realized gross receipts, or greater than the value of property, is not an income tax in the U.S. sense. In addition, the decision to provide an alternative gross receipts test in the 1983 final regulations, even if made in response to comments, does not preclude the Treasury Department and the IRS from later re-evaluating and removing the rule. The IRS' experience with applying the alternative gross receipts test has shown that the test is vague and unduly burdensome to administer because of the empirical evaluation needed to determine whether the alternative method is likely to produce an amount that is not greater than fair market value.

However, in response to comments received, the final regulations provide that deemed gross receipts resulting from deemed realization events or insignificant non-realization events that meet the realization requirement in § 1.901–2(b)(2) will meet the gross receipts requirement if the deemed gross receipts are reasonably calculated to produce an amount that is not greater than fair market value. For example, deemed gross receipts resulting from a mark-to-market regime or foreign tax law that imputes interest income under a provision similar to section 7872 would satisfy the gross receipts requirement.

The Treasury Department and the IRS disagree with the comment that seems to conflate a situation when actual gross receipts arise from a transaction between related parties that is priced under a cost-plus transfer pricing methodology with the transactions contemplated in the 2020 FTC proposed regulations. Such a related-party transaction is distinct from a foreign levy that imposes tax on deemed gross receipts that are determined based upon a markup of costs rather than the actual gross receipts from the transaction among unrelated parties. The former involves using a transfer pricing methodology to determine the appropriate payment (that is, the actual gross receipts as reported or adjusted for tax purposes) that a taxpayer in a transaction with a related party should receive based upon arm's length principles. In contrast, in the context of transactions between unrelated parties, using a measure of deemed gross receipts based on costs may have no relationship to the actual gross receipts.

However, the Treasury Department and the IRS have determined that the reference in proposed § 1.901–2(b)(3)(i) to gross receipts that are properly allocated to a taxpayer under a foreign tax meeting the jurisdictional nexus requirement was potentially confusing and unnecessary, because such a related party transfer pricing methodology would result in actual gross receipts, either by means of an actual payment or a constructive payment resulting from a receivable recorded on the taxpayer's books and records. Accordingly, the reference to gross receipts determined under a transfer pricing methodology is removed from the final regulations, and an example is added to the final regulations at § 1.901–2(b)(3)(ii)(B) to illustrate the intended application of the rule.

3. Cost Recovery Requirement

The 2020 FTC proposed regulations modified various aspects of the net income test of the existing regulations (referred to as the ''cost recovery requirement'' under the 2020 FTC proposed regulations) to ensure that a foreign tax is a creditable tax only if the determination of the foreign tax base conforms in essential respects to the determination of taxable income under the Code.

Several comments recommended against adopting the proposed changes to the cost recovery requirement out of concern that the proposed changes will result in more instances of unrelieved double taxation. One comment asserted that the effect of the revisions to the cost recovery requirement would be to limit creditability of foreign levies that have been traditionally characterized as income taxes based solely on minor deviations between U.S. tax principles and the foreign law. The comment asserted that the revised standard is stricter than the standard traditionally applied by the courts, and unreasonably narrows the standard since the term ''foreign income, war profits, and excess profits taxes'' in the statute has not been changed.

In general, the Treasury Department and the IRS disagree with comments that the revised cost recovery standard will result in additional unrelieved double taxation in a manner that is inconsistent with the policies underlying section 901. This is because double taxation that merits relief under section 901 occurs only if there is substantial conformity in the principles used to calculate the foreign tax base and the U.S. tax base. However, the final regulations modify certain aspects of the cost recovery requirement in order to provide additional flexibility and to reduce instances where minor deviations between U.S. principles and foreign tax law could cause a foreign levy to be non-creditable; these changes are described in part IV.B.3.ii and iii of this Summary of Comments and Explanation of Revisions.

i. Gross Basis Taxes

The 2020 FTC proposed regulations removed the nonconfiscatory gross basis tax rule of the existing regulations. That rule provided that a foreign levy whose base is gross receipts is treated as meeting the cost recovery requirement if the foreign levy is almost certain to reach net gain in the normal circumstances in which it applies because costs and expenses will almost never be so high as to offset gross receipts or gross income, and the rate of the tax is such that after the tax is paid persons subject to the tax are almost certain to have net gain. Instead, proposed § 1.901–2(b)(4)(i)(A) provided that a foreign levy must permit recovery of the significant costs and expenses attributable to such gross receipts, or permit recovery of an alternative amount that by its terms may be greater, but will never be less, than the actual amounts of such significant costs and

expenses. Proposed § 1.901–2(b)(4)(i)(A) further provided that a foreign tax that is imposed on gross receipts or gross income and that does not permit recovery of any costs or expenses does not meet the cost recovery requirement, even if in practice there are no or few costs and expenses attributable to all or particular types of gross receipts included in the foreign tax base.

One comment stated that the removal of the nonconfiscatory gross basis tax rule is inconsistent with court decisions that predate the 1983 regulations and that have concluded that a tax on gross receipts may qualify as a creditable income tax so long as it reaches net income. The comment specifically cited *Seatrain Lines, Inc.* v. *Comm'r,* 46 B.T.A. 1076 (1942), *Santa Eulalia Mining Co.* v. *Comm'r,* 2 T.C. 24 (1943), and *Bank of America Nat. Trust & Sav. Ass'n* v. *U. S.,* 459 F.2d 513 (Ct. Cl. 1972). The comment stated that in determining whether a foreign levy is an income tax, the courts focus on the nature of the income that is the subject of the tax and whether that type of income is likely to involve significant expenses that could result in a net loss being realized from the activity being taxed. The comment further contended that digital services taxes would qualify as creditable income taxes under this analysis, because the amounts of costs and expenses associated with the type of gross receipts subject to the digital services taxes are never so high as to cause businesses subject to the tax to incur a loss after payment of the tax. No explanation or evidence (whether empirical or anecdotal) was provided to support this assertion.

The comment further asserted that the explanation for the proposed change in the preamble to the 2020 FTC proposed regulations is unpersuasive. It contended that the court decisions involving the net gain requirement have not reflected any administrative difficulties. As such, the comment stated that the removal of the nonconfiscatory gross basis tax rule in the 2020 FTC proposed regulations is unjustified and recommended that the existing rule be retained.

The Treasury Department and the IRS have determined that foreign taxes that do not permit recovery of significant costs and expenses are not income taxes in the U.S. sense. Although some cases preceding the 1983 regulations, such as those cited in the comment, determined that a gross basis tax could be an income tax in the U.S. sense, other cases reached a different conclusion. See *C.I.R.* v. *American Metal Co.,* 221 F.2d 134 (1955) (a Mexican Production Tax was not creditable because it applied regardless of whether miners made a profit or sales); *Keasbey,* 133 F.2d 894 (tax imposed under the Quebec Mining Act was not an income tax in the U.S. sense because the levy permitted deductions only for costs incurred in the mining operation, and not for expenses incident to the general conduct of the business); *Bank of America,* 459 F.2d 513 (gross basis tax on income of banks did not qualify as an income tax under section 901). The Treasury Department and the IRS do not agree that a tax is properly considered a tax on net income so long as empirical evidence demonstrates that the nonrecoverable costs and expenses attributable to the gross receipts or gross income are almost never so high as to eliminate any profit after the tax is paid. It is unlikely, as a practical matter, that the data required to make such an empirical showing of the amounts of disallowed expenses of all taxpayers subject to the tax will be available to either taxpayers or the IRS other than in the context of a targeted tax of narrow application such as the levies considered in *Texasgulf* or *Exxon.* In any event, such a gross basis tax is so dissimilar to the U.S. income tax against which the foreign tax credit is allowed that the Treasury Department and the IRS have determined it should not qualify as an income tax in the U.S. sense. With respect to the comment that asserted that gross basis digital services taxes never result in a loss to affected companies, the fact that the comment failed to provide any evidence may be indicative of the difficulty of making this empirical showing. Furthermore, comments made by the affected industries have made clear that gross basis taxes are inconsistent with the fundamental nature of an income tax, and could in fact result in taxation of companies that are in a loss position.[7] Accordingly, the final regulations largely maintain the approach of the 2020 FTC proposed regulations in eliminating the nonconfiscatory gross basis tax rule.

However, upon consideration of the comments, the Treasury Department and the IRS agree that a gross basis tax may meet the cost recovery requirement if in fact there are no significant costs and expenses attributable to the gross receipts included in the taxable base. Accordingly, the final regulations at § 1.901–2(b)(4)(i)(A) remove the rule in the 2020 FTC proposed regulations that provided that a gross basis tax could never meet the cost recovery requirement, even if in practice there are no significant costs and expenses attributable to the gross receipts included in the foreign tax base. Instead, § 1.901–2(b)(4)(i)(A) provides that a gross basis tax satisfies the cost recovery requirement if there are no significant costs and expenses attributable to the gross receipts included in the foreign tax base that must be recovered under the rules of § 1.901–2(b)(4)(i)(C)(*1*). In addition, the Treasury Department and the IRS recognize that the Code contains various limitations on the recovery of non-business expenses that have been modified from time to time. For example, miscellaneous itemized deductions, including unreimbursed employee expenses, are generally not deductible. Thus, the final regulations provide in § 1.901–2(b)(4)(i)(C)(*2*) that a foreign tax law that does not permit recovery of costs and expenses attributable to wages and investment income not derived from a trade or business satisfies the cost recovery requirement. Furthermore, the final regulations clarify in § 1.901–2(b)(4)(i)(A) that a foreign tax need not permit recovery of costs and expenses, such as certain personal expenses, that are not attributable, under reasonable principles, to gross receipts included in the foreign taxable base.

ii. Significant Costs

Proposed § 1.901–2(b)(4)(i)(A) provided that the cost recovery requirement is satisfied if the foreign tax law permits recovery of significant costs and expenses attributable to the gross receipts included in the foreign tax base. The significance of the cost is determined based on whether, for all taxpayers in the aggregate to which the foreign tax applies, the item of cost or expense constitutes a significant portion of the taxpayers' total costs and expenses. See proposed § 1.901–2(b)(4)(i)(B)(*2*). In addition, proposed § 1.901–2(b)(4)(i)(B)(*2*) specified that certain costs—such as costs or expenses related to capital expenditures, interest,

[7] United States Trade Representative, Section 301 Investigation, Report on France's Digital Services Tax at 57–58 (Dec. 2, 2019), available at *https://ustr.gov/sites/default/files/Report_On_France%27s_Digital_Services_Tax.pdf* (quoting numerous comments from digital companies and industry groups attesting that the digital service taxes' application to revenue rather than income is inconsistent with prevailing principles of international taxation). In particular, a member from National Foreign Trade Council stated that a ''tax imposed on gross revenue has no relationship to net income or profits, which are the only proper bases for a corporate income tax.'' *Id.* at 57. Another industry representative stated that a ''tax on ordinary business profits, imposed on gross revenue, has no relationship to net income. . . . Gross revenue has no relationship to net income, and therefore such taxes are not limited to taxing the gains of an enterprise, and will drive companies into deeper losses if they are not profitable. Thus, such a tax is likely to harm growing companies. . . .''). *Id.* at 58.

rents, royalties, services, and research and experimentation—are always treated as significant, and thus, must be recoverable.

The 2020 FTC proposed regulations also addressed foreign expense disallowance provisions. Proposed § 1.901–2(b)(4)(i)(B)(*2*) provided that a foreign levy that disallows recovery of all or a portion of a significant cost or expense meets the cost recovery requirement if such disallowance is consistent with the types of disallowances reflected in the Code.

Several comments recommended that the Treasury Department and the IRS retain the standard in the existing regulations and withdraw the list of ''per se'' significant costs and expenses in proposed § 1.901–2(b)(4)(i)(B)(*2*). Although some comments acknowledged the rationale for adding the list of expenses that are always treated as significant and thus must be recoverable, they also asserted that this rule would create complexities because it would require continued evaluation and re-evaluation of U.S. and foreign tax rules. One comment noted that there could be changes to either the foreign tax law or the U.S. tax law that could cause a foreign tax to be no longer creditable. It suggested, as an example, that a foreign tax that includes rules identical to current section 163(j), which took effect in 2018, would have likely failed the cost recovery requirement in 2017 but would have met the cost recovery requirement in 2018.

One comment recommended that if the per se list of recoverable expenses is retained, it should apply only to taxpayers that in fact incur a significant amount of such cost or expense, for example, amounts in excess of a certain percentage of the particular taxpayer's gross receipts. The comment recognized that its recommendation conflicts with the rule in the existing and proposed regulations that a foreign tax either satisfies or does not satisfy the definition of a foreign income tax in its entirety, for all persons subject to the foreign tax, but asserted that such a deviation is appropriate because a taxpayer should not be denied a credit for a foreign tax because the foreign law does not permit or limits recovery of an expense if the particular taxpayer does not incur a significant amount of that expense.

One comment questioned why the Treasury Department and the IRS retained the empirical analysis in the definition of significance, noting that it is contrary to the stated overall purpose of the proposed modifications of the net gain requirement to minimize reliance on empirical evidence.

Comments also disagreed with the policy of the 2020 FTC proposed regulations of requiring foreign expense disallowance rules to be consistent with U.S. disallowances. Comments noted that foreign countries have different ways of structuring deduction disallowances and different policy goals that they want to achieve through deduction disallowances. One comment pointed to interest deduction disallowance rules as an example, noting that the U.S. rules have a myriad of restrictions on interest deductions, including because in certain circumstances interest payments may reflect a return on capital. The comment stated that if a foreign jurisdiction prohibits deductions for interest payments in some or most circumstances because it views interest as a return on capital, that could cause the foreign tax to be no longer creditable. The comment asserted that a foreign levy should not be non-creditable simply because the foreign jurisdiction has more restrictive limitations on interest deductibility. Comments also pointed to deduction disallowances for related-party interest payments, noting that foreign governments may significantly restrict deductions for interest incurred on related party debt. The comments contended that such limitations would not be unreasonable, but that it is unclear whether a foreign levy with such restrictions would be creditable under the 2020 FTC proposed regulations. One comment further asserted that it is unfair to disallow foreign tax credits when a foreign country adopts disallowance provisions different from U.S. rules, because denial of the credit results in double taxation of U.S. taxpayers that have no control over the foreign country's policy decisions. Another comment stated that the statute does not require strict conformity with U.S. tax principles for a foreign tax to be creditable. Thus, foreign tax law deviations from U.S. tax law should not cause a foreign levy to be non-creditable unless the foreign law expense disallowances are so pervasive as to make the foreign base not related to net income.

Comments also stated that the requirement that foreign cost disallowances must be consistent with the types of disallowances in the Code will lead to additional administrative burdens for the IRS and compliance burdens for taxpayers because the 2020 FTC proposed regulations provide insufficient guidance on the application of the rule. Comments noted it is unclear the degree to which the foreign tax disallowance rule must be similar to U.S. disallowance rules. The comment also asked how temporary changes to the U.S. tax rules that are intended to ameliorate shorter-term economic or policy concerns, such as the changes to section 163(j) under the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136, 134 Stat. 281 (2020), are intended to affect the application of the rule. Similarly, another comment noted that foreign countries may have a similar policy goal as the United States but may adopt limitations, for example as part of the BEPS initiative, on a different timeline than the United States.

Other comments noted that it is unclear if foreign expense disallowance provisions that are not similar to disallowances under the Code but that are necessitated by sound tax policy would cause a foreign levy to be non-creditable under the 2020 FTC proposed regulations. For example, one comment asked whether a foreign country that permits full expensing of capital expenditures but disallows any deduction for interest expense (which the comment asserts only avoids economically duplicative deductions in the case of debt-financed investments) would run afoul of the proposed rules because it is not consistent with the disallowances in section 162 of the Code. A comment queried whether disallowance of deductions under an alternative minimum tax regime similar to section 55 or section 59A would be deemed consistent with Federal income tax principles for purposes of the cost recovery requirement. Comments recommended that if the proposed modifications to the cost recovery requirement are finalized, the Treasury Department and the IRS should provide additional examples illustrating the application of the rule, including examples of permissible disallowances as well as examples of disallowances that are not identical to Federal income tax rules but are considered consistent with U.S. tax principles.

After consideration of the comments, the Treasury Department and the IRS have determined that the final regulations should generally maintain the approach of the 2020 FTC proposed regulations, which reflects the appropriate balance between accuracy and administrability in determining whether the foreign tax law permits recovery of the significant costs and expenses attributable to the gross receipts included in the foreign taxable base. The costs and expenses that are deemed significant under the 2020 FTC proposed regulations are those costs and

expenses that represent substantial deductions claimed by U.S. taxpayers in computing the base of the U.S. income tax. Therefore, it is reasonable to presume that those enumerated costs also reflect substantial costs and expenses of taxpayers operating abroad. The Treasury Department and the IRS have determined that it would be impossible, as a practical matter, for either taxpayers or the IRS to obtain both the private financial data and tax return data, for all taxpayers subject to a generally-imposed foreign tax, that would be needed to apply the empirical test of the existing regulations to determine whether in fact all such taxpayers in the aggregate incurred substantial costs and expenses for which deductions were not allowed in determining the foreign taxable base. Accordingly, the final regulations at § 1.901–2(b)(4)(i)(C)(*1*) retain the requirement that the foreign tax law by its terms must allow recovery of significant costs and expenses, including recovery of costs and expenses related to capital expenditures, interest, rents, royalties, wages or other payments for services, and research and experimentation. In addition, § 1.901–2(b)(4)(i)(C)(*1*) clarifies that the foreign tax law applies to determine the character of a particular deduction. For example, if a foreign country denies a deduction for a payment made on an instrument that is treated as equity for foreign tax purposes, the cost recovery requirement is met even if the instrument is treated as debt for U.S. tax purposes. In response to comments, § 1.901–2(b)(4)(i)(C)(*1*) also clarifies that foreign tax law that does not permit recovery of a significant cost or expense (such as interest expense) is not considered to allow recovery of such significant cost or expense by reason of the time value of money attributable to the acceleration of a tax benefit for a different expense (such as current expensing of capital expenditures).

However, the Treasury Department and the IRS agree that the final regulations should clarify the scope of permissible foreign tax law expense disallowance rules. Accordingly, the final regulations include additional rules and examples at § 1.901–2(b)(4)(i)(C)(*1*) and § 1.901–2(b)(4)(iv), respectively, illustrating that foreign tax law rules need not mirror U.S. expense disallowance rules, but need only be consistent with the principles reflected in U.S. tax law. For example, § 1.901–2(b)(4)(i)(C)(*1*) provides that a rule limiting interest deductions to 10 percent of a reasonable measure of taxable income (determined either before or after deductions for depreciation and amortization) based on principles similar to those underlying section 163(j) would qualify.

iii. Alternative Allowance Rule

Under the ''alternative allowance rule'' in § 1.901–2(b)(4) of the existing regulations, a foreign tax that does not permit recovery of one or more significant costs or expenses, but that provides allowances that effectively compensate for nonrecovery of such significant costs or expenses, is treated as meeting the cost recovery requirement. The 2020 FTC proposed regulations modified the alternative allowance rule to provide that an alternative allowance meets the cost recovery requirement only if the foreign tax law, by its terms, permits recovery of an amount that equals or exceeds the actual amounts of such significant costs and expenses. See proposed § 1.901–2(b)(4)(i)(A).

Several comments criticized the modification of the alternative allowance rule and recommended that the Treasury Department and the IRS retain the standard of the existing regulations. One comment asserted that the proposed rules would cause a foreign levy to be non-creditable even if the foreign levy provides an allowance that in fact equals or exceeds the taxpayer's actual expenses; the comment contends that this is arguably inconsistent with the language of the statute. Some comments asserted that foreign levies are unlikely to meet the requirement that the foreign tax law expressly guarantee that the alternative allowance will equal or exceed actual costs because alternative allowances are generally designed to avoid compliance burdens related to the determination of actual costs. Thus, the comments stated, the proposed rules could cause alternative tax regimes that foreign countries impose to be non-creditable, even if those regimes allow equivalent recovery of expenses in most if not all circumstances.

Some comments disagreed with the statement in the preamble of the 2020 FTC proposed regulations that alternative allowances fundamentally diverge from the approach to cost recovery in the Code; the comments pointed out that the Code also has examples of alternative allowances (citing to rules regarding travel expense reimbursement, the return on intangible income for global intangible low tax income (''GILTI'') and foreign-derived intangible income (''FDII''), the standard deduction, and certain safe harbor methods for determining home office deductions). Comments further stated that U.S. tax rules have allowed the use of estimates of expenses in certain circumstances through, for example, application of the ''*Cohan* rule'' (*Cohan* v. *Comm'r,* 39 F.2d 540 (2d Cir. 1930)), which permits courts to allow a tax benefit, such as a deduction, if a taxpayer proves entitlement to a tax benefit but fails to substantiate the exact amount of the benefit.

Some comments questioned the preamble's assertion that it is difficult in practice for taxpayers and the IRS to determine whether an alternative allowance under foreign tax law effectively compensates for the nonrecovery of significant costs or expenses, noting that the taxpayer was able to do so in *Texasgulf.* One comment asserted that many court decisions show that a foreign levy that provides alternative allowances for deductions can still be an income tax in the U.S. sense. The comment did not cite any court decisions in support of this assertion.

For the reasons explained in part IV.B.1 of this Summary of Comments and Explanation of Revisions, the Treasury Department and the IRS disagree with comments that the alternative allowance rule of the existing regulations is an appropriate or administrable rule. In addition, the use of percentages of the basis of certain tangible property to compute income for GILTI and FDII purposes is distinguishable from providing an alternative allowance in lieu of actual costs and expenses to compute the taxable base because these allowances are in addition to, and not in substitution for, provisions in the Code that allow deductions for the actual costs and expenses attributable to gross receipts included in the U.S. tax base. Moreover, nothing in the final regulations precludes a foreign tax law from allowing deductions in excess of those needed to recover the actual, significant costs and expenses of earning taxable gross receipts. Finally, the *Cohan* rule is a judicial doctrine that permits approximating actual costs and expenses in limited circumstances where the taxpayer demonstrates that it incurred a business expense but kept inadequate records to substantiate the exact amounts of such expense. Where a taxpayer can substantiate the actual amounts of its business expenses, the Code allows those expenses as deductions. Thus, the *Cohan* rule establishes a substantiation standard, but does not modify the Code rule allowing actual costs and expenses to be recovered. Accordingly, the final regulations retain the rule that a foreign

tax law must permit the recovery of significant costs and expenses to be an income tax in the U.S. sense.

However, the Treasury Department and the IRS recognize that some foreign jurisdictions, in order to relieve administrative and compliance burdens on certain small businesses, may provide an alternative method for determining deductible costs attributable to gross receipts, either as an optional alternative method or as the sole method. As the comments noted, the Code contains alternative allowances or safe-harbor rules for determining deductible business expenses in limited circumstances. As a result, the final regulations at § 1.901–2(b)(4)(i)(B)(*1*) provide that the cost recovery requirement is satisfied if the foreign tax law allows the taxpayer to choose between deducting actual costs or expenses or an optional allowance in lieu of actual costs and expenses. In addition, the Treasury Department and the IRS have determined that additional flexibility is warranted to accommodate alternative allowances in lieu of actual cost recovery, if the alternative measures are designed to minimize administrative or compliance burdens with respect to small taxpayers. Accordingly, the final regulations at § 1.901–2(b)(4)(i)(B)(*2*) provide an exception for these types of alternative allowances.

C. Tax in Lieu of Income Tax

1. In General

Section 903 provides that the term ''income, war profits, and excess profits taxes'' includes a tax paid in lieu of a tax on income, war profits, or excess profits that is otherwise generally imposed by any foreign country. Under the 2020 FTC proposed regulations, a foreign levy is a tax in lieu of an income tax only if (i) it is a foreign tax, and (ii) it satisfies the substitution requirement. See proposed § 1.903–1(b)(2). A foreign tax (the ''tested foreign tax'') satisfies the substitution requirement, if based on the foreign tax law, it meets the four requirements in proposed § 1.903–1(c)(1): The generally-imposed net income tax requirement, the non-duplication requirement, the close connection requirement, and the jurisdiction-to-tax requirement.

2. Generally-Imposed Net Income Tax Requirement

To meet the generally-imposed net income tax requirement, a separate levy that is a net income tax (as defined in proposed § 1.901–2(a)(3)) must be generally imposed by the same foreign country (the ''generally-imposed net income tax'') that imposed the tested foreign tax. Comments stated that the 2020 FTC proposed regulations would unduly limit a foreign levy's qualification as a creditable ''in lieu of tax'' by requiring the generally-imposed net income tax to satisfy proposed § 1.901–2, particularly as it has been revised to require more similarity to U.S. tax principles. One comment further explained that a tested foreign tax would not satisfy the generally-imposed net income tax requirement with respect to a foreign jurisdiction that limits the deductibility of interest under rules that are inconsistent with the Code. Because these comments request relaxation of the rules in proposed § 1.901–2, as opposed to changes to proposed § 1.903–1, the responses to these comments are addressed above at part IV.A of this Summary of Comments and Explanation of Revisions, with respect to the jurisdictional nexus requirement, and at part IV.B, with respect to the net gain requirement.

3. Non-Duplication Requirement

Under the non-duplication requirement, neither the generally-imposed net income tax nor any other net income tax imposed by the foreign country may be imposed with respect to any portion of the income to which the amounts that form the base of the tested foreign tax relate (the ''excluded income''). A tested foreign tax does not meet this requirement if a net income tax imposed by the same country applies to the excluded income of any persons that are subject to the tested foreign tax, even if not all persons subject to the tested foreign tax are subject to the net income tax.

Comments asserted that the non-duplication requirement is inconsistent with the interpretation of the substitution requirement in *Metropolitan Life Ins. Co.* v. *United States,* 375 F. 2d 835 (Ct. Cl. 1967), which held that the Canadian premiums tax was ''in lieu of'' the income tax for mutual life insurance companies, which were only subject to the premiums tax, even though other types of insurance businesses were subject to both the Canadian premiums tax and the generally-imposed net income tax. As such, comments recommended that the non-duplication requirement apply on a taxpayer-by-taxpayer basis, and any loss of creditability of taxes paid should be limited to income that is actually subject to both the generally-imposed net income tax and the tested foreign tax.

Under the existing regulations, a foreign levy is either creditable or not creditable for all taxpayers subject to the levy. This ''all or nothing rule'' applies under existing § 1.903–1 to the determination of whether a foreign tax is an in lieu of tax. The 2020 FTC proposed regulations similarly provided as part of the non-duplication requirement that a foreign levy that is imposed in addition to the generally-imposed net income tax with respect to some taxpayers is not a tax that is imposed in substitution for, or in lieu of, a generally-imposed net income tax. The Treasury Department and the IRS have determined that analyzing each tested foreign tax based on how it applies to each taxpayer (instead of analyzing the tax as a whole) would significantly increase compliance and administrative burdens for taxpayers and the IRS. Moreover, allowing a tested foreign tax to qualify as an in lieu of tax for any taxpayer when some taxpayers pay both the tested foreign tax and the generally-imposed income tax on income from the same activity is inconsistent with the notion that the foreign country made a deliberate choice to create and impose a separate levy instead of imposing the generally-imposed net income tax on the excluded income. Accordingly, the final regulations retain the ''all or nothing'' rule in the non-duplication requirement.

Comments stated that it would be difficult for both the IRS and taxpayers to determine how a tested foreign tax would apply to all taxpayers subject to the levy, given that the tax can be applied on a basis other than income. The 2020 FTC proposed regulations apply based on the terms of the foreign tax law, not how the tax applies in practice. To determine whether a tested foreign tax is creditable, the taxpayer is not required to analyze how the tested foreign tax applies on a taxpayer-by-taxpayer basis in practice, but instead is required only to analyze the foreign tax law. Therefore, the provision is finalized without change.

4. Close Connection Requirement

The close connection requirement in the 2020 FTC proposed regulations requires that, but for the existence of the tested foreign tax, the generally-imposed net income tax would otherwise have been imposed on the excluded income. The requirement is met only if the imposition of the tested foreign tax bears a close connection to the failure to impose the generally-imposed net income tax on the excluded income. A close connection exists if the generally-imposed net income tax would apply by its terms to the income, but for the fact that the excluded income is expressly excluded. Otherwise, a close connection

must be established with proof that the foreign country made a cognizant and deliberate choice to impose the tested foreign tax instead of the generally-imposed net income tax. This proof must be based on foreign tax law, or the legislative history of either the tested foreign tax or the generally-imposed net income tax.

One comment suggested that the close connection requirement can be read to be met only if the tested foreign tax applies to activities that were initially subject to the generally-imposed net income tax and then expressly excluded from its scope, and not if the activities subject to the tested foreign tax were never within the scope of the generally-imposed net income tax. The Treasury Department and the IRS did not intend for the regulations to apply in this manner. Therefore, the final regulations at § 1.903–1(c)(1)(iii) clarify that a close connection also exists if the generally-imposed net income tax by its terms does not apply to the excluded income, and the tested foreign tax is enacted contemporaneously with the generally-imposed net income tax.

Comments asserted that the close connection requirement goes beyond the language of section 903, which comments maintained requires only that the tested foreign tax be imposed in place of the generally-imposed net income tax; not that the generally-imposed net income tax would otherwise apply to the taxpayer. Comments also asserted that the close connection requirement should be removed because the non-duplication requirement is sufficient for ensuring that the tested foreign tax does not duplicate the tax base of the generally-imposed net income tax. Some comments also stated that the requirement that the taxpayer provide proof that the generally-imposed net income tax ''would be imposed'' absent the tested foreign tax contradicts the court's finding in *Metropolitan Life.*

The Treasury Department and the IRS have determined that the close connection requirement is consistent with a reasonable construction of the term ''in lieu of'' in section 903. According to Black's Law Dictionary, ''in lieu of'' means ''to be instead of'' which implies a connection between the imposition of the tested foreign tax and the absence of a generally-imposed net income tax. Otherwise, the statute would have provided that a credit would be allowed for any tax paid by persons not subject to a generally-imposed net income tax. The mere fact that two taxes may be mutually exclusive with respect to some subset of taxpayers does not demonstrate that one is ''in lieu'' of the other.

Furthermore, the requirement that taxpayers demonstrate a close connection is consistent with the text of section 903 as well as court decisions interpreting section 903. The Treasury Department and the IRS disagree that the close connection requirement contradicts the court's finding in *Metropolitan Life.* Rather, the ''close connection'' requirement is taken directly from *Metropolitan Life,* 375 F.2d at 839–40 (''We have found 'a very close connection between the imposition of the Canadian premiums taxes involved here and the failure to impose income taxes.' . . . The Canadian jurisdictions, we also found, made 'a cognizant and deliberate choice . . . between the application of premiums taxes or income taxes for mutual life insurance companies.''). Therefore, the comments are not adopted.

Other comments stated that the close connection requirement would result in significant administrative burdens and uncertainties because jurisdictions with less sophisticated legislative processes and tax regimes may lack specific statutory language or legislative histories to determine whether there was a close connection between the tested foreign tax and the generally-imposed net income tax.

In response to the comments, the final regulations at § 1.903–1(c)(1)(iii) clarify that a close connection also exists if the generally-imposed net income tax by its terms does not apply to the excluded income, and the tested foreign tax is enacted contemporaneously with the generally-imposed net income tax. Therefore, legislative history is not always required to establish that the tested foreign tax satisfies the close connection requirement.

5. Jurisdiction-to-Tax Requirement

The jurisdiction-to-tax requirement provides that if the generally-imposed net income tax were applied to the excluded income, the generally-imposed net income tax would either continue to qualify as a net income tax under proposed § 1.901–2(a)(3), or would constitute a separate levy from the generally-imposed net income tax that would itself be a net income tax under proposed § 1.901–2(a)(3). One comment noted that the reference to proposed § 1.901–2(a)(3) incorporates both the jurisdictional nexus requirement and the net gain requirement. The comment questioned how a taxpayer can determine whether a hypothetical generally-imposed net income tax would reach net gain.

In response to the comment, the final regulations clarify that if the generally-imposed net income tax, or a hypothetical new tax that is a separate levy with respect to the generally-imposed net income tax, were applied to the excluded income, such generally-imposed net income tax or separate levy must meet the attribution requirement in § 1.901–2(b)(5) but does not need to meet the other net gain requirements contained in § 1.901–2(b).

D. Separate Levy Determination

The 2020 FTC proposed regulations retained the general rule of the existing regulations, which provides that whether a foreign levy is an income tax for purposes of sections 901 and 903 is determined independently for each separate foreign levy, but modified the rules to clarify the principles used to determine whether one foreign levy is separate from another foreign levy. See proposed § 1.901–2(d)(1). Proposed § 1.901–2(d)(1)(ii) provided that separate levies are imposed on particular classes of taxpayers if the taxable base is different for those taxpayers.

One comment requested clarification of the treatment of a foreign tax imposed on a distribution that is, in part, a dividend and, in part, gives rise to capital gain. The comment noted that § 1.861–20(g)(5) includes an example that treats the tax imposed on the dividend amount as a separate levy from the tax imposed on the capital gain amount of the distribution, but it is unclear whether the separate levy determination results from the fact that two different tax rates apply to the same distribution, or because the taxes apply to two different types of income. The comment recommended that the final rules clarify the analysis for identifying separate levies in the case of different taxable bases, or to elaborate on the policy considerations underlying the separate levy rules.

One comment recommended that the Treasury Department and the IRS further consider the application of the separate levy rules to minimum tax regimes to ensure they do not prevent creditability of amounts that would otherwise be treated as foreign income taxes. The comment noted that if a regime imposes an incremental alternative minimum tax that would not be creditable under section 901 or section 903, creditability of the net income tax could depend on whether the two amounts are considered separate levies.

Another comment stated that because the 2020 FTC proposed regulations require separate determinations of

creditability for each class of taxpayers for which the application of the foreign levy results in a significantly different tax base (rather than determining whether a foreign levy applies to net income in the normal instance), the application of the separate levy rules and the net gain requirements is complex. It stated that the determination of a separate levy is both fact intensive and nuanced because all deviations from the ''pure'' income tax system of the Code will have to be identified and some deviations will create a separate class of taxpayers (and therefore a separate levy) while other deviations would simply have to be weighed for significance.

The Treasury Department and the IRS have determined that additional clarification of the separate levy rules is not needed in connection with the example in § 1.861–20(g)(5), because the rules for allocating and apportioning the foreign income tax on the facts of the example would be the same whether the tax on the foreign law dividend and capital gain amounts was imposed pursuant to a single levy or separate levies. However, in response to comments, the final regulations at § 1.901–2(d)(3) provide additional examples to illustrate the application of the separate levy rules to minimum tax regimes and other foreign tax regimes involving separate levies that include some common elements. In particular, § 1.901–2(d)(3)(ix) (Example 9) illustrates that a foreign tax containing a limitation on interest deductions that applies only to one class of taxpayers subject to the tax does not cause the tax to be treated as a separate levy as to that class of taxpayers.

E. Amount of Tax That Is Considered Paid

1. Refundable Credits

The 2020 FTC proposed regulations modified § 1.901–2(e)(2)(ii) of the existing regulations to provide explicit rules regarding the effect of foreign law tax credits in determining the amount of tax a taxpayer is considered to pay or accrue. Proposed § 1.901–2(e)(2)(ii) provided that a tax credit allowed under foreign law is considered to reduce the amount of foreign income tax paid, regardless of whether the amount of the tax credit is refundable in cash to the extent it exceeds the taxpayer's liability for foreign income tax. Proposed § 1.901–2(e)(2)(iii) provided an exception to this rule for credits in respect of overpayments of a different tax liability that are refundable in cash at the taxpayer's option and applied to satisfy the taxpayer's foreign income tax liability.

While one comment agreed with the rule in proposed § 1.901–2(e)(2), other comments disagreed with the proposed rule, including the example illustrating these rules in proposed § 1.901–2(e)(4)(ii)(A), asserting that refundable tax credits should be treated as government grants administered through the foreign country's tax system. Under that view, refundable tax credits should be treated as a constructive payment of cash to the taxpayer that the taxpayer uses to constructively pay the amount of foreign income tax liability that is offset or satisfied by application of the tax credit. These comments argue that refundable tax credits provide an economic benefit that is not tied to taxable income or tax liability, which is similar to a government grant and unlike non-refundable tax credits or subsidies described in section 901(i). They further argue that accounting standards under IFRS and GAAP, as well as OECD commentary, treat refundable tax credits as a government expenditure, and that the IRS has issued guidance in the past that suggests that refundable tax credits may be deemed to satisfy, rather than reduce, a foreign tax liability (TAM 200146001; Rev. Rul. 86–134, 1986–2 C.B. 104).

Comments also stated that the IRS's administrative concerns about the difficulty of distinguishing between refundable and non-refundable tax credits could be addressed through additional guidance, through data collection, or by requiring that any excess of a tax credit over a taxpayer's cumulative foreign income tax liability cannot be indefinitely carried forward but must be paid to the taxpayer in cash after a certain period. Comments argued that the proposed treatment of refundable tax credits would increase taxpayers' worldwide tax costs by reducing effective foreign tax rates of taxpayers' controlled foreign corporations and thereby subjecting more taxpayers to residual U.S. tax on GILTI inclusions. Finally, one comment requested guidance on the treatment of transferable tax credits, which are tax credits that are acquired by a taxpayer from another taxpayer and used to satisfy the acquiring taxpayer's tax liability. The comment suggested that transferable tax credits should be treated similarly to refundable tax credits.

The Treasury Department and the IRS generally disagree that refundable tax credits are appropriately treated as offsetting constructive payments of cash to the taxpayer followed by a constructive payment of an (unreduced) foreign income tax liability. Refundable tax credits that are payable in cash only to the extent they exceed a taxpayer's foreign income tax liability, either in the current year or over a period of years, are not similar to unrestricted cash grants. Tax revenue foregone by a foreign taxing jurisdiction by means of such a tax credit reflects a policy choice to forego revenue, and that may be viewed as a tax expenditure, but a tax expenditure is distinct from a cash outlay. Revenue foregone by granting a tax credit that the taxpayer does not have the option to receive in cash reduces its tax liability in exactly the same manner whether the credit is fully nonrefundable or potentially refundable only to the extent the credit exceeds the taxpayer's tax liability. In both cases, the taxpayer does not have the option to receive the applied amount of the credit in cash. No comments suggested that a nonrefundable credit should be treated as constructively received in cash by the taxpayer and used to pay an unreduced tax liability. The Treasury Department and the IRS have determined that it is inappropriate to treat the nonrefundable portion of a refundable credit differently from a fully nonrefundable credit.

In addition, a rule that required the IRS to obtain empirical data on the refundability in practice of nominally refundable tax credits would be too difficult for taxpayers and the IRS to apply. Because the foreign law rules governing such credits often limit the refundable portion to the amount by which the credit exceeds the taxpayer's tax liability over a period of years, taxpayers would have to make speculative determinations, or post-hoc adjustments based on whether the excess portion of credits granted in one year actually became refundable in later years, in order to determine whether the application of the credit could be treated as a payment (rather than a reduction) of foreign tax.

The Treasury Department and the IRS generally agree with the comment that transferable tax credits granted by a foreign country, which presumably are never fully refundable in cash at the taxpayer's option since that option would eliminate the benefit taxpayers derive from selling tax credits to other taxpayers, should be analyzed under the same rules as other foreign law tax credits. The application of a purchased tax credit to satisfy a foreign tax liability, similar to other tax credits that are not fully refundable in cash at the taxpayer's option, represents foregone revenue that is not received or retained by the foreign country. In order to constitute an amount of foreign income tax paid for purposes of section 901, an

amount must be both owed and remitted to the foreign country, and not used to provide a benefit to the taxpayer, to a related person, to any party to the transaction, or to any party to a related transaction. See section 901(i) and § 1.901–2(e)(3). Accordingly, § 1.901–2(e)(2)(ii) of the final regulations confirms that applying a foreign law tax credit, including credits that are refundable in cash only to the extent they exceed tax liability and credits that are transferred from another taxpayer, to reduce a foreign income tax liability is not considered a payment of foreign tax that is eligible for a credit.

These regulations do not address whether the use of a transferred tax credit to satisfy a foreign (or other) income tax liability may constitute the payment of a liability for purposes of other provisions of the Code, such as section 164. However, section 275 generally disallows a deduction for foreign income taxes paid or accrued in a taxable year for which the taxpayer claims to any extent the benefit of the foreign tax credit.

However, the Treasury Department and the IRS agree that refundable tax credits may appropriately be treated as a means of paying, rather than reducing, a foreign income tax liability if the taxpayer has the option to receive in cash the full amount of the tax credit, rather than just the portion that exceeds the taxpayer's foreign income tax liability. Accordingly, the final regulations expand the tax overpayment exception in proposed § 1.901–2(e)(2)(iii) to apply to any tax credit that is fully refundable in cash at the taxpayer's option. The final regulations also clarify that a tax credit will not be considered not fully refundable solely by reason of the fact that the amount of the tax credit could be subject to seizure or garnishment to satisfy a different, pre-existing debt of the taxpayer to the government or a third party.

2. Noncompulsory Payments

The 2020 FTC proposed regulations clarified that the references to a ''foreign tax'' in § 1.901–2(e)(5)(i) of the existing final regulations, defining the amount of tax paid for purposes of sections 901 and 903, are only to creditable foreign income taxes (and in lieu of taxes). As under the existing final regulations, the 2020 FTC proposed regulations provided that an amount remitted is not a compulsory payment, and so is not an amount of foreign income tax paid, to the extent the taxpayer failed to minimize the amount of foreign income tax due over time. Comments disagreed with the clarification, arguing that when taxpayers settle tax controversies with foreign tax authorities, a credit should be allowed for foreign income taxes that were paid in exchange for a greater reduction in foreign non-income taxes. A comment argued that foreign non-income taxes should be treated like litigation costs or any other costs of pursuing a remedy in determining whether a taxpayer has acted reasonably to minimize its foreign income tax liability.

The final regulations retain the clarification that § 1.901–2(e)(5) requires taxpayers to take reasonable steps to minimize their liability for foreign income taxes, including by exhausting remedies that an economically rational taxpayer would pursue whether or not the amount at issue was eligible for the foreign tax credit. However, the Treasury Department and the IRS agree that this requirement is met if the reasonably expected, arm's length costs of reducing foreign income tax liability would exceed the amount of the potential reduction, and that reasonably expected costs may include the cost of a reasonably anticipated offsetting foreign non-income tax liability. In addition, the Treasury Department and the IRS have determined that this reasonable cost analysis should apply not only in the exhaustion of remedies context, but also in evaluating whether a taxpayer has appropriately applied foreign tax law to minimize its foreign income tax liabilities even in the absence of a foreign tax controversy. The final regulations are modified to reflect these changes. In addition, an example is added to the final regulations at § 1.901–2(e)(5)(vi)(G) (*Example 7*) to illustrate that where a taxpayer has a choice to claim or forgo a deduction that would reduce its foreign income tax liability but increase its foreign non-income tax liability by a greater amount, the taxpayer can choose not to claim the income tax deduction without violating the noncompulsory payment requirement.

The 2020 FTC proposed regulations added provisions clarifying the scope of a taxpayer's obligation under the noncompulsory payment rules to take advantage of foreign law options and elections that may minimize the taxpayer's foreign income tax liability. The final regulations clarify that a taxpayer must take advantage of foreign law options and elections that relate to the computation of tax liability as applied to the facts that affect the taxpayer's liability, but do not require taxpayers to modify any other conduct that may have tax consequences, including, for example, choices relating to business form or the maintenance of books and records on which income is reported, or the terms of contracts or other business arrangements.

The 2020 FTC proposed regulations also exempted foreign law options or elections relating to loss sharing and entity classification from the noncompulsory payment rules. One comment suggested that the final regulations should also include an exception for options and elections that have the effect of increasing the tax liability of the taxpayer while also reducing the tax liability of a related person by a greater amount and provided an example related to foreign law anti-hybrid regimes. The Treasury Department and the IRS have determined that applying the noncompulsory payment rule on a group-wide basis would be too difficult for taxpayers to comply with and for the IRS to administer, due to the difficulty of defining the related group in a way that properly accounts for differences in U.S. and foreign tax law and prevents abuse. However, the final regulations at § 1.901–2(e)(5)(iv) include an additional limited exception for certain transactions that increase one person's foreign income tax liability but result in a reduction in another person's foreign income tax liability through the application of foreign law hybrid mismatch rules, provided that such reduction in the second person's liability is greater than the increase in the first person's liability.

F. Applicability Date

1. In General

Proposed § 1.901–2(h) provided that the revised rules in proposed § 1.901–2 apply to foreign taxes paid or accrued in taxable years beginning on or after the date that the final regulations adopting the rules are filed with the **Federal Register**. Proposed § 1.903–1(e) similarly provided that proposed § 1.903–1 applies to foreign taxes paid or accrued in taxable years beginning on or after the date that the final regulations are filed with the **Federal Register**.

One comment asked that the final regulations include a delayed applicability date. The comment stated that, given the potentially significant impact of the jurisdictional nexus requirement discussed in part IV.A of this Summary of Comments and Explanation of Revisions on the creditability of foreign levies and uncertainty regarding whether the proposed amendments to the section 901 and 903 regulations would be finalized, it is unreasonable to expect that taxpayers would modify their business operations before the

regulations are finalized. The comment recommended that the final regulations should delay the applicability date to allow taxpayers ample time to assess the impact of the regulations on their business and to adjust their operations accordingly. Another comment recommended that the Treasury Department and the IRS defer finalizing the regulations and provide an additional extended comment period.

The Treasury Department and the IRS have determined that it is not appropriate to delay the applicability date of §§ 1.901–2 and 1.903–1 beyond the date indicated in the 2020 FTC proposed regulations. The Treasury Department and the IRS recognized the potentially significant impact of the jurisdictional nexus requirement, and thus, provided a fully prospective applicability date in the 2020 FTC proposed regulations. The 2020 FTC proposed regulations provided ample notice to taxpayers that extraterritorial taxes that are not an income tax in the U.S. sense would not be creditable, and these final regulations largely adopt § 1.901–2 and § 1.903–1 as proposed. The Treasury Department and the IRS disagree with the comment's assertion that applicability dates of significant final regulations should be deferred to allow time for taxpayers to modify their business operations to take into account the new rules. The Treasury Department and the IRS have also determined that sufficient time has been afforded for stakeholders to provide comments. Ten comments were received in relation to the jurisdictional nexus requirement, all of which were carefully considered in finalizing the regulations. In addition, the Treasury Department and the IRS have determined that it is essential to finalize these regulations and to retain the applicability date announced in the 2020 FTC proposed regulations to avoid the detrimental impact to the U.S. fisc if, due to ambiguities under existing regulations, novel extraterritorial taxes are inappropriately allowed as a foreign tax credit against U.S. tax.

Comments asked for confirmation that foreign taxes paid or accrued in a taxable year before the regulations are finalized but that are carried forward and claimed as a credit (and thus ''deemed'' paid or accrued under section 904(c)) in a taxable year after the final regulations become applicable will not be subject to the final regulations.

For the avoidance of doubt, the final regulations clarify that the term ''paid,'' which for purposes of §§ 1.901–2 and 1.903–1 means ''paid'' or ''accrued'' depending on whether the taxpayer is claiming a foreign tax credit on the cash or accrual basis, does not refer to foreign taxes that are carried over and ''deemed'' paid or accrued under section 904(c) or to taxes paid by CFCs that are ''deemed paid'' by a U.S. shareholder under section 960. See § 1.901–2(g)(5). The applicability date provisions in §§ 1.901–2(h) and 1.903–1(e) have been conformed to cross-reference the revised definition of ''paid'' in § 1.901–2(g)(5). Because the Treasury Department and the IRS view the revised definition to be a clarification, not a change, to existing law, no inference is intended with respect to the proper interpretation of the applicability date of existing foreign tax credit regulations that are not modified by these final regulations.

2. Deferred Application to Certain Puerto Rican Taxes

Notice 2011–29, 2011–16 IRB 663, announced that the IRS and the Treasury Department were evaluating the novel issues raised by legislation enacted by Puerto Rico on October 25, 2010. The legislation added new rules (''Expanded ECI Rules'') to section 1123 of the Puerto Rico Internal Revenue Code of 1994 (''1994 PR IRC'') that characterize certain income of nonresident corporations, partnerships, and individuals as effectively connected with the conduct of a trade or business in Puerto Rico. The legislation also added section 2101 to the 1994 PR IRC, which imposes an excise tax (''Puerto Rico Excise Tax'') on a controlled group member's acquisition from another group member of certain personal property manufactured or produced in Puerto Rico and certain services performed in Puerto Rico.[8] Pending the resolution of the novel issues involved in the determination of the creditability of the Puerto Rico Excise Tax, Notice 2011–29 announced that the IRS will not challenge a taxpayer's position that the Puerto Rico Excise Tax is a tax in lieu of an income tax under section 903, and that any change in the foreign tax credit treatment of the Puerto Rico Excise Tax would be prospective.

Notwithstanding the general applicability of §§ 1.901–2 and 1.903–1 to foreign taxes paid or accrued in taxable years beginning on or after the date these final regulations are filed with the **Federal Register**, the final regulations provide that § 1.901–2 will apply to Puerto Rico income tax paid by reason of the Expanded ECI Rules, and § 1.903–1 will apply to Puerto Rico Excise Tax, paid or accrued in taxable years beginning on or after January 1, 2023. The Treasury Department and the IRS have determined that a delayed applicability date is necessary and appropriate in light of the status of Puerto Rico as a territory of the United States, the special treatment of the Puerto Rico Excise Tax under Notice 2011–29 that has been in place since 2011, and with respect to the Expanded ECI Rules, the interconnectedness between such rules and the Puerto Rico Excise Tax under Puerto Rico's statutory scheme. Notice 2011–29 will continue to apply until the final regulations are applicable with respect to the Puerto Rico Excise Tax.

V. Definition of Foreign Branch Category Income in Connection With Intercompany Payments

Proposed § 1.904–4(f)(4)(xv) (*Example 15*) illustrated the application of the matching rule in § 1.1502–13 to a regarded intercompany payment between one affiliated group member and a foreign branch of a different member. One comment noted that the example does not illustrate how § 1.1502–13(b)(2) would apply to limit the amount of an intercompany item taken into account under § 1.1502–13(c). The comment also suggested that additional examples would help clarify how intercompany payments for R&D services required to be taken into account under § 1.1502–13, or disregarded payments for such services, are accounted for in determining the amount and source of foreign branch category income.

The 2020 FTC proposed regulations did not modify the application of § 1.1502–13(b) in the foreign branch category context, and additional examples illustrating the application of the intercompany transaction regulations, the R&E expense allocation rules, and the foreign branch category are beyond the scope of the issues considered in the 2020 FTC proposed regulations. Accordingly, the foreign branch examples are finalized without substantive change. However, the Treasury Department and the IRS may address these issues in a future guidance project.

VI. Sections 901(a) and 905(a)—Rules Regarding When the Foreign Tax Credit Can Be Claimed

A. Timing of Foreign Tax Accruals

The 2020 FTC proposed regulations provided rules regarding when a taxpayer can claim a credit for foreign income taxes paid or accrued, depending on the taxpayer's method of accounting. For taxpayers that use the

[8] The provisions implementing the Expanded ECI Rules and the Puerto Rico Excise Tax were incorporated into sections 1035.05 and 3070.01, respectively, of the Puerto Rico Internal Revenue Code of 2011 (13 L.P.R.A §§ 30155, 31771).

accrual method of accounting or that have made an election under section 905(a) to claim foreign tax credits on the accrual basis, proposed § 1.905–1(d)(1)(i) provided that foreign income taxes accrue and can be claimed as a credit in the taxable year in which all the events have occurred that establish the fact of the liability and the amount of the liability can be determined with reasonable accuracy (that is, in the taxable year when the all events test under § 1.446–1(c)(1)(ii)(A) has been met). Proposed § 1.905–1(d)(1)(i) further provided that in the case of a foreign income tax that is computed based on items of income, deduction, and loss that arise in a foreign taxable year (''foreign net income tax''), the tax accrues at the close of the foreign taxable year and can be claimed as a credit in the U.S. taxable year with or within which the taxpayer's foreign taxable year ends. Foreign withholding taxes that represent advance payments of a foreign net income tax liability determined on the basis of a foreign taxable year accrue at the close of the foreign taxable year. See proposed § 1.905–1(d)(1)(i). In contrast, foreign withholding taxes that are imposed on a payment giving rise to an item of gross income accrue on the date the payment from which the tax is withheld is made. *Id.*

One comment argued that the rule in proposed § 1.905–1(d)(1)(i) providing that foreign net income tax accrues at the close of the foreign taxable year is an incorrect application of the all events test in section 461. The comment acknowledged that the proposed rule incorporated the long-standing position of the Treasury Department and the IRS reflected in Revenue Ruling 61–93, 1961–1 C.B. 390, but argued that that ruling reached the wrong conclusion because it asserted that the liability accrues when all events have occurred to establish the fact of the liability and the amount of the liability, whereas section 461(h) only requires that the amount of the liability can be determined with reasonable accuracy. The comment argued that in cases where the foreign and U.S. taxable years do not coincide, the fact of the liability for foreign taxes on income earned during the U.S. taxable year is established, and, in normal circumstances, the amount of the liability should be determinable with reasonable accuracy at the end of the U.S. taxable year, because both the amount of income and applicable foreign tax rate will be known. The comment further noted that in the case of taxpayers employed in a foreign country, the employer will also withhold and remit foreign tax on the taxpayer's salary to the foreign country throughout the year. The comment further argued that the proposed rule would result in instances where the taxpayer has to pay U.S. tax on foreign source income in a U.S. taxable year earlier than the year in which the foreign taxable year ends and the credit for foreign tax on the income may be claimed, creating a mismatch that may not be addressed by section 904(c) carryback rules.

The Treasury Department and the IRS disagree with the comment's contention that proposed § 1.905–1(d)(1)(i) is inconsistent with the all events test in section 461 and that the all events test can be satisfied, in the case of a foreign net income tax, before the close of the foreign taxable year. First, the comment's contention that Revenue Ruling 61–93 reached the wrong conclusion because it misapplied the all events test is incorrect. The revenue ruling was issued before Congress codified in section 461(h)(4) the all events test that had developed through case law. The ruling's statement of the all events test is consistent with the Supreme Court's description of the standard in *Dixie Pine Products Co.* v. *Comm'r,* 320 U.S. 516, 519 (1944) (''all the events must occur in that year which fix the amount and the fact of the taxpayer's liability for items of indebtedness deducted though not paid.'').

Second, the comment's argument regarding whether the all events test requires the amount of the liability to be fixed or only to be determinable with reasonable accuracy is misplaced, because in the case of a foreign net income tax, neither the fact of the liability nor the amount due can be determined with reasonable accuracy until the accounting period closes and the amount of the taxpayer's taxable income for that period can be computed. An estimate does not meet the standard required by the all events test to accrue a foreign tax expense; all events through the close of the taxable year must have occurred before the fact and amount of the liability can be determined with reasonable accuracy. See Rev. Rul. 72–490, 1972–2 C.B. 100. Before the accounting period closes, any number of events, such as a large loss incurred late in the foreign taxable year, could occur that could affect the taxpayer's taxable income and resulting foreign income tax liability for that period. Although withholding taxes or estimated payments made to satisfy a projected net income tax liability are readily determinable by a taxpayer, the basis for the calculation of the final foreign income tax liability is not knowable until the foreign taxable year ends. For these reasons, the final regulations do not adopt the comment and confirm that foreign net income taxes accrue at the end of the foreign taxable year and can be claimed as a credit by an accrual basis taxpayer only in the U.S. taxable year with or within which the taxpayer's foreign taxable year ends.

B. Cash to Accrual Basis Election

Proposed § 1.905–1(e) provided rules related to the election in section 905(a) for a cash method taxpayer to claim foreign tax credits on the accrual basis. Proposed § 1.905–1(e)(1) provided that, in general, the election must be made on a timely-filed original return by checking the appropriate box on Form 1116 (Foreign Tax Credit (Individual, Estate, or Trust)) or Form 1118 (Foreign Tax Credit—Corporations) indicating the cash method taxpayer's choice to claim the foreign tax credit in the year the foreign income taxes accrue. However, the 2020 FTC proposed regulations also provided an exception in proposed § 1.905–1(e)(2), which permitted a taxpayer who has never previously claimed a foreign tax credit to elect to claim the foreign tax credit on an accrual basis, even if such initial claim for credit is made on an amended return.

One comment asserted that an election to change from the cash to the accrual method under section 905(a) should be allowed to be made on an amended return. In support of that assertion, the comment argued that the purpose of the election is to allow better matching between the credit for the foreign tax and the U.S. tax on the foreign income. The comment further argued that cases such as *Dougherty* v. *CIR,* 60 T.C. 917 (1973), support the principle that elections should be allowed to be made on an amended return when circumstances that are not known at the time of the filing of the initial return are material to the decision for making the election. The comment further argued that the case discussed in the preamble of the 2020 FTC proposed regulations in support of the rule not allowing an election change to be made on an amended return, *Strong* v. *Willcuts,* 17 AFTR 1027 (D. Minn. 1935), did not hold that the election cannot be made on an amended return, and that the court's discussion of the issue was dictum and does not represent legal authority.

The Treasury Department and the IRS disagree with this comment. First, section 905(a) requires that if a cash basis taxpayer elects to claim foreign tax

credits on the accrual basis, ''the credits for all subsequent years shall be taken on the same basis.'' This statutory language plainly allows only a one-time change from the cash to the accrual method for determining the year in which the credit is taken and precludes a taxpayer from ever again changing that choice. If the one-time choice to switch from the cash to the accrual method were permitted to be made retroactively on an amended return, then the taxpayer would have to file amended returns for intervening years in which credits had been originally claimed on the cash basis to comply with the statutory mandate and prevent duplicative credits for foreign taxes that accrued in one year and were paid (and claimed as credits on the cash basis) in a different year. Because the applicable statutes of limitation for assessments and refunds relating to foreign tax credits may expire at different times, in the absence of a foreign tax redetermination any retroactive revisions to the year in which foreign tax credits are properly claimed could result in time-barred U.S. tax deficiencies. The Treasury Department and the IRS have determined that the compliance burdens and administrative complexity that would follow from deviating from the rule requiring the election to be made prospectively outweigh the benefits for taxpayers of any flexibility that would follow from allowing the accrual basis election to be made on an amended return for a year in which the taxpayer originally claimed foreign tax credits on the cash basis.

In addition, although the legislative history indicates that Congress, in enacting the predecessor to the section 905(a) election, was concerned with better matching of U.S. and foreign taxes on the same income, that does not mean that Congress intended taxpayers to be able to make the election on an amended return. See S. Rep. No. 68–398 (1924); H.R. Rep. No. 68–179 (1924). Cases from the 1940s examined whether section 131(a), which between 1932 and 1942 provided that the election to claim a foreign tax credit was made ''[i]f the taxpayer signifies in his return his desire to have the benefits of this section,'' allowed taxpayers to change their choice from deducting to crediting foreign taxes after they filed their original return. In one such case, the Second Circuit noted that:

> Section 131(a) was intended, we think, to prevent a taxpayer, fully cognizant of the facts when making its return, from subsequently changing its position, but not to hold a taxpayer to a choice made when unaware that its choice had practical consequences. *That such was the legislative purpose is emphasized by Sec. 131(d) which does preclude a shift of position by a taxpayer, knowingly electing to claim a credit, as to a cash or accrual basis.*

W.K. Buckley, Inc., v. *Comm'r,* 158 F.2d 158, 162 (2d Cir. 1946) (emphasis added). Congress amended section 131(a) in the Revenue Act of 1942 to provide that the election to claim a credit can be made or changed before the expiration of the refund period. See Revenue Act of 1942, Public Law 77–753, 158, 56 Stat. 798, 857. Notably, Congress has never amended section 905(a) to prescribe a time by which the section 905(a) election must be made.

The Treasury Department and the IRS also disagree with the comment's assertion that *Strong* v. *Willcuts* does not support the position that the accrual basis election cannot be made on an amended return. In that case, the court denied the taxpayer's claim on two bases. The first was that, in the court's view, the statute contemplates that the election must be made when the return is originally filed and that there is no basis to assume that a taxpayer can shift his position after the filing of his return. *Strong* v. *Willcuts,* 17 AFTR 1027. The court addressed ''another and even more formidable obstacle'' to taxpayer's claim, but that did not mean that the first issue was not relevant to the court's decision. *Id.*

In addition, although the *Dougherty* court held that the taxpayer could make a section 962 election on an amended return, it acknowledged that there are limits on when a taxpayer can make a late election. The court reviewed prior case law and concluded that ''the critical question involved in determining the timeliness of a delayed election is whether the original action (or the failure to act) on the part of the taxpayer did not amount to an election against, and was not inconsistent with, the position which the taxpayer ultimately did adopt.'' *Dougherty,* 60 T.C. at 940. In addition, the court noted that it was significant that the granting of a right of late election did not permit the taxpayer, in effect, to play both ends against the middle as the result of hindsight. *Id.* Proposed § 1.905–1(e)(2) already provided an exception that, consistent with the above principles, permitted a taxpayer who is claiming a foreign tax credit for the first time to make the election on an amended return, because in that case, the taxpayer has not taken an action (claiming a foreign tax credit on the cash basis) that is inconsistent with the position the taxpayer seeks to adopt by making a section 905(a) election (claiming a foreign tax credit on the accrual basis). For the above reasons, the final regulations do not adopt the comment's recommendation.

C. Provisional Credit for Contested Taxes

1. In General

The 2020 FTC proposed regulations provided that, in general, contested foreign income taxes do not accrue and cannot be claimed as a credit in the relation-back year until the contest is resolved, even if the taxpayer remits the contested taxes to the foreign country in an earlier year. See proposed § 1.905–1(d)(3). Proposed § 1.905–1(d)(4), however, provided an elective exception for accrual basis taxpayers to claim a provisional credit for the portion of the contested taxes that the taxpayer has paid, even though the contest has not been resolved and the taxes have not yet accrued. As a condition for making this election, a taxpayer must agree to not assert the statute of limitations as a defense to the assessment of additional taxes and interest if, after the contest has been concluded, the IRS determines that the tax was not a compulsory payment. The taxpayer must also agree to comply with annual reporting requirements.

Proposed § 1.905–1(d)(4)(i) provided that a taxpayer may make an election to claim a foreign tax credit, but not a deduction, for contested foreign income taxes. One comment asked for clarification on whether this limitation on deducting a contested tax applies to CFC-level deductions, or whether this limitation was intended to apply only to a U.S. taxpayer claiming a deduction, rather than a foreign tax credit, for the contested foreign taxes. The comment recommended that the final regulations address the application of the contested tax liability rules to the deductions of CFC taxpayers and argued that if a provisional credit election is made, the CFC should be allowed a deduction for the relation-back year in advance of the accrual. In response to this comment, the final regulations clarify that the provisional foreign tax credit can only be made for contested foreign income taxes that relate to a taxable year in which the taxpayer has made the election under section 901 to claim a credit (instead of a deduction) for foreign income taxes that accrue in such year. See § 1.905–1(d)(4)(i). The final regulations also clarify that if an election is made by the U.S. taxpayer with respect to a contested foreign income tax liability incurred by a CFC, the taxpayer may claim the deemed paid credit in the relation-back year; in addition, the CFC can take the

deduction for the contested foreign income tax into account in computing its taxable income in the relation-back year. *Id.*

2. Annual Reporting

Proposed § 1.905–1(d)(4)(iii) provided annual reporting requirements associated with the election to claim a provisional foreign tax credit for contested foreign income taxes. Proposed § 1.905–1(d)(4)(v) provided that a taxpayer that fails to comply with those annual reporting requirements will be treated as receiving a refund of the amount of the contested foreign income tax liability, resulting in a redetermination of the taxpayer's U.S. tax liability pursuant to § 1.905–3(b). Comments argued that an annual reporting requirement is unnecessary because taxpayers must waive the assessment statute to make the election and recommended instead that taxpayers should be required to file an amended return notifying the IRS when the contest is resolved. Alternatively, if the final regulations retain an annual reporting requirement, comments recommended that the deemed refund consequence for failure to comply be removed because it is overly harsh.

The Treasury Department and the IRS have determined that annual reporting is necessary and appropriate to ensure that taxpayers and the IRS properly track ongoing contests for which a provisional foreign tax credit has been allowed. However, the Treasury Department and the IRS agree that an inadvertent failure to timely report an ongoing contest or the conclusion of a contest need not result in a deemed refund, because the government's interests are adequately protected by the statute waiver required by the election. The terms of the election guarantee the IRS sufficient time after being notified of the conclusion of the contest to evaluate whether the taxpayer failed to exhaust effective and practical remedies to minimize its foreign income tax if it fails to secure a refund of the contested tax, and to assess any resulting underpayment of U.S. tax. Accordingly, the final regulations omit the deemed refund rule.

D. Creditable Foreign Tax Expenditures of Partnerships and Other Pass-Through Entities

1. Foreign Tax Redeterminations for Cash Method Partners

Proposed § 1.905–1(f)(1) provided that a partner that elects to claim a foreign tax credit in a taxable year may claim its distributive share of foreign income taxes that the partnership paid or accrued (as determined under the partnership's method of accounting) during the partnership's taxable year that ends with or within the partner's taxable year. Under this rule, a cash method taxpayer may claim a credit for its distributive share of an accrual method partnership's foreign income taxes even if the partnership has not paid (that is, remitted) the taxes to the foreign country during the partner's taxable year with or within which the partnership's tax expense accrued. However, proposed § 1.905–1(f)(1) further provided that if additional foreign taxes result from a redetermination of the partnership's foreign tax liability for a prior taxable year, a cash-method partner may only take into account its distributive share of such additional taxes for foreign tax credit purposes in the partner's taxable year with or within which the taxable year of the partnership in which it pays the taxes ends.

One comment recommended that the final regulations extend the application of the principles of the relation-back rule in proposed § 1.905–1(d)(1)(ii) to partners of an accrual method partnership by treating a cash method partner's distributive share of additional tax paid by the partnership as a result of a change in the foreign tax liability as paid or accrued by the partner in its taxable year with or within which the partnership's relation-back year ends. The comment stated that this would be more consistent with the principle espoused in proposed § 1.905–1(f)(1) that the partnership's method of accounting for foreign income taxes generally controls for purposes of determining the taxable year in which a partner is considered to pay or accrue its distributive share of those taxes.

The Treasury Department and the IRS disagree with the comment's suggestion that proposed § 1.905–1(f)(1) should essentially cause a partner's method of accounting to be the same as the partnership's method with regard to any partnership items of foreign income tax. The proposed regulation is consistent with §§ 1.702–1(a)(6) and 1.703–1(b)(2)(i), which provide that when a partnership takes into account a creditable foreign tax expenditure under its method of accounting, the partner takes its distributive share of the foreign tax into account as if it was properly taken into account under the partner's method of accounting in the partner's year with or within which the partnership's taxable year ends. These rules do not change the partner's method of accounting to conform to the partnership's method of accounting with respect to its distributive share of the partnership's taxes. Thus, for example, in the case of an accrual method partnership and a cash method partner, if the partnership accrues, but has not yet paid, an amount of foreign income tax, the cash method partner takes into account its distributive share of the foreign tax expense as if it had been paid in the partner's taxable year with or within which the partnership's taxable year ends. Similarly, if the partnership later accrues and pays an additional amount of foreign income tax with respect to the same taxable year pursuant to a foreign tax redetermination described in section 905(c)(2)(B), a cash method partner takes its distributive share of the additional amount of foreign tax into account in its taxable year with or within which ends the partnership's taxable year in which the foreign tax redetermination occurs, because the additional foreign tax is considered to be paid by the partner in that year, not in the former taxable year to which additional foreign tax of the accrual-basis partnership relates. Therefore, the final regulations do not adopt the comment's recommendation.

2. Provisional Credit for Cash Method Taxpayers

Proposed § 1.905–1(f)(2) provided that a partnership takes into account and reports a contested foreign income tax to its partners only when the contest concludes and the finally determined amount of the liability has been paid by the partnership. However, proposed § 1.905–1(f)(2) allowed an accrual method partner to elect to claim a provisional foreign tax credit, in the relation-back year, for its share of a contested foreign income tax liability that the partnership has remitted to the foreign country, even though the contested tax has not yet accrued. The procedures for making this election were set forth in proposed § 1.905–1(d)(4).

One comment recommended the same election be made available for cash method partners. The Treasury Department and the IRS agree that a cash method partner should be allowed to elect to claim a provisional foreign tax credit for its share of a contested foreign income tax liability that the partnership has paid to the same extent as an accrual basis partner, even though under § 1.901–2(e)(2) a contested tax is not a reasonable approximation of the final tax liability to the foreign country and so in the absence of the election is not treated as an amount of tax paid. The final regulations, at § 1.905–1(c)(3), extend the election provided for in proposed § 1.905–1(d)(4) to allow cash

method taxpayers to claim a provisional foreign tax credit for a contested foreign income tax in the year the contested tax is remitted. The election is available for contested foreign income taxes paid directly by the taxpayer or paid by a partnership in which the taxpayer is a partner. The procedure and requirements for making this election are the same as those that apply under proposed § 1.905–1(d)(4), which is being finalized with the modifications discussed in part VI.D.1 of this Summary of Comments and Explanation of Revisions.

E. Correction of Improper Accrual

Proposed § 1.905–1(d)(5) provided rules for accrual method taxpayers that are changing from an improper method to a proper method for accruing foreign income taxes. Proposed § 1.905–1(d)(5)(ii) provided a modified cutoff approach under which taxpayers were required to adjust the amount of foreign income taxes that can be claimed as a credit or deduction in the taxable year of the method change (and, if applicable, in subsequent years) to prevent duplication or omission of any amount of foreign income tax paid. Specifically, proposed § 1.905–1(d)(5)(ii) provided that the amount of foreign income tax in a statutory or residual grouping that properly accrues in the taxable year of change is adjusted either downward, but not below zero, by the amount of foreign income tax in the same grouping that the taxpayer improperly accrued and deducted or credited in a prior taxable year, or conversely, adjusted upward by the amount of foreign income tax that properly accrued but that had not been taken as a deduction or credit by the taxpayer in a taxable year before the year of change.

No comments were received regarding the rules in proposed § 1.905–1(d)(5) and they are generally finalized as proposed. However, the Treasury Department and the IRS have determined that there are circumstances in which a taxpayer may have both a downward and an upward adjustment to the properly accrued foreign income taxes in a statutory or residual grouping in the taxable year of change, and that in those circumstances, proposed § 1.905–1(d)(5)(ii) was unclear whether the rule provided that the downward adjustment alone could not reduce the properly accrued taxes below zero, or that the downward adjustment, net of the upward adjustment, could not reduce the properly accrued taxes below zero. Section 1.905–1(d)(5)(ii) has been revised to clarify that, under the modified cutoff approach, the amount of properly accrued foreign income tax in each statutory and residual grouping is first adjusted upward and then adjusted downward (but not below zero), and that any downward adjustment in excess of the amount of properly accrued foreign income tax in any grouping, as increased by the upward adjustment, is carried forward and reduces the properly accrued foreign income tax in the grouping in subsequent years.

In addition, the Treasury Department and the IRS determined that proposed § 1.905–1(d)(5)(ii) was unclear regarding the treatment of foreign income taxes for which a credit is never allowed under section 901, but for which a deduction under section 164(a)(3) is allowed because section 275 does not apply. See, for example, sections 901(j), (k), (l), and (m). Accordingly, the final regulations clarify that the modified cut-off approach is applied separately with respect to amounts of these foreign income taxes. See § 1.905–1(d)(5)(ii).

Special Analyses

I. Regulatory Planning and Review

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The final regulations have been designated by the Office of Information and Regulatory Affairs (OIRA) as subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (MOA, April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations. The Office of Information and Regulatory Affairs has designated these regulations as economically significant under section 1(c) of the MOA. Accordingly, the OMB has reviewed these regulations.

A. Background and Need for the Final Regulations

The U.S. foreign tax credit (FTC) regime alleviates potential double taxation by allowing a non-refundable credit for foreign income taxes paid or accrued that could be applied to reduce the U.S. tax on foreign source income. Although the Tax Cuts and Jobs Act (TCJA) eliminated the U.S. tax on some foreign source income by enacting a dividends received deduction, the United States continues to tax other foreign source income, and to provide foreign tax credits against this U.S. tax. The calculation of how foreign taxes can be credited against U.S. tax operates by defining different categories of foreign source income (a ''separate category'') based on the type of income.[9] Foreign taxes paid or accrued, as well as deductions for expenses borne by U.S. parents and domestic affiliates that support foreign operations, are allocated to the separate categories based on the income to which such taxes or deductions relate. These allocations of deductions reduce foreign source taxable income and therefore reduce the allowable FTCs for the separate category, since FTCs are limited to the U.S. income tax on the foreign source taxable income (that is, foreign source gross income less allocated expenses) in that separate category. Therefore, these expense allocations help to determine how much foreign tax credit is allowable, and the taxpayer can then use allowable foreign tax credits allocated to each separate category against the U.S. tax owed on income in that category.

The Code and existing regulations further provide definitions of the foreign taxes that constitute creditable foreign taxes. Section 901 allows a credit for foreign income taxes, war profits taxes, and excess profits taxes. The existing regulations under section 901 define these ''foreign income taxes'' such that a foreign levy is an income tax if it is a tax whose predominant character is that of an income tax in the U.S. sense. Under the existing regulations, this requires that the foreign tax is likely to reach net gain in the normal circumstances in which it applies (the ''net gain requirement''), and that it is not a so-called soak-up tax.

The ''net gain requirement'' of the existing regulations is made up of the realization, gross receipts, and net income requirements. Generally, the creditability of the foreign tax under the existing regulations relies on the definition of an income tax under U.S. principles, and on several aggregate empirical tests designed to determine if in practice the tax base upon which the tax is levied is an income tax base. However, compliance and administrative challenges faced by taxpayers and the IRS in implementing

[9] Before the TCJA, these categories were primarily the passive income and general income categories. The TCJA added new separate categories for global intangible low-taxed income (the section 951A category) and foreign branch income.

the existing definition of an income tax necessitate changes to the existing structure. These final regulations set forth such changes.

Additionally, as a dollar-for-dollar credit against United States income tax, the foreign tax credit is intended to mitigate double taxation of foreign source income. This fundamental purpose is most appropriately served if there is substantial conformity in the principles used to calculate the base of the foreign tax and the base of the U.S. income tax, not only with respect to the definition of the income tax base, but also with respect to the jurisdictional nexus upon which the tax is levied. Further, countries, including the United States, have traditionally adhered to consensus-based norms governing jurisdictional nexus for the imposition of tax. However, the adoption or potential adoption by foreign countries of novel extraterritorial foreign taxes that diverge in significant respects from these norms of taxing jurisdiction now suggests that further guidance is appropriate to ensure that creditable foreign taxes in fact have a predominant character of ''an income tax in the U.S. sense.''

Finally, these regulations are necessary in order to respond to outstanding comments raised with respect to other regulations and in order to address a variety of issues arising from the interaction of provisions in other regulations.

The Treasury Department and the IRS in 2019 issued final regulations (84 FR 69022) (2019 FTC final regulations) and proposed regulations (84 FR 69124) (2019 FTC proposed regulations), which were finalized in 2020 (85 FR 71998) (2020 FTC final regulations). The Treasury Department and the IRS received comments with respect to the 2019 FTC proposed regulations, some of which were addressed in proposed regulations (85 FR 72078) published in 2020 (2020 FTC proposed regulations) instead of in the 2020 FTC final regulations in order to allow further opportunity for notice and comment. The 2020 FTC proposed regulations, which also addressed additional issues, are finalized in these final regulations.

The following analysis provides an overview of the regulations, discussion of the costs and benefits of these regulations as compared with the baseline, and a discussion of alternative policy choices that were considered.

B. Overview of the Structure of and Need for Final Regulations

These final regulations address a variety of outstanding issues, most importantly with respect to the existing definition of a foreign income tax. Section 901 allows a credit for foreign income taxes, and the existing regulations define the conditions under which foreign taxes will be considered foreign income taxes. These final regulations revise aspects of this definition in light of challenges that taxpayers and the IRS have faced in applying the rules of the existing regulations. In particular, the requirements in the existing regulations presuppose conclusions based on country-level or other aggregated data that can be difficult for taxpayers and the IRS to obtain and analyze for purposes of determining whether the foreign tax is imposed on net gain, causing both administrative and compliance burdens and difficulties resolving disputes. Therefore, the final regulations revise the net gain requirements such that, in cases where data-driven conclusions have been difficult to establish historically, the requirements rely less on data of the effects of the foreign tax, and instead rely more on the terms of the foreign tax law (See Part I.C.3.i. of this Special Analyses for alternatives considered and affected taxpayers). For example, a foreign tax, to be creditable, must generally be levied on realized gross receipts (and certain deemed gross receipts) net of deductions for expenses. Under these final regulations, the use of data to demonstrate that an alternative base upon which the tax is levied is in practice a gross receipts equivalent cannot be used to satisfy the gross receipts portion of the net gain requirement.

In addition to these changes, the final regulations adopt the jurisdictional nexus requirement introduced by the 2020 FTC proposed regulations (renamed the ''attribution requirement'' in the final regulations) for purposes of determining whether a foreign tax is an income tax in the U.S. sense. Under this requirement, the foreign tax law must require a sufficient nexus between the foreign country and the taxpayer's activities or investment of capital or other assets that give rise to the income being taxed. Therefore, a tax imposed by a foreign country on income that lacks sufficient nexus to activity in that foreign country (such as operations, employees, factors of production) is not creditable. This limitation is designed to ensure that the foreign tax is an income tax in the U.S. sense by requiring that there is an appropriate nexus between the taxable amount and the foreign taxing jurisdiction (see Part I.C.3.ii of this Special Analyses for discussion of alternatives considered and taxpayers affected). Together, the clarifications and changes to the net gain requirement and the attribution requirement will tighten the rules governing the creditability of foreign taxes and will likely restrict creditability of foreign taxes to some extent relative to the existing regulations.

Finally, these final regulations address other issues raised in comments to the 2019 FTC proposed regulations or resulting from other legislation. For example, comments on the 2019 FTC proposed regulations asked for clarification of uncertainty regarding the appropriate level of aggregation (affiliated group versus subgroup) at which expenses of life insurance companies should be allocated to foreign source income, and comments asked for clarification on when contested taxes (that is, taxes owed to a foreign government which a taxpayer disputes) accrue for purposes of the foreign tax credit. With respect to the life insurance issue, the 2019 FTC proposed regulations specified an allocation method, but requested comments regarding whether another method might be superior. Subsequent comments supported both methods for different reasons, and the Treasury Department and the IRS found both methods to have merit. Therefore, the 2020 FTC proposed regulations and the final regulations allow taxpayers to choose the most appropriate method for their circumstances. (See Part I.C.3.iii of this Special Analyses for alternatives considered and affected taxpayers).

With respect to the contested tax issue, the final regulations establish that contested taxes do not accrue (and therefore cannot be claimed as a credit) until the contest is resolved. However, the final regulations will allow taxpayers to claim a provisional credit for the portion of taxes already remitted to the foreign government, if the taxpayer agrees to notify the IRS when the contest concludes and agrees not to assert the statute of limitations as a defense to assessment of U.S. tax if the IRS determines that the taxpayer failed to take appropriate steps to secure a refund of the foreign tax. (See Part I.C.3.iv of this Special Analyses for alternatives considered and affected taxpayers). In this way, the final regulations alleviate taxpayer cash flow constraints that could result from temporary double taxation during the period of dispute resolution, while still providing the taxpayer with the incentive to resolve the tax dispute and providing the IRS with the ability to ensure that appropriate action was taken regarding dispute resolution.

The guidance and specificity provided by these regulations clarify which foreign taxes are creditable as income taxes, and (with respect to contested taxes) when they are creditable. The guidance also helps to resolve uncertainty and more generally to address issues raised in comments.

C. Economic Analysis

1. Baseline

In this analysis, the Treasury Department and the IRS assess the benefits and costs of these final regulations relative to a no-action baseline reflecting anticipated Federal income tax-related behavior in the absence of these regulations.

2. Summary of Economic Effects

The final regulations provide certainty and clarity to taxpayers regarding the creditability of foreign taxes. In the absence of the enhanced specificity provided by these regulations, similarly situated taxpayers might interpret the creditability of foreign taxes differently, particularly with respect to new extraterritorial taxes, potentially resulting in inefficient patterns of economic activity. For example, some taxpayers may forego specific economic projects, foreign or domestic, that other taxpayers deem worthwhile based on different interpretations of the tax consequences alone. The guidance provided in these regulations helps to ensure that taxpayers face more uniform incentives when making economic decisions. In general, economic performance is enhanced when businesses face more uniform signals about tax treatment.

In addition, these regulations generally reduce the compliance and administrative burdens associated with information collection and analysis required to claim foreign tax credits, relative to the no-action baseline. The regulations achieve this reduction because they rely to a significantly lesser extent on data-driven conclusions than the regulatory approach provided in the existing regulations and instead rely more on the terms and structure of the foreign tax law.

To the extent that taxpayers, in the absence of further guidance, would generally interpret the existing foreign tax credit rules as being more favorable to the taxpayer than the final regulations provide, the final regulations may result in reduced international activity relative to the no-action baseline. This reduced activity may have included both activities that could have been beneficial to the U.S. economy (perhaps because the activities would have represented enhanced international opportunities for businesses with U.S. owners) and activities that may not have been beneficial (perhaps because the activities would have been accompanied by reduced activity in the United States). Thus, the Treasury Department and the IRS recognize that foreign economic activity by U.S. taxpayers may be a complement or substitute to activity within the United States and that to the extent these regulations lead to a reduction in foreign economic activity relative to the no-action baseline, a mix of results may occur. To the extent that foreign governments, in response to these regulations, alter their tax regimes to reduce their reliance on taxes that are not income taxes in the U.S. sense, any such reduction in foreign economic activity by U.S. taxpayers as a result of these regulations, relative to the no-action baseline, will be mitigated.

The Treasury Department and the IRS project that the regulations will have economic effects greater than $100 million per year ($2021) relative to the no-action baseline. This determination is based on the substantial size of many of the businesses potentially affected by these regulations and the general responsiveness of business activity to effective tax rates,[10] one component of which is the creditability of foreign taxes. Based on these two magnitudes, even modest changes in the treatment of foreign taxes, relative to the no-action baseline, can be expected to have annual effects greater than $100 million ($2021).

The Treasury Department and the IRS have not undertaken quantitative estimates of the economic effects of these regulations. The Treasury Department and the IRS do not have readily available data or models to estimate with reasonable precision (i) the tax stances that taxpayers would likely take in the absence of the final regulations or under alternative regulatory approaches; (ii) the difference in business decisions that taxpayers might make between the final regulations and the no-action baseline or alternative regulatory approaches; or (iii) how this difference in those business decisions will affect measures of U.S. economic performance.

In the absence of such quantitative estimates, the Treasury Department and the IRS have undertaken a qualitative analysis of the economic effects of the final regulations relative to the no-action baseline and relative to alternative regulatory approaches. This analysis is presented in Part I.C.3 of this Special Analyses.

3. Options Considered and Number of Affected Taxpayers, by Specific Provisions

i. ''Net Gain Requirement'' for Determining a Creditable Foreign Tax

a. Summary

Under existing regulations, a foreign tax is creditable if it reaches ''net gain,'' which is determined based in part on data-driven analysis. Therefore, under the existing regulations, a gross basis tax can in certain cases be creditable if it can be shown that the tax as applied does not result in taxing more than the taxpayer's profit. In certain cases, in order to determine creditability, the IRS requests country-level or other aggregate data to analyze whether the tax reaches net gain. The creditability determination is made based on data with respect to a foreign tax in its entirety, as it is applied to all taxpayers. In other words, the tax is creditable or not creditable based on its application to all taxpayers rather than on a taxpayer-by-taxpayer basis. However, different taxpayers can and do take different positions with respect to what the language of the existing regulations and the empirical tests imply about creditability.

b. Options Considered for the Final Regulations

The Treasury Department and the IRS considered three options to address concerns with the ''net gain'' test. The first option is not to implement any changes and to continue to determine the definition of a foreign income tax based in part on conclusions based on country-level or other aggregate data. This option would mean that the determination of whether a tax satisfies the definition of foreign income tax would continue to be administratively difficult for taxpayers and the IRS, in part because it requires the IRS and the taxpayer to obtain information from the foreign country to determine how the tax applies in practice to taxpayers subject to the tax. The existing regulations apply a ''predominant character'' analysis such that deviations from the net gain requirement do not cause a tax to fail this requirement if the predominant character of the tax is that of an income tax in the U.S. sense. For example, the existing regulations allow a credit for a foreign tax whose base, judged on its predominant character, is computed by reducing gross receipts by significant costs and expenses, even if gross receipts are not reduced by all

[10] See E. Zwick and J. Mahon, ''Tax Policy and Heterogeneous Investment Behavior,'' at *American Economic Review* 2017, 107(1): 217–48 and articles cited therein.

allocable costs and expenses. This requires some judgment in determining whether the exclusion of some costs and expenses causes the tax to fail the net gain requirement.

The second option considered is not to use data-driven conclusions for any portion of the net gain requirement and rely only on foreign tax law to make the determination. This rule would be easier to apply compared with the first option because it requires looking only at foreign law, regulations, and rulings. However, this option could result in an overly harsh outcome, to the extent the rules determine whether a levy is an income tax in its entirety (that is, not on a taxpayer-by-taxpayer basis). For example, if a country had a personal income tax that satisfied all the requirements, except that the country also included imputed rental income in the tax base, the Treasury Department and the IRS would not necessarily want to disallow as a credit the entire personal income tax system of that country due to the one deviation from U.S. tax law definitions of income tax. As part of this option, the Treasury Department and the IRS therefore considered also allowing a parsing of each tax for conforming and non-conforming parts. For example, in the prior example, only a portion of the income tax could be disallowed (that is, the portion attributable to imputed rental income). However, this approach would be extremely complicated to administer since there would need to be special rules for determining which portion of the tax relates to the non-conforming parts and which do not. It would also imply that taxpayers could not know from the outset whether a particular levy is an income tax but would instead have to analyze the tax in each fact and circumstances in which it applied to a particular taxpayer.

The third option considered is to use data-driven conclusions only for portions of the net gain requirement. The Treasury Department and the IRS considered retaining data-based conclusions in portions of the realization requirement and the cost-recovery requirement but removing them in the gross receipts requirement. This is the approach taken in these regulations. In these regulations, the cost recovery requirement retains the rule that the tax base must allow for recovery of significant costs and expenses. Data are still used in limited circumstances as part of the cost recovery analysis to determine whether a cost or expense is significant with respect to all taxpayers; however, in order to provide clarity and certainty to taxpayers, the final regulations contain a non-exclusive per se list of significant costs and expenses.

Because these options differ in terms of the creditability of foreign taxes, they may increase or decrease foreign activity by U.S. taxpayers. The Treasury Department and the IRS have not projected the differences in economic activity across the three alternatives because they do not have readily available data or models that capture these effects. It is anticipated that the final regulations will reduce taxpayer compliance costs relative to the baseline by significantly reducing the circumstances in which taxpayers must incur costs to obtain data (which may or may not be readily available) in order to evaluate the creditability of a tax.

The Treasury Department and the IRS do not have data or models that would allow them to quantify the reduced administrative burden resulting from these final regulations relative to alternative regulatory approaches. The Treasury Department and the IRS expect that the regulations will reduce administrative burden and compliance burdens because the collection and analysis of empirical data is time consuming for taxpayers and the IRS, and the existing regulations have resulted in a variety of disputes. Hence a reduction in required data collection should reduce burdens. Further, greater reliance on legal definitions rather than empirical review of available data has the potential to reduce the number of disputes, which also should reduce burdens.

c. Number of Affected Taxpayers

The Treasury Department and the IRS have determined that the population of taxpayers potentially affected by the net gain provisions of the final regulations includes any taxpayer with foreign operations claiming foreign tax credits (or with the potential to claim foreign tax credits). Based on currently available tax filings for tax year 2018, there were about 9.3 million Form 1116s filed by U.S. individuals to claim foreign tax credits with respect to foreign taxes paid on individual, partnership, or S corporation income. There were 17,500 Form 1118s filed by C corporations to claim foreign tax credits with respect to foreign taxes paid. In addition, there were about 16,500 C corporations with CFCs that filed at least one Form 5471 with their Form 1120 return, indicating a potential to claim a foreign tax credit even if no credit was claimed in 2018. Similarly, in these data there were about 41,000 individuals with CFCs that e-filed at least one Form 5471 with their Form 1040 return. In 2018, there were about 3,250 S corporations with CFCs that filed at least one Form 5471 with their Form 1120S return. The identified S corporations had an estimated 23,000 shareholders. Finally, the Treasury Department and the IRS estimate that there were approximately 7,500 U.S. partnerships with CFCs that e-filed at least one Form 5741 in 2018. The identified partnerships had approximately 1.7 million partners, as indicated by the number of Schedules K–1 filed by the partnerships; however, this number includes both domestic and foreign partners. Furthermore, there is, likely to be some overlap between the Form 5471 and the Form 1116 and/or 1118 filers.

These numbers suggest that between 9.3 million (under the assumption that all Form 5471 filers or shareholders of filers also filed Form 1116 or 1118) and 11 million (under the assumption that filers or shareholders of filers of Form 5471 are a separate pool from Form 1116 and 1118 filers) taxpayers will potentially be affected by these regulations. Based on Treasury tabulations of Statistics of Income data, the total volume of foreign tax credits reported on Form 1118 in 2016 was about $90 billion. Data do not exist that would allow the Treasury Department or the IRS to identify how this total volume might change as a result of these regulations; however, the Treasury Department and the IRS anticipate that only a small fraction of existing foreign tax credits would be impacted by these regulations.

ii. Jurisdictional Nexus

a. Summary

Rules under existing § 1.901–2 do not explicitly require, for purposes of determining whether a foreign tax is a creditable foreign income tax, that the tax be imposed only on income that has a jurisdictional nexus (or adequate connection) to the country imposing the tax. In order to ensure that creditable taxes under section 901 conform to traditional international norms of taxing jurisdiction and therefore are income taxes in the U.S. sense, these regulations add a jurisdictional nexus requirement.

b. Options Considered for the Final Regulations

The Treasury Department and the IRS considered the following three options for designing a nexus requirement. The first option considered is to create a jurisdictional nexus requirement based on Articles 5 (Permanent Establishment) and 7 (Business Profits) in the U.S. Model Income Tax Convention (the ''U.S. Convention''). The U.S.

Convention includes widely accepted and understood standards with respect to a country's right to tax a nonresident's income. The relevant articles of the U.S. Convention generally require a certain presence or level of activity before the country can impose tax on business income, and the tax can only be imposed on income that is attributable to the business activity. This option was rejected due to concerns that this standard would be too rigid and prescriptive in light of the fact that the Code contains a broader rule for determining when a nonresident is taxed on its income attributable to a activity in the United States.

The second option considered was to create a jurisdictional nexus requirement based on Code section 864, which contains a standard for income effectively connected with the conduct of a U.S. trade or business (ECI). The Code does not provide a definition of U.S. trade or business; it is instead defined in case law, and the definition is therefore not strictly delineated. This option was therefore rejected as potentially being ambiguous, and not necessarily targeting the primary concern with respect to the new extraterritorial taxes, which is that, in contrast to traditional international income tax norms governing the creditability of taxes, they are imposed based on the location of customers or users, or other destination-based criteria.

The third option considered was to require that foreign tax imposed on a nonresident must be based on the nonresident's activities located in the foreign country (including its functions, assets, and risks located in the foreign country) without taking into account as a significant factor the location of customers, users, or similar destination-based criteria. This more narrowly tailored approach better addresses the concern that extraterritorial taxes that are imposed on the basis of location of customers, users, or similar criteria should not be creditable under traditional norms reflected in the Internal Revenue Code that govern nexus and taxing rights and therefore should be excluded from creditable income taxes. Taxes imposed on nonresidents that would meet the Code-based ECI requirement could qualify, as well as taxes that would meet the permanent establishment and business profit standard under the U.S. Convention. This is the option adopted by the Treasury Department and the IRS.

This approach is consistent with the fact that under traditional norms reflected in the Internal Revenue Code, income tax is generally imposed taking into account the location of the operations, employees, factors of production, residence, or management of the taxpayer. In contrast, consumption taxes such as sales taxes, value-added taxes, or so-called destination-based income taxes are generally imposed on the basis of the location of customers, users, or similar destination-based criteria. Although the tax incidence of these two groups of taxes may vary, tax incidence does not play a role in the definition of an income tax in general, or an income tax in the U.S. sense. Therefore, the choice among regulatory options was based on which option most closely aligned the definition of foreign income taxes to taxes that are income taxes in the U.S. sense.

The Treasury Department and the IRS have not attempted to estimate the differences in economic activity that might result under each of these regulatory options because they do not have readily available data or models that capture (i) the jurisdictional nexus of taxpayers' activities under the different regulatory approaches and (ii) the economic activities that taxpayers might undertake under different jurisdictional nexus criteria. In addition, the Treasury Department and the IRS have not attempted to estimate the difference in compliance costs under each of these regulatory options.

c. Number of Affected Taxpayers

The Treasury Department and the IRS have determined that the population of taxpayers potentially affected by the jurisdictional nexus requirement of the regulations includes any taxpayer with foreign operations claiming foreign tax credits (or with the potential to claim foreign tax credits). Based on currently available tax filings for tax year 2018, there were about 9.3 million Form 1116s filed by U.S. individuals to claim foreign tax credits with respect to foreign taxes paid on individual, partnership, or S corporation income. There were 17,500 Form 1118s filed by C corporations to claim foreign tax credits with respect to foreign taxes paid. In addition, there were about 16,500 C corporations with CFCs that filed at least one Form 5471 with their Form 1120 return, indicating a potential to claim a foreign tax credit, even if no credit was claimed in these years. Similarly, for the same period, there were about 41,000 individuals with CFCs that e-filed at least one Form 5471 with their Form 1040 return. In 2018, there were about 3,250 S corporations with CFCs that filed at least one Form 5471 with their Form 1120S return. The identified S corporations had an estimated 23,000 shareholders. Finally, the Treasury Department and the IRS estimate that there were approximately 7,500 U.S. partnerships with CFCs that e-filed at least one Form 5471 in 2018. The identified partnerships had approximately 1.7 million partners, as indicated by the number of Schedules K–1 filed by the partnerships; however, this number includes both domestic and foreign partners. Furthermore, there is likely to be overlap between the Form 5471 and the Form 1116 and/or 1118 filers.

These numbers suggest that between 9.3 million (under the assumption that all Form 5471 filers or shareholders of filers also filed Form 1116 or 1118) and 11 million (under the assumption that filers or shareholders of filers of Form 5471 are a separate pool from Form 1116 and 1118 filers) taxpayers will potentially be affected by these regulations. Based on Treasury Department tabulations of Statistics of Income data, the total volume of foreign tax credits reported on Form 1118 in 2016 was about $90 billion. Data do not exist that would allow the Treasury Department or the IRS to identify how this total volume might change as a result of these regulations; however, the Treasury Department and the IRS anticipate that only a small fraction of existing foreign tax credits would be impacted by these regulations.

iii. Allocation and Apportionment of Expenses for Insurance Companies

a. Summary

Section 818(f) provides that for purposes of applying the expense allocation rules to a life insurance company, the deduction for policyholder dividends, reserve adjustments, death benefits, and certain other amounts (''section 818(f) expenses'') are treated as items that cannot be definitely allocated to an item or class of gross income. That means, in general, that the expenses are apportioned ratably across all of the life insurance company's gross income.

Under the expense allocation rules, for most purposes, affiliated groups are treated as a single entity, although there are exceptions for certain expenses. The statute is unclear, however, about how affiliated groups are to be treated with respect to the allocation of section 818(f) expenses of life insurance companies. Depending on how section 818(f) expenses are allocated across an affiliated group, the results could be different because the gross income categories across the affiliated group could be calculated in multiple ways.

The Treasury Department and the IRS received comments and are aware that in the absence of further guidance taxpayers are taking differing positions on this treatment. Some taxpayers argue that the expenses described in section 818(f) should be apportioned based on the gross income of the entire affiliated group, while others argue that expenses should be apportioned on a separate company or life subgroup basis taking into account only the gross income of life insurance companies.

b. Options Considered for the Final Regulations

The Treasury Department and the IRS are aware of at least five potential methods for allocating section 818(f) expenses in a life-nonlife consolidated group. First, the expenses might be allocated solely among items of the life insurance company that has the reserves (''separate entity method''). Second, to the extent the life insurance company has engaged in a reinsurance arrangement that constitutes an intercompany transaction (as defined in § 1.1502–13(b)(1)), the expenses might be allocated in a manner that achieves single entity treatment between the ceding member and the assuming member (''limited single entity method''). Third, the expenses might be allocated among items of all life insurance members (''life subgroup method''). Fourth, the expenses might be allocated among items of all members of the consolidated group (including both life and non-life members) (''single entity method''). Fifth, the expenses might be allocated based on a facts and circumstances analysis (''facts and circumstances method'').

The 2019 FTC proposed regulations proposed adopting the separate entity method because it is consistent with section 818(f) and with the separate entity treatment of reserves under § 1.1502–13(e)(2). The Treasury Department and the IRS recognized, however, that this method may create opportunities for consolidated groups to use intercompany transactions to shift their section 818(f) expenses and achieve a more advantageous foreign tax credit result. Accordingly, the Treasury Department and the IRS requested comments on whether a life subgroup method more accurately reflects the relationship between section 818(f) expenses and the income producing activities of the life subgroup as a whole, and whether the life subgroup method is less susceptible to abuse because it might prevent a consolidated group from inflating its foreign tax credit limitation through intercompany transfers of assets, reinsurance transactions, or transfers of section 818(f) expenses. Comments received supported both methods and the 2020 FTC proposed regulations provided that the life subgroup method should generally be used, because it minimizes opportunities for abuse and is more consistent with the general rules for allocating expenses among affiliated group members. However, recognizing that the separate entity method also has merit, the 2020 FTC proposed regulations and the final regulations permit a taxpayer to make a one-time election to use the separate entity method for all life insurance members in the affiliated group. This election is binding for all future years and may not be revoked without the consent of the Commissioner. Because the election is binding and applies to all members of the group, taxpayers will not be able to change allocation methods from year to year depending on which is most advantageous. The Treasury Department and the IRS may consider future proposed regulations to address any additional anti-abuse concerns (such as under section 845), if needed.

The Treasury Department and the IRS have not attempted to assess the differences in economic activity that might result under each of these regulatory options because they do not have readily available data or models that capture activities at this level of specificity. The Treasury Department and the IRS further have not estimated the difference in compliance costs under each of these regulatory options because they lack adequate data.

c. Number of Affected Taxpayers

The Treasury Department and the IRS have determined that the population of taxpayers potentially affected by these insurance expense allocation rules consists of life insurance companies that are members of an affiliated group. The Treasury Department and the IRS have established that there are approximately 60 such taxpayers.

iv. Creditability of Contested Foreign Income Taxes

a. Summary

Section 901 allows a taxpayer to claim a foreign tax credit for foreign income taxes paid or accrued (depending on the taxpayer's method of accounting) in a taxable year. Foreign income taxes accrue in the taxable year in which all the events have occurred that establish the fact of the liability and the amount of the liability can be determined with reasonable accuracy (''all events test''). When a taxpayer disputes or contests a foreign tax liability with a foreign country, that contested tax does not accrue until the contest concludes because only then can the amount of the liability be finally determined. However, under two IRS revenue rulings (Rev. Ruls. 70–290 and 84–125), a taxpayer is allowed to claim a credit for the portion of a contested tax that the taxpayer has remitted to the foreign country, even though the taxpayer continues to dispute the liability. While this alleviates cash flow constraints associated with temporary double taxation, it is not consistent with the all events test. In addition, it potentially disincentivizes the taxpayer from continuing to contest the foreign tax, since the tax is already credited and the dispute could be time-consuming and costly, which could result in U.S. tax being reduced by foreign tax in excess of amounts properly due.

The final regulations clarify the treatment of contested foreign taxes of accrual basis taxpayers. As described in part VI.D.2 of the Summary of Comments and Explanation of Revisions, the final regulations also clarify, in response to comments, the circumstances in which cash method taxpayers may claim a foreign tax credit for contested taxes that are remitted before the contest has been concluded.

b. Options Considered for the Final Regulations

The Treasury Department and the IRS considered three options for the treatment of contested foreign taxes. The first option considered is to not make any changes to the existing rule and to continue to allow taxpayers to claim a credit for a foreign tax that is being contested but that has been paid to the foreign country. The Treasury Department and the IRS determined that this option is inconsistent with the all events test for accrual method taxpayers and with the § 1.901–2(e) compulsory payment requirement. It would also result in an accrual basis taxpayer potentially having two foreign tax redeterminations (FTRs) with respect to one contested liability: One FTR at the time the taxpayer pays the contested tax to the foreign country, and a second FTR when the contest concludes (if the finally determined liability differs from the amount that was paid and claimed as a credit). Furthermore, this option impinges on the IRS's ability to enforce the requirement in existing § 1.902–1(e) that a tax has to be a compulsory payment in order to be creditable—if a taxpayer claims a credit for a contested tax, then surrenders the contest once the assessment statute closes, the IRS would be time-barred from challenging that the tax was not creditable on the grounds

that the taxpayer failed to exhaust all practical remedies.

The second option considered is to only allow taxpayers to claim a credit when the contest concludes. In some cases, the taxpayer must pay the tax to the foreign country in order to contest the tax or in order to stop the running of interest in the foreign country. This option would leave the taxpayer out of pocket to two countries (potentially giving rise to cash flow issues for the taxpayer) while the contest is pending, which could take several years. The Treasury Department and the IRS determined that this outcome is unduly harsh.

The third option considered is to allow taxpayers the option to claim a provisional credit for an amount of contested tax that is actually paid, even though in general, taxpayers can only claim a credit when the contest is resolved. This is the option adopted in § 1.905–1(c)(3) and (d)(4). As a condition for making this election, the taxpayer must enter into a provisional foreign tax credit agreement in which it agrees to notify the IRS when the contest concludes and agrees to not assert the expiration of the assessment statute (for a period of three years from the time the contest resolves) as a defense to assessment, so that the IRS is able to challenge the foreign tax credit claimed with respect to the contested tax if the IRS determines that the taxpayer failed to exhaust all practical remedies.

The Treasury Department and the IRS have not attempted to assess the differences in economic activity that might result under each of these regulatory options because they do not have readily available data or models that capture taxpayers' activities under the different treatments of contested taxes. The Treasury Department and the IRS further have not attempted to estimate the difference in compliance costs under each of these regulatory options.

c. Number of Affected Taxpayers

The Treasury Department and the IRS have determined that the final regulations potentially affect U.S. taxpayers that claim foreign tax credits and that contest a foreign income tax liability with a foreign country. Although data reporting the number of taxpayers that claim a credit for contested foreign income tax in a given year are not readily available, the potentially affected population of taxpayers would, under existing § 1.905–3, generally have a foreign tax redetermination. Data reporting the number of taxpayers subject to a foreign tax redetermination in a given year are not readily available; however, some taxpayers currently subject to such redetermination will file amended returns. Based on currently available tax filings for tax year 2018, the Treasury Department and the IRS have determined that approximately 11,400 filers would be affected by these regulations. This estimate is based on the number of U.S. corporations that filed an amended return that had a Form 1118 attached to the Form 1120; S corporations that filed an amended return with a Form 5471 attached to the Form 1120S or that reported an amount of foreign tax on the Form 1120S, Schedule K; partnerships that filed an amended return with a Form 5471 attached to Form 1065 or that reported an amount of foreign tax on Schedule K; U.S. individuals that filed an amended return and had a Form 1116 attached to the Form 1040.

II. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (''Paperwork Reduction Act'') requires that a federal agency obtain the approval of the OMB before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit.

A. Overview

The collections of information in these final regulations are in §§ 1.905–1(c)(3), (d)(4) and (d)(5), 1.901–1(d)(2), and 1.905–3. These collections of information are generally the same as the collections of information in the 2020 FTC proposed regulations, except for the addition of § 1.905–1(c)(3), which extends the election and filing requirements in § 1.905–1(d)(4) for claiming a provisional foreign tax credit for contested foreign income to cash method taxpayers. See Part VI.D.2 of the Summary of Comments and Explanation of Revisions for explanation of this change.

The collections of information in §§ 1.905–1(c)(3) and (d)(4) apply to taxpayers that elect to claim a provisional credit for contested foreign income taxes before the contest resolves. Under the final regulations, both cash and accrual method taxpayers making this election are required to file an agreement described in § 1.905–1(d)(4)(ii) as well as an annual notification described in § 1.905–1(d)(4)(iv). The collection of information in § 1.905–1(d)(5) requires taxpayers that are correcting an improper method of accruing foreign income tax expense to file a Form 3115, Application for Change in Accounting Method, to obtain the Commissioner's permission to make the change. Sections 1.901–1(d)(2) and 1.905–3 require taxpayers that make a change between claiming a credit and a deduction for foreign income taxes to comply with the notification and reporting requirements in § 1.905–4, which generally require taxpayers to file an amended return for the year or years affected, along with an updated Form 1116 or Form 1118 if foreign tax credits are claimed, and a written statement providing specific information.

The burdens associated with collections of information in §§ 1.905–1(d)(4)(iv) and (d)(5), 1.901–1(d)(2), and 1.905–3, which will be conducted through existing IRS forms, are described in Part II.B of this Special Analyses. The burden associated with the collection of information in § 1.905–1(d)(4)(ii), which will be conducted on a new IRS form, is described in Part II.C of this Special Analyses.

B. Collections of Information—§§ 1.905–1(d)(4)(iv), 1.905–1(d)(5), 1.901–1(d)(2), and 1.905–3

The Treasury Department and the IRS intend that the information collection requirements described in this Part II.B of this Special Analyses will be set forth in the forms and instructions identified in Table 1.

TABLE 1—TABLE OF TAX FORMS IMPACTED

Tax forms impacted		
Collection of information	Number of respondents (estimated)	Forms to which the information may be attached
§ 1.905–1(d)(4)(iv)	11,400	Form 1116, Form 1118.
§ 1.905–1(d)(5)	465,500–514,500	Form 3115.

TABLE 1—TABLE OF TAX FORMS IMPACTED—Continued

Tax forms impacted		
Collection of information	Number of respondents (estimated)	Forms to which the information may be attached
§ 1.901–1(d)(2), § 1.905–3	10,400–13,500	Form 1065 series, Form 1040 series, Form 1041 series, and Form 1120 series.

Source: [MeF, DCS, and IRS's Compliance Data Warehouse].

As indicated in Table 1, the Treasury Department and the IRS intend the annual notification requirement in § 1.905–1(d)(4)(iv), which applies to taxpayers that elect to claim a provisional credit for contested taxes, will be conducted through amendment of existing Form 1116, Foreign Tax Credit (Individual, Estate, or Trust) (covered under OMB control numbers 1545–0074 for individuals, and 1545–0121 for estates and trusts) and existing Form 1118, Foreign Tax Credit (Corporations) (covered under OMB control number 1545–0123). The collection of information in § 1.905–1(d)(4)(iv) will be reflected in the Paperwork Reduction Act submission that the Treasury Department and the IRS will submit to OMB for these forms. The current status of the Paperwork Reduction Act submissions related to these forms is summarized in Table 2. The estimate for the number of impacted filers with respect to the collection of information in § 1.905–1(d)(4)(iv), as well as with respect to the collection of information in § 1.905–1(d)(4)(ii) (described in Part II.C), is based on the number of U.S. corporations that filed an amended return that had a Form 1118 attached to the Form 1120; S corporations that filed an amended return with a Form 5471 attached to the Form 1120S or that reported an amount of foreign tax on the Form 1120S, Schedule K; partnerships that filed an amended return with a Form 5471 attached to Form 1065 or that reported an amount of foreign tax on Schedule K; and U.S. individuals that filed an amended return and had a Form 1116 attached to the Form 1040.

The Treasury Department and the IRS expect that the collection of information in § 1.905–1(d)(5) will be reflected in the Paperwork Reduction Act submission that the Treasury Department and the IRS will submit to OMB for Form 3115 (covered under OMB control numbers 1545–0123 and 1545–0074). See Table 2 for the current status of the Paperwork Reduction Act submission for Form 3115. Exact data is not available to estimate the number of taxpayers that have used an incorrect method of accounting for accruing foreign income taxes, and that are potentially subject to the collection of information in § 1.905–1(d)(5). The estimate in Table 1 of the number of taxpayers potentially affected by this collection of information is based on the total number of filers in the Form 1040, Form 1041, Form 1120, Form 1120S, and Form 1065 series that indicated on their return that they use an accrual method of accounting, and that either claimed a foreign tax credit or claimed a deduction for taxes (which could include foreign income taxes). This represents an upper bound of potentially affected taxpayers. The Treasury Department and the IRS expect that only a small portion of this population of taxpayers will be subject to the collection of information in § 1.905–1(d)(5), because only taxpayers that have used an improper method of accounting are subject to § 1.905–1(d)(5).

The collection of information resulting from §§ 1.901–1(d)(2) and 1.905–3, which is contained in § 1.905–4, will be reflected in the Paperwork Reduction Act submission that the Treasury Department and the IRS will submit for OMB control numbers 1545–0123, 1545–0074 (which cover the reporting burden for filing an amended return and amended Form 1116 and Form 1118 for individual and business filers), OMB control number 1545–0092 (which covers the reporting burden for filing an amended return for estate and trust filers), OMB control number 1545–0121 (which covers the reporting burden for filing a Form 1116 for estate and trust filers), and OMB control number 1545–1056 (which covers the reporting burden for the written statement for FTRs). Exact data are not available to estimate the additional burden imposed by §§ 1.901–1(d)(2) and 1.905–3, which amend the definition of a foreign tax redetermination in § 1.905–3 to include a taxpayer's change from claiming a deduction to claiming a credit, or vice versa, for foreign income taxes. Taxpayers making or changing their election to claim a foreign tax credit, under existing regulations, must already file amended returns and, if applicable, a Form 1116 or Form 1118, for the affected years. The Treasury Department and the IRS do not anticipate that regulations that will require taxpayers making this change to comply with the collection of information and reporting burden in § 1.905–4 will substantially change the reporting requirement. Exact data are not available to estimate the number of taxpayers potentially subject to §§ 1.901–1(d)(2) and 1.905–3. The estimate in Table 1 is based upon the total number of filers in the Form 1040, Form 1041, and Form 1120 series that either claimed a foreign tax credit or claimed a deduction for taxes (which could include foreign income taxes), and filed an amended return. This estimate represents an upper bound of potentially affected taxpayers.

OMB control number 1545–0123 represents a total estimated burden time for all forms and schedules for corporations of 1.085 billion hours and total estimated monetized costs of $44.279 billion ($2021). OMB control number 1545–0074 represents a total estimated burden time, including all other related forms and schedules for individuals, of 2.14 billion hours and total estimated monetized costs of $37.960 billion ($2021). OMB control number 1545–0092 represents a total estimated burden time, including related forms and schedules, but not including Form 1116, for trusts and estates, of 307,844,800 hours and total estimated monetized costs of $14.077 billion ($2018). OMB control number 1545–0121 represents a total estimated burden time for all estate and trust filers of Form 1116, of 2,506,600 hours and total estimated monetized costs of $1.744 billion ($2018). OMB control number 1545–1056 has an estimated number of 13,000 respondents and total estimated burden time of 54,000 hours and total estimated monetized costs of $2,583,840 ($2017).

The overall burden estimates provided for OMB control numbers 1545–0123, 1545–0074, and 1545–0092 are aggregate amounts that relate to the entire package of forms associated with these OMB control numbers and will in the future include but not isolate the estimated burden of the tax forms that

will be revised as a result of the information collections in the final regulations. The difference between the burden estimates reported here and those future burden estimates will therefore not provide an estimate of the burden imposed by the final regulations. The burden estimates reported here have been reported for other regulations related to the taxation of cross-border income. The Treasury Department and IRS urge readers to recognize that many of the burden estimates reported for regulations related to taxation of cross-border income are duplicates and to guard against overcounting the burden that international tax provisions impose. The Treasury Department and the IRS have not identified the estimated burdens for the collections of information in §§ 1.905–1(d)(4)(iv) and (d)(5), 1.901–1(d)(2), and 1.905–3 because no burden estimates specific to §§ 1.905–1(d)(4)(iv) and (d)(5), 1.901–1(d)(2), and 1.905–3 are currently available. The Treasury Department and the IRS estimate burdens on a taxpayer-type basis rather than a provision-specific basis.

TABLE 2—STATUS OF CURRENT PAPERWORK REDUCTION SUBMISSIONS

Form	Type of filer	OMB No. (s)	Status
Form 1116	Trusts & estates (NEW Model) *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202010-1545-010.*	1545–0121	Approved by OMB through 12/31/2023.
	Individual (NEW Model) *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202108-1545-001.*	1545–0074	Approved by OMB through 12/31/2021.
Form 1118	Business (NEW Model) *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202012-1545-012.*	1545–0123	Approved by OMB through 12/31/2021.
Form 3115	Business (NEW Model) *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202012-1545-012.*	1545–0123	Approved by OMB through 12/31/2021.
	Individual (NEW Model) *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202108-1545-001.*	1545–0074	Approved by OMB through 12/31/2021.
Notification of FTRs	*https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202105-1545-005.*	1545–1056	Approved by OMB through 7/31/2024.
Amended returns	Business (NEW Model) *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202012-1545-012.*	1545–0123	Approved by OMB through 12/31/2021.
	Individual (NEW Model) *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202108-1545-001.*	1545–0074	Approved by OMB through 12/31/2021.
	Trusts & estates *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201806-1545-014.*	1545–0092	Approved by OMB through 5/31/2022.

C. Collections of Information—§§ 1.905–1(c)(3) and 1.905–1(d)(4)(ii)

The collection of information contained in § 1.905–1(d)(4)(ii)—relating to the provisional foreign tax credit agreement that taxpayers electing to claim a provisional credit for contested foreign income taxes must file—was submitted to the OMB for review in accordance with the Paperwork Reduction Act and was approved under OMB control number 1545–2296. No comments regarding this collection of information were received. As described in Part II.A of this Special Analyses, the final regulations, under § 1.905–1(c)(3), extend the provisional credit election and associated collection of information in § 1.905–1(d)(4)(ii) to cash method taxpayers. The burden estimates for control number 1545–2296 will be updated to reflect this change.

The likely respondents are U.S. persons who pay or accrue foreign income taxes.

Estimated total annual reporting burden: 22,800 hours.

Estimated average annual burden per respondent: 2 hours.

Estimated number of respondents: 11,400.

Estimated frequency of responses: annually.

III. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that the final 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.

The final regulations provide guidance needed to comply with the statutory rules under sections 245A(d), 861, 901, 903, 904, 905, and 960 and affect U.S. individuals and corporations that claim a credit or a deduction for foreign taxes. The domestic small business entities that are subject to these Code provisions and to the rules in the final regulations are those that operate in foreign jurisdictions or that have income from sources outside of the United States and pay foreign taxes. The final regulations also contain clarifying

rules relating to foreign derived intangible income (FDII) under section 250. Specifically, § 1.250(b)–1(c)(7) provides a clarification regarding the determination of domestic oil and gas extraction income and § 1.250(b)–5(c)(5) clarifies the meaning of the term ''electronically supplied services'' as used in the section 250 regulations. Because these rules only clarify the intended meaning of terms in the section 250 regulations, they do not change the economic impact that the section 250 regulations have on small business entities. See the Regulatory Flexibility Act analysis of TD 9901, 85 FR 43078–79.

Many of the important aspects of the final regulations, including the rules in §§ 1.245A(d)–1, 1.367(b)–4, 1.367(b)–7, 1.367(b)–10, 1.861–3, and 1.960–1, apply only to U.S. persons that are at least 10 percent shareholders of foreign corporations, and thus are eligible to claim dividends received deductions or compute foreign taxes deemed paid under section 960 with respect to inclusions under subpart F and section 951A from CFCs. Other provisions of the final regulations, specifically the rules in § 1.861–14, apply only to members of an affiliated group of insurance companies earning income from sources outside of the United States. It is infrequent for domestic small entities to operate as part of an affiliated group, to operate as an insurance company, or to operate outside the United States in corporate form. Consequently, the Treasury Department and the IRS do not expect that the final regulations will likely affect a substantial number of domestic small business entities. However, the Treasury Department and the IRS do not have adequate data readily available to assess the number of small entities potentially affected by the final regulations.

The Treasury Department and the IRS have determined that the final regulations will not have a significant economic impact on domestic small business entities. A significant part of the final regulations is the modification of the requirements in §§ 1.901–2 and 1.903–1 for determining whether a foreign tax is a creditable ''foreign income tax'' or a creditable ''tax in lieu of an income tax'' under sections 901 and 903, respectively. Of particular note, the final regulations add a jurisdictional nexus requirement to the existing creditability requirements. A principal reason for adding the jurisdictional nexus requirement is to ensure that certain novel extraterritorial foreign taxes, such as digital services taxes, are not creditable. Many of these novel extraterritorial taxes only apply to large multinational corporations; as such, small business entities are unlikely to be impacted by the denial of credits for such extraterritorial taxes. In addition, as described in Part I.C.3.i of this Special Analysis, the final regulations remove the empirical analysis required by the existing creditability requirements under § 1.901–2 in favor a creditability analysis based principally on the terms of foreign tax law. The Treasury Department and the IRS anticipate that the final regulations will reduce taxpayer compliance costs relative to the existing regulations by significantly reducing the circumstances in which taxpayers must incur costs to obtain data in order to evaluate the creditability of a tax.

To provide an upper bound estimate of the impact these final regulations could have on business entities, the Treasury Department and the IRS calculated, based on information from the Statistics of Income 2017 Corporate File, foreign tax credits [11] as a percentage of three different tax-related measures of annual receipts (see Table for variables) by corporations. As demonstrated by the data in the table below, foreign tax credits as a percentage of all three measures of annual receipts is substantially less than the 3 to 5 percent threshold for significant economic impact for corporations with business receipts less than $250 million. The Treasury Department and the IRS anticipate that only a small fraction of existing foreign tax credits would be impacted by these regulations, and thus, the economic impact of these regulations will be considerably smaller than the effects shown in the table.

Size (by business receipts)	Under $500,000 (percent)	$500,000 under $1,000,000 (percent)	$1,000,000 under $5,000,000 (percent)	$5,000,000 under $10,000,000 (percent)	$10,000,000 under $50,000,000 (percent)	$50,000,000 under $100,000,000 (percent)	$100,000,000 under $250,000,000 (percent)	$250,000,000 or more (percent)
FTC/Total Receipts	0.12	0.00	0.00	0.00	0.01	0.01	0.02	0.28
FTC/(Total Receipts—Total Deductions)	0.61	0.03	0.09	0.05	0.35	0.71	1.38	9.89
FTC/Business Receipts	0.84	0.00	0.00	0.00	0.01	0.01	0.02	0.05

Source: RAAS: (Tax Year 2017 SOI Data).

A portion of the economic impact of these final regulations derive from the collection of information requirements in §§ 1.905–1(c)(3), (d)(4), and (d)(5), 1.901–1(d)(2), and 1.905–3. The data to assess precise counts of small entities affected by §§ 1.905–1(c)(3), (d)(4), and (d)(5), 1.901–1(d)(2), and 1.905–3 are not readily available. However, the Treasury Department and the IRS do not anticipate that these collections of information significantly add to the burden on small entities, compared to the existing regulatory and statutory requirements. The rules in §§ 1.901–1(d)(2), and 1.905–3, which treat a taxpayer's change between claiming a deduction and a credit for foreign income taxes as a foreign tax redetermination and thus require the taxpayer to comply with reporting requirements in § 1.905–4, do not significantly add to the taxpayer's burden because taxpayers making this change must already file amended returns, along with Forms 1116 or 1118, if applicable, for the affected years. In fact, these rules reduce the uncertainty faced by taxpayers seeking to make the change but that have a time-barred deficiency in one or more intervening years and provide an efficient process by which taxpayers can change between crediting and deducting foreign income taxes. Similarly, under the existing rules, taxpayers that remit a contested foreign tax liability to a foreign country and seek to claim a foreign tax credit for such liability would be subject to the

[11] Although certain parts of the final regulations, such as the rules under § 1.901–1(d) and § 1.905–1, also impact taxpayers that claim a deduction, instead of a credit, for foreign income taxes, the Treasury Department and the IRS expect that the vast majority of taxpayers that have creditable foreign income taxes would choose a dollar-for-dollar credit, instead of a deduction, for such taxes. In addition, a significant aspect of these final regulations, specifically the rules under §§ 1.901–2 and 1.903–1 regarding the definition of a foreign income tax and a tax in lieu of an income tax, only impact taxpayers that elect to claim a foreign tax credit. Thus, the data in this table measuring foreign tax credit against various variables is a reasonable estimate of the economic impact of these final regulations.

reporting requirements related to foreign tax redeterminations under § 1.905–4, and may have a second foreign tax redetermination when the contest is resolved if the taxpayer receives a refund of any of the taxes claimed as a credit. Under §§ 1.905–1(c) and (d) of these final regulations, taxpayers do not claim a credit for the foreign taxes until the contest is resolved (and thus, would generally only have one foreign tax redetermination). The reporting requirements in §§ 1.905–1(c)(3) and (d)(4), relating to taxpayers claiming a provisional credit for contested foreign income taxes, apply only if the taxpayer elects to claim the foreign tax credit early. If a taxpayer makes this election, it must file a provisional foreign tax credit agreement described in Part II.C of this Special Analysis and comply with annual reporting requirements described in Part II.B of this Special Analysis. The Treasury Department and the IRS estimate that the average burden of the provisional foreign tax credit agreement will be 2 hours per response. In addition, the Treasury Department and the IRS expect that the annual reporting requirement, which will be added to the existing Forms 1116 and 1118, will only marginally increase the burden for completing those forms. Finally, the Treasury Department and the IRS expect that the collection of information in § 1.905–1(d)(5), which requires taxpayers seeking to change their method of accounting for foreign income taxes to file a Form 3115, will not significantly impact small business entities because only taxpayers that have deducted or credited foreign income taxes and that have used an improper method of accounting for such taxes are subject to the rules in § 1.905–1(d)(5).

The Treasury Department and the IRS do not have readily available data to determine the incremental burdens these collections of information will have on small business entities. However, as demonstrated in the table in this Part III of the Special Analyses, foreign tax credits do not have a significant economic impact for any gross-receipts class of business entities. Therefore, the final regulations do not have a significant economic impact on small business entities. Accordingly, it is hereby certified that the final regulations will not have a significant economic impact on a substantial number of small entities.

IV. Section 7805(f)

Pursuant to section 7805(f), the proposed regulations preceding these final regulations (REG–101657–20) were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses. The proposed regulations also request comments from the public regarding the RFA certification. No comments were received.

V. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. This final rule does not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

VI. Executive Order 13132: Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive order.

Drafting Information

The principal authors of the final regulations are Corina Braun, Karen J. Cate, Jeffrey P. Cowan, Moshe A. Dlott, Logan M. Kincheloe, Brad McCormack, Jeffrey L. Parry, Teisha M. Ruggiero, Tianlin (Laura) Shi, and Suzanne M. Walsh of the Office of Associate Chief Counsel (International), as well as Sarah K. Hoyt and Brian R. Loss of Associate Chief Counsel (Corporate). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry for § 1.245A(d)–1 in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

* * * * *

Section 1.245A(d)–1 also issued under 26 U.S.C. 245A(g).

* * * * *

■ **Par. 2.** Section 1.164–2 is amended by revising paragraph (d) and adding paragraph (i) to read as follows:

§ 1.164–2 Deduction denied in case of certain taxes.

* * * * *

(d) *Foreign income taxes.* Except as provided in § 1.901–1(c)(2) and (3), foreign income taxes, as defined in § 1.901–2(a), paid or accrued (as the case may be, depending on the taxpayer's method of accounting for such taxes) in a taxable year, if the taxpayer chooses to take to any extent the benefits of section 901, relating to the credit for taxes of foreign countries and possessions of the United States, for taxes that are paid or accrued (according to the taxpayer's method of accounting for such taxes) in such taxable year.

* * * * *

(i) *Applicability dates.* Paragraph (d) of this section applies to foreign taxes paid or accrued in taxable years beginning on or after December 28, 2021.

■ **Par. 3.** Section 1.245A(d)–1 is added to read as follows:

§ 1.245A(d)–1 Disallowance of foreign tax credit or deduction.

(a) *No foreign tax credit or deduction allowed under section 245A(d)*–(1) *Foreign income taxes paid or accrued by domestic corporations or successors.* No credit under section 901 or deduction is allowed in any taxable year for:

(i) Foreign income taxes paid or accrued by a domestic corporation that are attributable to section 245A(d) income of the domestic corporation;

(ii) Foreign income taxes paid or accrued by a successor to a domestic corporation that are attributable to section 245A(d) income of the successor; and

(iii) Foreign income taxes paid or accrued by a domestic corporation that is a United States shareholder of a foreign corporation, other than a foreign corporation that is a passive foreign investment company (as defined in section 1297) with respect to the domestic corporation and that is not a controlled foreign corporation, that are attributable to non-inclusion income of

the foreign corporation and are not otherwise disallowed under paragraph (a)(1)(i) or (ii) of this section.

(2) *Foreign income taxes paid or accrued by foreign corporations.* No credit under section 901 or deduction is allowed in any taxable year for foreign income taxes paid or accrued by a foreign corporation that are attributable to section 245A(d) income, and such taxes are not eligible to be deemed paid under section 960 in any taxable year.

(3) *Effect of disallowance on earnings and profits.* The disallowance of a credit or deduction for foreign income taxes under this paragraph (a) does not affect whether the foreign income taxes reduce earnings and profits of a corporation.

(b) *Attribution of foreign income taxes*—(1) *Section 245A(d) income.* Foreign income taxes are attributable to section 245A(d) income to the extent that the foreign income taxes are allocated and apportioned under § 1.861–20 to the section 245A(d) income group. For purposes of this paragraph (b)(1), § 1.861–20 is applied by treating the section 245A(d) income group in each section 904 category of a domestic corporation, successor, or foreign corporation as a statutory grouping and treating all other income, including the receipt of a distribution of previously taxed earnings and profits other than section 245A(d) PTEP, as income in the residual grouping. See § 1.861–20(d)(2) through (3) for rules regarding the allocation and apportionment of foreign income taxes to the statutory and residual groupings if the taxpayer does not realize, recognize, or take into account a corresponding U.S. item in the U.S. taxable year in which the foreign income taxes are paid or accrued. In the case of a foreign law distribution or foreign law disposition, a corresponding U.S. item is assigned to the statutory and residual groupings under § 1.861–20(d)(2)(ii)(B) and (C) without regard to the application of section 246(c), the holding periods described in sections 964(e)(4)(A) and 1248(j), and § 1.245A–5.

(2) *Non-inclusion income of a foreign corporation*—(i) *Scope.* This paragraph (b)(2) provides rules for attributing foreign income taxes paid or accrued by a domestic corporation that is a United States shareholder of a foreign corporation to non-inclusion income of the foreign corporation. It applies only in cases in which the foreign income taxes are allocated and apportioned under § 1.861–20 by reference to the characterization of the tax book value of stock, whether the stock is held directly or indirectly through a partnership or other passthrough entity, for purposes of allocating and apportioning the domestic corporation's interest expense, or by reference to the income of a foreign corporation that is a reverse hybrid or foreign law CFC.

(ii) *Foreign income taxes on a remittance, U.S. return of capital amount, or U.S. return of partnership basis amount.* This paragraph (b)(2)(ii) applies to foreign income taxes paid or accrued by a domestic corporation that is a United States shareholder of a foreign corporation with respect to foreign taxable income that the domestic corporation includes by reason of a remittance, a distribution (including a foreign law distribution) that is a U.S. return of capital amount or U.S. return of partnership basis amount, or a disposition (including a foreign law disposition) that gives rise to a U.S. return of capital amount or a U.S. return of partnership basis amount. These foreign income taxes are attributable to non-inclusion income of the foreign corporation to the extent that they are allocated and apportioned to the domestic corporation's section 245A subgroup of general category stock, section 245A subgroup of passive category stock, or section 245A subgroup of U.S. source category stock in applying § 1.861–20 for purposes of section 904 as the operative section. For purposes of this paragraph (b)(2)(ii), § 1.861–20 is applied by treating the domestic corporation's section 245A subgroup of general category stock, section 245A subgroup of passive category stock, and section 245A subgroup of U.S. source category stock as the statutory groupings and treating the tax book value of the non-section 245A subgroup of stock for each separate category as tax book value in the residual grouping.

(iii) *Foreign income taxes on income of a reverse hybrid or a foreign law CFC.* This paragraph (b)(2)(iii) applies to foreign income taxes paid or accrued by a domestic corporation, other than a regulated investment company (as defined in section 851), real estate investment trust (as defined in section 856), or S corporation (as defined in section 1361), that is a United States shareholder of a foreign corporation that is a reverse hybrid or foreign law CFC with respect to the foreign law pass-through income or foreign law inclusion regime income of the reverse hybrid or foreign law CFC, respectively. These taxes are attributable to the non-inclusion income of a reverse hybrid or foreign law CFC to the extent that they are allocated and apportioned to the non-inclusion income group under § 1.861–20. For purposes of this paragraph (b)(2)(iii), § 1.861–20 is applied by treating the non-inclusion income group in each section 904 category of the domestic corporation and the foreign corporation as a statutory grouping and treating all other income as income in the residual grouping.

(3) *Anti-avoidance rule.* Foreign income taxes are treated as attributable to section 245A(d) income of a domestic corporation or foreign corporation, or non-inclusion income of a foreign corporation, if a transaction, series of related transactions, or arrangement is undertaken with a principal purpose of avoiding the purposes of section 245A(d) and this section with respect to such foreign income taxes, including, for example, by separating foreign income taxes from the income, or earnings and profits, to which such foreign income taxes relate or by making distributions (or causing inclusions) under foreign law in multiple years that give rise to foreign income taxes that are allocated and apportioned with reference to the same previously taxed earnings and profits. See paragraph (d)(4) of this section (*Example 3*).

(c) *Definitions.* The following definitions apply for purposes of this section.

(1) *Corresponding U.S. item.* The term *corresponding U.S. item* has the meaning set forth in § 1.861–20(b).

(2) *Foreign income tax.* The term *foreign income tax* has the meaning set forth in § 1.901–2(a).

(3) *Foreign law CFC.* The term *foreign law CFC* has the meaning set forth in § 1.861–20(b).

(4) *Foreign law disposition.* The term *foreign law disposition* has the meaning set forth in § 1.861–20(b).

(5) *Foreign law distribution.* The term *foreign law distribution* has the meaning set forth in § 1.861–20(b).

(6) *Foreign law inclusion regime.* The term *foreign law inclusion regime* has the meaning set forth in § 1.861–20(b).

(7) *Foreign law inclusion regime income.* The term *foreign law inclusion regime income* has the meaning set forth in § 1.861–20(b).

(8) *Foreign law pass-through income.* The term *foreign law pass-through income* has the meaning set forth in § 1.861–20(b).

(9) *Foreign taxable income.* The term *foreign taxable income* has the meaning set forth in § 1.861–20(b).

(10) *Gross included tested income.* The term *gross included tested income* means, with respect to a foreign corporation that is described in paragraph (b)(2)(iii) of this section, an item of gross tested income multiplied by the inclusion percentage of a domestic corporation that is described

in paragraph (b)(2)(iii) of this section for the domestic corporation's U.S. taxable year with or within which the foreign corporation's taxable year described in § 1.861–20(d)(3)(i)(C) or § 1.861–20(d)(3)(iii) ends.

(11) *Hybrid dividend.* The term *hybrid dividend* has the meaning set forth in § 1.245A(e)–1(b)(2).

(12) *Inclusion percentage.* The term *inclusion percentage* has the meaning set forth in § 1.960–1(b).

(13) *Non-inclusion income.* The term *non-inclusion income* means the items of gross income of a foreign corporation other than the items that are described in § 1.960–1(d)(2)(ii)(B)(*2*) (items of income assigned to the subpart F income groups) and section 245(a)(5) (without regard to section 245(a)(12)), and other than gross included tested income.

(14) *Non-inclusion income group.* The term *non-inclusion income group* means the income group within a section 904 category that consists of non-inclusion income.

(15) *Non-section 245A subgroup.* The term *non-section 245A subgroup* means each non-section 245A subgroup determined under § 1.861–13(a)(5), applied as if the foreign corporation whose stock is being characterized were a controlled foreign corporation.

(16) *Pass-through entity.* The term *pass-through entity* has the meaning set forth in § 1.904–5(a)(4).

(17) *Remittance.* The term *remittance* has the meaning set forth in § 1.861–20(d)(3)(v)(E).

(18) *Reverse hybrid.* The term *reverse hybrid* has the meaning set forth in § 1.861–20(b).

(19) *Section 245A subgroup.* The term *section 245A subgroup* means each section 245A subgroup determined under § 1.861–13(a)(5), applied as if the foreign corporation whose stock is being characterized were a controlled foreign corporation.

(20) *Section 245A(d) income.* With respect to a domestic corporation, the term *section 245A(d) income* means a dividend (including a section 1248 dividend and a dividend received indirectly through a pass-through entity) or an inclusion under section 951(a)(1)(A) for which a deduction under section 245A(a) is allowed, a distribution of section 245A(d) PTEP, a hybrid dividend, or an inclusion under section 245A(e)(2) and § 1.245A(e)–1(c)(1) by reason of a tiered hybrid dividend. With respect to a successor of a domestic corporation, the term *section 245A(d) income* means the receipt of a distribution of section 245A(d) PTEP. With respect to a foreign corporation, the term *section 245A(d) income* means an item of subpart F income that gave rise to a deduction under section 245A(a), a tiered hybrid dividend or a distribution of section 245A(d) PTEP. An item described in this paragraph (c)(20) that qualifies for the deduction under section 245A(a) is considered section 245A(d) income regardless of whether the domestic corporation claims the deduction on its return with respect to the item.

(21) *Section 245A(d) income group.* The term *section 245A(d) income group* means an income group within a section 904 category that consists of section 245A(d) income.

(22) *Section 245A(d) PTEP.* The term *section 245A(d) PTEP* means previously taxed earnings and profits described in § 1.960–3(c)(2)(v) or (ix) if such previously taxed earnings and profits arose either as a result of a dividend that gave rise to a deduction under section 245A(a), or as a result of a tiered hybrid dividend that, by reason of section 245A(e)(2) and § 1.245A(e)–1(c)(1), gave rise to an inclusion in the gross income of a United States shareholder. For purposes of this paragraph (c)(22), a dividend that qualifies for the deduction under section 245A(a) is considered to have given rise to a deduction under section 245A(a) regardless of whether the domestic corporation claims the deduction on its return with respect to the dividend.

(23) *Section 904 category.* The term *section 904 category* has the meaning set forth in § 1.960–1(b).

(24) *Section 1248 dividend.* The term *section 1248 dividend* means an amount of gain that is treated as a dividend under section 1248.

(25) *Successor.* The term successor means a person, including an individual who is a citizen or resident of the United States, that acquires from any person any portion of the interest of a United States shareholder in a foreign corporation for purposes of section 959(a).

(26) *Tested income.* The term *tested income* has the meaning set forth § 1.960–1(b).

(27) *Tiered hybrid dividend.* The term *tiered hybrid dividend* has the meaning set forth in § 1.245A(e)–1(c)(2).

(28) *U.S. capital gain amount.* The term *U.S. capital gain amount* has the meaning set forth in § 1.861–20(b).

(29) *U.S. return of capital amount.* The term *U.S. return of capital amount* has the meaning set forth in § 1.861–20(b).

(30) *U.S. return of partnership basis amount.* The term *U.S. return of partnership basis amount* means, with respect to a partnership in which a domestic corporation is a partner, the portion of a distribution by the partnership to the domestic corporation, or the portion of the proceeds of a disposition of the domestic corporation's interest in the partnership, that exceeds the U.S. capital gain amount.

(d) *Examples.* The following examples illustrate the application of this section.

(1) *Presumed facts.* Except as otherwise provided, the following facts are presumed for purposes of the examples:

(i) USP is a domestic corporation;

(ii) CFC is a controlled foreign corporation organized in Country A, and is not a reverse hybrid or a foreign law CFC;

(iii) USP owns all of the outstanding stock of CFC;

(iv) USP would be allowed a deduction under section 245A(a) for dividends received from CFC;

(v) All parties have a U.S. dollar functional currency and a U.S. taxable year and foreign taxable year that correspond to the calendar year; and

(vi) References to income are to gross items of income, and no party has deductions for Country A tax purposes or deductions for Federal income tax purposes (other than foreign income tax expense).

(2) *Example 1: Distribution for foreign and Federal income tax purposes—(i) Facts.* As of December 31, Year 1, CFC has $800x of section 951A PTEP (as defined in § 1.960–3(c)(2)(viii)) in a single annual PTEP account (as defined in § 1.960–3(c)(1)), and $500x of earnings and profits described in section 959(c)(3). On December 31, Year 1, CFC distributes $1,000x of cash to USP. For Country A tax purposes, the entire $1,000x distribution is a dividend and is therefore a foreign dividend amount (as defined in § 1.861–20(b)). Country A imposes a withholding tax on USP of $150x with respect to the $1,000x of foreign gross dividend income under Country A law. For Federal income tax purposes, USP includes in gross income $200x of the distribution as a dividend for which a deduction is allowable under section 245A(a). The remaining $800x of the distribution is a distribution of PTEP that is excluded from USP's gross income and not treated as a dividend under section 959(a) and (d), respectively. The entire $1,000x dividend is a U.S. dividend amount (as defined in § 1.861–20(b)).

(ii) *Analysis*—(A) *In general.* The rules of this section are applied by first determining the portion of the $150x Country A withholding tax that is attributable under paragraph (b)(1) of this section to the section 245A(d) income of USP, and then by

determining the portion of the $150x Country A withholding tax that is described in paragraph (b)(2)(i) of this section and that is attributable under either paragraph (b)(2)(ii) or (b)(2)(iii) of this section to the non-inclusion income of CFC. No credit or deduction is allowed in any taxable year under paragraph (a)(1)(i) of this section for any portion of the $150x Country A withholding tax that is attributable to the section 245A(d) income of USP, or, under paragraph (a)(1)(iii) of this section, for any portion of that tax that is attributable to the non-inclusion income of CFC, to the extent the tax is not disallowed under paragraph (a)(1)(i) of this section.

(B) *Attribution of foreign income taxes to section 245A(d) income.* Under paragraph (b)(1) of this section, the $150x Country A withholding tax is attributable to the section 245A(d) income of USP to the extent that it is allocated and apportioned to the section 245A(d) income group (the statutory grouping) under § 1.861–20. Section 1.861–20(c) allocates and apportions foreign income tax to the statutory and residual groupings to which the items of foreign gross income that were included in the foreign tax base are assigned under § 1.861–20(d). Section 1.861–20(d)(3)(i) assigns foreign gross income that is a foreign dividend amount, to the extent of the U.S. dividend amount, to the statutory and residual groupings to which the U.S. dividend amount is assigned. The $1,000x foreign dividend amount is therefore assigned to the statutory and residual groupings to which the $1,000x U.S. dividend amount is assigned under Federal income tax law. The $1,000x U.S. dividend amount comprises a $200x dividend for which a deduction under section 245A(a) is allowed, which is an item of section 245A(d) income, and $800x of section 951A PTEP, the receipt of which is income in the residual grouping. Accordingly, $200x of the $1,000x of foreign gross dividend income is assigned to the section 245A(d) income group, and $800x is assigned to the residual grouping. Under § 1.861–20(f), $30x ($150x × $200x/$1,000x) of the $150x Country A withholding tax is apportioned to the section 245A(d) income group and is attributable to the section 245A(d) income of USP. The remaining $120x ($150x × $800x/$1,000x) of the tax is apportioned to the residual grouping.

(C) *Attribution of foreign income taxes to non-inclusion income.* Under paragraph (b)(2) of this section, the $150x Country A withholding tax may be attributed to non-inclusion income of CFC if the tax is allocated and apportioned under § 1.861–20 by reference to either the characterization of the tax book value of stock under § 1.861–9 or the income of a foreign corporation that is a reverse hybrid or foreign law CFC. CFC is neither a reverse hybrid nor a foreign law CFC. In addition, no portion of the $150x Country A withholding tax is allocated and apportioned under § 1.861–20 by reference to the characterization of the tax book value of CFC's stock. See § 1.861–20(d)(3)(i). Therefore, none of the tax is attributable to non-inclusion income of CFC.

(D) *Disallowance.* Under paragraph (a)(1)(i) of this section, no credit under section 901 or deduction is allowed in any taxable year to USP for the $30x portion of the Country A withholding tax that is attributable to section 245A(d) income of USP.

(3) *Example 2: Distribution for foreign law purposes*—(i) *Facts.* As of December 31, Year 1, CFC has $800x of section 951A PTEP (as defined in § 1.960–3(c)(2)(viii)) in a single annual PTEP account (as defined in § 1.960–3(c)(1)), and $500x of earnings and profits described in section 959(c)(3). On December 31, Year 1, CFC distributes $1,000x of its stock to USP. For Country A tax purposes, the entire $1,000x stock distribution is treated as a dividend to USP and is therefore a foreign dividend amount (as defined in § 1.861–20(b)). Country A imposes a withholding tax on USP of $150x with respect to the $1,000x of foreign gross dividend income that USP includes under Country A law. For Federal income tax purposes, USP does not recognize gross income as a result of the stock distribution under section 305(a). The $1,000x stock distribution is therefore a foreign law distribution.

(ii) *Analysis*—(A) *In general.* The rules of this section are applied by first determining the portion of the $150x Country A withholding tax that is attributable under paragraph (b)(1) of this section to the section 245A(d) income of USP, and then by determining the portion of the $150x Country A withholding tax that is described in paragraph (b)(2)(i) of this section and that is attributable under either paragraph (b)(2)(ii) or (b)(2)(iii) of this section to the non-inclusion income of CFC. No credit or deduction is allowed in any taxable year under paragraph (a)(1)(i) of this section for any portion of the $150x Country A withholding tax that is attributable to the section 245A(d) income of USP or, under paragraph (a)(1)(iii) of this section, for any portion of that tax that is attributable to the non-inclusion income of CFC, to the extent the tax is not disallowed under paragraph (a)(1)(i) of this section.

(B) *Attribution of foreign income taxes to section 245A(d) income.* Under paragraph (b)(1) of this section, the $150x Country A withholding tax is attributable to the section 245A(d) income of USP to the extent that it is allocated and apportioned to the section 245A(d) income group (the statutory grouping) under § 1.861–20. Section 1.861–20(c) allocates and apportions foreign income tax to the statutory and residual groupings to which the items of foreign gross income that were included in the foreign tax base are assigned under § 1.861–20(d). In general, § 1.861–20(d) assigns foreign gross income to the statutory and residual groupings to which the corresponding U.S. item is assigned. If a taxpayer does not recognize a corresponding U.S. item in the year in which it pays or accrues foreign income tax with respect to foreign gross income that it includes by reason of a foreign law dividend, § 1.861–20(d)(2)(ii)(B) assigns the foreign dividend amount to the same statutory or residual groupings to which the foreign dividend amount would be assigned if a distribution were made for Federal income tax purposes in the amount of, and on the date of, the foreign law distribution. Further, § 1.861–20(d)(2)(ii)(B) computes the U.S. dividend amount (as defined in § 1.861–20(b)) as if the distribution occurred on the date the distribution occurs for foreign law purposes. Therefore, the foreign dividend amount is assigned to the same statutory and residual groupings to which it would be assigned if a $1,000x distribution occurred on December 31, Year 1 for Federal income tax purposes. If such a distribution occurred, it would result in a $200x dividend to USP for which a deduction would be allowed under section 245A(a). The remaining $800x of the distribution would be excluded from USP's gross income and not treated as a dividend under section 959(a) and (d), respectively. Under paragraphs (c)(20) and (b)(1) of this section, the $1,000x U.S. dividend amount comprises a $200x dividend for which a deduction under section 245A(a) would be allowed, which is an item of section 245A(d) income, and $800x of section 951A PTEP, which is income in the residual grouping. Accordingly, $200x of the $1,000x foreign gross dividend income is assigned to the section 245A(d) income group, and $800x is assigned to the residual grouping. Under § 1.861–20(f), $30x ($150x × $200x/$1,000x) of the Country A foreign income tax is apportioned to the section

245A(d) income group and is attributable to the section 245A(d) income of USP. The remaining $120x ($150x × $800x/$1,000x) of the tax is apportioned to the residual grouping.

(C) *Attribution of foreign income taxes to non-inclusion income.* Under paragraph (b)(2) of this section, the $150x Country A withholding tax may be attributed to non-inclusion income of CFC if the tax is allocated and apportioned under § 1.861–20 by reference to either the characterization of the tax book value of stock under § 1.861–9 or the income of a foreign corporation that is a reverse hybrid or foreign law CFC. CFC is neither a reverse hybrid nor a foreign law CFC. In addition, no portion of the $150x Country A withholding tax is allocated and apportioned under § 1.861–20 by reference to the characterization of the tax book value of CFC's stock. See § 1.861–20(d)(3)(i). Therefore, none of the tax is attributable to non-inclusion income of CFC.

(D) *Disallowance.* Under paragraph (a)(1)(i) of this section, no credit under section 901 or deduction is allowed in any taxable year to USP for the $30x portion of the Country A withholding tax that is attributable to section 245A(d) income of USP.

(4) *Example 3: Successive foreign law distributions subject to anti-avoidance rule*—(i) *Facts.* For Year 1, CFC earns $500x of subpart F income that gives rise to a $500x gross income inclusion to USP under section 951(a), and income that creates $500x of earnings and profits described in section 959(c)(3). CFC earns no income in Years 2 through 4. As of January 1, Year 2, and through December 31, Year 4, CFC has $500x of earnings and profits described in section 959(c)(3) and $500x of section 951(a)(1)(A) PTEP (as defined in § 1.960–3(c)(2)(x)) in a single annual PTEP account (as defined in § 1.960–3(c)(1))). In each of Years 2 and 3, USP makes a consent dividend election under Country A law that, for Country A tax purposes, deems CFC to distribute to USP, and USP immediately to contribute to CFC, $500x on December 31 of each year. For Country A tax purposes, each deemed distribution is a dividend of $500x to USP, and each deemed contribution is a non-taxable contribution of $500x to the capital of CFC. Each $500x deemed distribution is therefore a foreign dividend amount (as defined in § 1.861–20(b)). Country A imposes $150x of withholding tax on USP in each of Years 2 and 3 with respect to the $500x of foreign gross dividend income that USP includes in income under Country A law. For Federal income tax purposes, the Country A deemed distributions in Years 2 and 3 are disregarded such that USP recognizes no income, and the deemed distributions are therefore foreign law distributions. On December 31, Year 4, CFC distributes $1,000x to USP, which for Country A tax purposes is treated as a return of contributed capital on which no withholding tax is imposed. For Federal income tax purposes, $500x of the $1,000x distribution is a dividend to USP for which a deduction under section 245A(a) is allowed; the remaining $500x of the distribution is a distribution of section 951(a)(1)(A) PTEP that is excluded from USP's gross income and not treated as a dividend under section 959(a) and (d), respectively. The entire $1,000x dividend is a U.S. dividend amount (as defined in § 1.861–20(b)). The Country A consent dividend elections in Years 2 and 3 are made with a principal purpose of avoiding the purposes of section 245A(d) and this section to disallow a credit or deduction for Country A withholding tax incurred with respect to USP's section 245A(d) income.

(ii) *Analysis*—(A) *In general.* The rules of this section are applied by first determining the portion of the $150x Country A withholding tax paid by USP in each of Years 2 and 3 that is attributable under paragraph (b)(1) of this section to the section 245A(d) income of USP, and then by determining the portion of the $150x Country A withholding tax paid by USP in each of Years 2 and 3 that is described in paragraph (b)(2)(i) of this section and that is attributable under either paragraph (b)(2)(ii) or (b)(2)(iii) of this section to the non-inclusion income of CFC. Finally, the anti-avoidance rule under paragraph (b)(3) of this section applies to treat any portion of the $150x Country A withholding tax paid by USP in each of Years 2 and 3 as attributable to section 245A(d) income of USP or non-inclusion income of CFC, if a transaction, series of related transactions, or arrangement is undertaken with a principal purpose of avoiding the purposes of section 245A(d) and this section. No credit or deduction is allowed in any taxable year under paragraph (a)(1)(i) of this section for any portion of the $150x Country A withholding tax paid by USP in each of Years 2 and 3 that is attributable to the section 245A(d) income of USP or, under paragraph (a)(1)(iii) of this section, for any portion of that tax that is attributable to the non-inclusion income of CFC, to the extent the tax is not disallowed under paragraph (a)(1)(i) of this section.

(B) *Attribution of foreign income taxes to section 245A(d) income.* Under paragraph (b)(1) of this section, the $150x Country A withholding tax paid by USP in each of Years 2 and 3 is attributable to the section 245A(d) income of USP to the extent that it is allocated and apportioned to the section 245A(d) income group (the statutory grouping) under § 1.861–20. Section 1.861–20(c) allocates and apportions foreign income tax to the statutory and residual groupings to which the items of foreign gross income that were included in the foreign tax base are assigned under § 1.861–20(d). In general, § 1.861–20(d) assigns foreign gross income to the statutory and residual groupings to which the corresponding U.S. item is assigned. If a taxpayer does not recognize a corresponding U.S. item in the year in which it pays or accrues foreign income tax with respect to foreign gross income that it includes by reason of a foreign law dividend, § 1.861–20(d)(2)(ii)(B) assigns the foreign dividend amount to the same statutory or residual groupings to which the foreign dividend amount would be assigned if a distribution were made for Federal income tax purposes in the amount of, and on the date of, the foreign law distribution. Therefore, the $500x foreign dividend amount in each of Years 2 and 3 is assigned to the same statutory and residual groupings to which it would be assigned if a $500x distribution occurred on December 31 of each of those years for Federal income tax purposes.

(*1*) *Year 2 $500x deemed distribution.* CFC made no distributions in Year 1 and earned no income and made no distributions in Year 2 for Federal income tax purposes. As of December 31, Year 2, CFC has $500x of earnings and profits described in section 959(c)(3) and $500x of section 951(a)(1)(A) PTEP. If CFC distributed $500x on that date, the distribution would be a distribution of section 951(a)(1)(A) PTEP. A distribution of previously taxed earnings and profits is a U.S. dividend amount. Section 1.861–20(d)(3)(i) assigns the foreign dividend amount, to the extent of the U.S. dividend amount, to the statutory and residual groupings to which the U.S. dividend amount is assigned. The receipt of a distribution of previously taxed earnings and profits is assigned to the residual grouping under paragraph (b)(1) of this section. Therefore, all $500x foreign dividend amount would be assigned to the residual grouping, and none of the $150x withholding tax paid or accrued by USP in Year 2 would

be treated as attributable to section 245A(d) income of USP.

(*2*) *Year 3 $500x deemed distribution.* CFC made no distributions in Year 1 and earned no income and made no distributions in Year 2 or Year 3 for Federal income tax purposes. Consequently, as of December 31, Year 3, CFC has $500x of earnings and profits described in section 959(c)(3) and $500x of section 951(a)(1)(A) PTEP. If CFC distributed $500x on that date, the distribution would be a distribution of section 951(a)(1)(A) PTEP. For the reasons described in paragraph (d)(4)(ii)(B)(*1*) of this section, all $500x of the foreign dividend amount would be assigned to the residual grouping, and none of the $150x withholding tax paid or accrued by USP in Year 2 would be treated as attributable to section 245A(d) income of USP.

(*3*) *Year 4 $1,000x distribution.* The Year 4 $1,000x distribution is, for Country A purposes, a return of capital distribution that is not subject to withholding tax. For Federal income tax purposes, it comprises a $500x dividend for which a deduction under section 245A(a) is allowed, which is an item of section 245A(d) income of USP, and a $500x distribution of section 951(a)(1)(A) PTEP, the receipt of which is income in the residual grouping.

(C) *Attribution of foreign income taxes to non-inclusion income.* Under paragraph (b)(2) of this section, the $150x Country A withholding tax paid by USP in each of Years 2 and 3 may be attributed to non-inclusion income of CFC if the tax is allocated and apportioned under § 1.861–20 by reference to either the characterization of the tax book value of stock under § 1.861–9 or the income of a foreign corporation that is a reverse hybrid or foreign law CFC. CFC is neither a reverse hybrid nor a foreign law CFC. In addition, no portion of the Country A withholding tax is allocated and apportioned under § 1.861–20 by reference to the characterization of the tax book value of CFC's stock. See § 1.861–20(d)(3)(i). Therefore, none of the tax is attributable to non-inclusion income of CFC.

(D) *Attribution of foreign income taxes pursuant to anti-avoidance rule.* USP made two successive foreign law distributions in Years 2 and 3 that were subject to Country A withholding tax and that did not individually exceed, but together exceeded, the section 951(a)(1)(A) PTEP of CFC. The Country A withholding tax on each consent dividend is allocated to the residual grouping rather than to the statutory grouping of section 245A(d) income under §§ 1.861–20(d)(2)(ii) and 1.861–20(d)(3)(i). USP paid no Country A withholding tax on the Year 4 distribution as a result of the Country A consent dividends in Years 2 and 3. If CFC had distributed its earnings and profits in Year 4 without the prior consent dividends, the distribution would have been subject to withholding tax, a portion of which would have been attributable to the section 245A(d) income arising from the distribution. But for the application of the anti-avoidance rule in paragraph (b)(3) of this section, USP would avoid the disallowance under section 245A(d) with respect to this portion of the withholding tax. Because USP made foreign law distributions that caused withholding tax from multiple foreign law distributions to be associated with the same previously taxed earnings and profits with a principal purpose of avoiding the purposes of section 245A(d) and this section, the $150x Country A withholding tax paid by USP in each of Years 2 and 3 is treated as being attributable to section 245A(d) income of USP.

(E) *Disallowance.* Under paragraph (a)(1)(i) of this section, no credit under section 901 or deduction is allowed in any taxable year to USP for the $150x Country A withholding tax paid by USP in each of Years 2 and 3 that is attributable to section 245A(d) income of USP.

(5) *Example 4: Distribution that is in part a dividend and in part a return of capital*—(i) *Facts.* CFC uses the modified gross income method to allocate and apportion its interest expense, and its stock has a tax book value of $10,000x. For Year 1, CFC earns $500x of income that is specified foreign source general category gross income as that term is defined in § 1.861–13(a)(1)(i)(A)(*9*) and is therefore neither tested income nor subpart F income of CFC. As of December 31, Year 1, CFC has $500x of earnings and profits described in section 959(c)(3). On that date, CFC distributes $1,000x of cash to USP. For Country A tax purposes, the entire $1,000x distribution is a dividend to USP and is therefore a foreign dividend amount (as defined in § 1.861–20(b)). Country A imposes a withholding tax on USP of $150x with respect to the $1,000x of foreign gross dividend income that USP includes under the law of Country A. For Federal income tax purposes, USP includes $500x of the distribution in its gross income as a dividend for which a $500x deduction is allowed to USP under section 245A(a); the remaining $500x of the distribution is applied against and reduces USP's basis in its CFC stock under section 301(c)(2). The portion of the distribution that is a $500x dividend is a U.S. dividend amount (as defined in § 1.861–20(b)). The remaining $500x of the distribution is a U.S. return of capital amount.

(ii) *Analysis*—(A) *In general.* The rules of this section are applied by first determining the portion of the $150x Country A withholding tax that is attributable under paragraph (b)(1) of this section to the section 245A(d) income of USP, and then by determining the portion of the $150x Country A withholding tax that is described in paragraph (b)(2)(i) of this section and that is attributable under either paragraph (b)(2)(ii) or (b)(2)(iii) of this section to the non-inclusion income of CFC. No credit or deduction is allowed under paragraph (a)(1)(i) of this section for any portion of the $150x Country A withholding tax that is attributable to the section 245A(d) income of USP or, under paragraph (a)(1)(iii) of this section, for any portion of that tax that is attributable to the non-inclusion income of CFC, to the extent the tax is not disallowed under paragraph (a)(1)(i) of this section.

(B) *Attribution of foreign income taxes to section 245A(d) income.* Under paragraph (b)(1) of this section, the $150x Country A withholding tax is attributable to the section 245A(d) income of USP to the extent that it is allocated and apportioned to the section 245A(d) income group (the statutory grouping) under § 1.861–20. Section 1.861–20(c) allocates and apportions foreign income tax to the statutory and residual groupings to which the items of foreign gross income that were included in the foreign tax base are assigned under § 1.861–20(d). Section 1.861–20(d)(3)(i) assigns foreign gross income that is a foreign dividend amount, to the extent of the U.S. dividend amount, to the statutory and residual groupings to which the U.S. dividend amount is assigned. Of the $1,000x foreign dividend amount, $500x is therefore assigned to the statutory and residual groupings to which the $500x U.S. dividend amount is assigned under Federal income tax law. The entire $500x U.S. dividend amount is a dividend for which a section 245A(a) deduction is allowed and is therefore section 245A(d) income that is assigned to the section 245A(d) income group. Accordingly, $500x of the foreign dividend amount is assigned to the section 245A(d) income group. Under § 1.861–20(f), $75x ($150x × $500x/$1,000x) of the Country A withholding tax is allocated to the section 245A(d) income group and so under paragraph (b)(1) of this section is attributable to the section 245A(d) income of USP.

(C) *Attribution of foreign income taxes to non-inclusion income.* The remaining $75x of the Country A withholding tax is described in paragraph (b)(2)(i) of this section because the $500x of foreign dividend amount that corresponds to the $500x U.S. return of capital amount is assigned, and the remaining withholding tax imposed on that foreign dividend amount is allocated and apportioned, by reference to the characterization of the tax book value of the stock of CFC. Under paragraph (b)(2)(ii) of this section, the remaining $75x Country A withholding tax is attributable to non-inclusion income of CFC to the extent that the tax is allocated and apportioned under § 1.861–20 to USP's section 245A subgroup of general category stock, section 245A subgroup of passive category stock, and section 245A subgroup of U.S. source category stock (the statutory groupings) for purposes of section 904 as the operative section. Under § 1.861–20(d)(3)(i), the $500x portion of the foreign dividend amount that corresponds to the $500x U.S. return of capital amount is assigned to the statutory and residual groupings to which $500x of earnings of CFC would be assigned if CFC recognized them in Year 1. Those earnings are deemed to arise in the statutory and residual groupings in the same proportions as the proportions of the tax book value of CFC's stock in the groupings for Year 1 for purposes of applying the asset method of expense allocation and apportionment under § 1.861–9. Under § 1.861–9, § 1.861–9T(f), and § 1.861–13, for purposes of section 904 as the operative section, all of the tax book value of the stock of CFC is assigned to USP's section 245A subgroup of general category stock because CFC uses the modified gross income method to allocate and apportion its interest expense and earns only specified foreign source general category gross income for Year 1. Under § 1.861–20(d)(3)(i), if CFC recognized $500x of earnings in Year 1 these earnings would be deemed to arise in the section 245A subgroup of general category stock. Accordingly, the remaining $500x of foreign dividend amount is assigned to USP's section 245A subgroup of general category stock. Under § 1.861–20(f), the remaining $75x of withholding tax is allocated to the section 245A subgroup and, under paragraph (b)(2)(ii) of this section, is attributable to the non-inclusion income of CFC.

(D) *Disallowance.* Under paragraph (a)(1)(i) of this section, no credit under section 901 or deduction is allowed in any taxable year to USP for the $75x portion of the Country A withholding tax that is attributable to section 245A(d) income of USP. Under paragraph (a)(1)(iii) of this section, no credit under section 901 or deduction is allowed in any taxable year to USP for the $75x portion of the Country A withholding tax that is attributable to non-inclusion income of CFC.

(6) *Example 5: Income of a reverse hybrid*—(i) *Facts.* CFC is a reverse hybrid. In Year 1, CFC earns a $500x item of services income that is non-inclusion income. CFC also earns for Federal income tax purposes and Country A tax purposes a $1,000x item of royalty income, of which $500x is gross included tested income and $500x is non-inclusion income. USP includes the $500x item of foreign gross services income and the $1,000x item of foreign gross royalty income in its Country A taxable income, and the items are foreign law pass-through income. If CFC included these items under Country A tax law, its $1,000x of royalty income for Federal income tax purposes would be the corresponding U.S. item for the foreign gross royalty income, and its $500x of services income for Federal income tax purposes would be the corresponding U.S. item for the foreign gross services income. Country A imposes a $150x foreign income tax on USP with respect to $1,500x of foreign gross income.

(ii) *Analysis*—(A) *In general.* The rules of this section are applied by first determining the portion of the $150x Country A tax that is attributable under paragraph (b)(1) of this section to the section 245A(d) income of USP, and then by determining the portion of the $150x Country A tax that is described in paragraph (b)(2)(i) of this section and that is attributable under either paragraph (b)(2)(ii) or (iii) of this section to the non-inclusion income of CFC. No credit or deduction is allowed under paragraph (a)(1)(i) of this section for any portion of the $150x Country A tax that is attributable to the section 245A(d) income of USP or, under paragraph (a)(1)(iii) of this section, for any portion of that tax that is attributable to the non-inclusion income of CFC, to the extent the tax is not disallowed under paragraph (a)(1)(i) of this section.

(B) *Attribution of foreign income taxes to section 245A(d) income.* Under paragraph (b)(1) of this section, the $150x Country A tax is attributable to section 245A(d) income to the extent the tax is allocated and apportioned to the section 245A(d) income group (the statutory grouping) under § 1.861–20. Section 1.861–20(c) allocates and apportions foreign income tax to the statutory and residual groupings to which the items of foreign gross income that were included in the foreign tax base are assigned under § 1.861–20(d). In general, § 1.861–20(d) assigns foreign gross income to the statutory and residual groupings to which the corresponding U.S. item is assigned. Section 1.861–20(d)(3)(i)(C) assigns the foreign law pass-through income that USP includes by reason of its ownership of CFC to the statutory and residual groupings by treating USP's foreign law pass-through income as foreign gross income of CFC, and by treating CFC as paying the $150x of Country A tax in CFC's U.S. taxable year within which its foreign taxable year ends (Year 1). CFC is therefore treated as including a $1,000x foreign gross royalty item and a $500x foreign gross services income item and paying $150x of Country A tax in Year 1. These foreign gross income items are assigned to the statutory and residual groupings to which the corresponding U.S. items are assigned under Federal income tax law. No foreign gross income is assigned to the section 245A(d) income group because neither the corresponding U.S. item of royalty income nor the corresponding U.S. item of services income is assigned to the section 245A(d) income group. Therefore, none of USP's Country A tax is allocated to the section 245A(d) income group.

(C) *Attribution of foreign income taxes to non-inclusion income.* The $150x Country A tax is described in paragraph (b)(2) of this section because USP is a United States shareholder of CFC, CFC is a reverse hybrid, and § 1.861–20(d)(3)(i)(C) allocates and apportions the tax by reference to the income of CFC. Under paragraph (b)(2)(iii) of this section, the $150x Country A tax is attributable to the non-inclusion income of CFC to the extent that the foreign income taxes are allocated and apportioned to the non-inclusion income group under § 1.861–20. For the reasons described in paragraph (d)(6)(ii)(B) of this section, under § 1.861–20(d)(3)(i)(C) CFC is treated as including a $1,000x foreign gross royalty item and a $500x foreign gross services income item and paying $150x of Country A tax in Year 1. These foreign gross income items are assigned to the statutory and residual groupings to which the corresponding U.S. items are assigned under Federal income tax law. For Federal income tax purposes, the $500x item of services income and $500x of the $1,000x item of royalty income are items of non-inclusion income that are therefore assigned to the non-inclusion income group. The remaining $500x of the foreign gross

royalty income item is assigned to the residual grouping. Under § 1.861–20(f), $100x ($150x × $1,000x/$1,500x) of the Country A tax is apportioned to the non-inclusion income group, and $50x ($150x × $500x/$1,500x) is apportioned to the residual grouping. Under paragraph (b)(2)(iii) of this section, the $100x of Country A tax that is apportioned to the non-inclusion income group under § 1.861–20(d)(3)(i)(C) is attributable to non-inclusion income of CFC.

(D) *Disallowance.* Under paragraph (a)(1)(iii) of this section, no credit under section 901 or deduction is allowed in any taxable year to USP for the $100x of Country A foreign income tax that is attributable to non-inclusion income of CFC.

(e) *Applicability date.* This section applies to taxable years of a foreign corporation that begin after December 31, 2019, and end on or after November 2, 2020, and with respect to a United States person, taxable years in which or with which such taxable years of the foreign corporation end.

§ 1.245A(e)–1 [AMENDED]

■ **Par. 4.** Section 1.245A(e)–1 is amended by adding the language ''and § 1.245A(d)–1'' after the language ''rules of section 245A(d)'' in paragraphs (b)(1)(ii), (c)(1)(iii), (g)(1)(ii) introductory text, (g)(1)(iii) introductory text, and (g)(2)(ii) introductory text.

■ **Par. 5.** Section 1.250(b)–1 is amended by adding two sentences to the end of paragraph (c)(7) to read as follows:

§ 1.250(b)–1 Computation of foreign-derived intangible income (FDII).

* * * * *

(c) * * *

(7) * * * A taxpayer must use a consistent method to determine the amount of its domestic oil and gas extraction income (''DOGEI'') and its foreign oil and gas extraction income (''FOGEI'') from the sale of oil or gas that has been transported or processed. For example, a taxpayer must use a consistent method to determine the amount of FOGEI from the sale of gasoline from foreign crude oil sources in computing the exclusion from gross tested income under § 1.951A–2(c)(1)(v) and the amount of DOGEI from the sale of gasoline from domestic crude oil sources in computing its section 250 deduction.

* * * * *

■ **Par. 6.** Section 1.250(b)–5 is amended by revising paragraph (c)(5) to read as follows:

§ 1.250(b)–5 Foreign-derived deduction eligible income (FDDEI) services.

* * * * *

(c) * * *

(5) *Electronically supplied service.* The term *electronically supplied service* means, with respect to a general service other than an advertising service, a service that is delivered primarily over the internet or an electronic network and for which value of the service to the end user is derived primarily from automation or electronic delivery. Electronically supplied services include the provision of access to digital content (as defined in § 1.250(b)–3), such as streaming content; on-demand network access to computing resources, such as networks, servers, storage, and software; the provision or support of a business or personal presence on a network, such as a website or a web page; online intermediation platform services; services automatically generated from a computer via the internet or other network in response to data input by the recipient; and similar services. Electronically supplied services do not include services that primarily involve the application of human effort by the renderer (not considering the human effort involved in the development or maintenance of the technology enabling the electronically supplied services). Accordingly, electronically supplied services do not include certain services (such as legal, accounting, medical, or teaching services) involving primarily human effort that are provided electronically.

* * * * *

■ **Par. 7.** Section 1.336–2 is amended by:

■ 1. Revising the paragraph (g)(3)(ii) heading.

■ 2. In paragraph (g)(3)(ii)(A):

■ a. Revising the first sentence; and

■ b. In the second sentence, removing the language ''foreign tax'' and adding in its place the language ''foreign income tax''.

■ 3. Revising paragraphs (g)(3)(ii)(B) and (g)(3)(iii).

■ 4. Removing both occurrences of paragraph (h) at the end of the section.

The revisions read as follows:

§ 1.336–2 Availability, mechanics, and consequences of section 336(e) election.

* * * * *

(g) * * *

(3) * * *

(ii) *Allocation of foreign income taxes*—(A) * * * Except as provided in paragraph (g)(3)(ii)(B) of this section, if a section 336(e) election is made for target and target's taxable year under foreign law (if any) does not close at the end of the disposition date, foreign income tax as defined in § 1.960–1(b) (other than a withholding tax as defined in section 901(k)(1)(B)) paid or accrued by new target with respect to such foreign taxable year is allocated between old target and new target. * * *

(B) *Foreign income taxes imposed on partnerships and disregarded entities.* If a section 336(e) election is made for target and target holds an interest in a disregarded entity (as described in § 301.7701–2(c)(2)(i) of this chapter) or partnership, the rules of § 1.901–2(f)(4) and (5) apply to determine the person who is considered for Federal income tax purposes to pay foreign income tax imposed at the entity level on the income of the disregarded entity or partnership.

(iii) *Disallowance of foreign tax credits under section 901(m).* For rules that may apply to disallow foreign tax credits by reason of a section 336(e) election, see section 901(m) and §§ 1.901(m)–1 through 1.901(m)–8.

* * * * *

■ **Par. 8.** Section 1.336–5 is revised to read as follows:

§ 1.336–5 Applicability dates.

Except as otherwise provided in this section, the provisions of §§ 1.336–1 through 1.336–4 apply to any qualified stock disposition for which the disposition date is on or after May 15, 2013. The provisions of § 1.336–1(b)(5)(i)(A) relating to section 1022 apply on and after January 19, 2017. The provisions of § 1.336–2(g)(3)(ii) and (iii) apply to foreign income taxes paid or accrued in taxable years beginning on or after December 28, 2021.

■ **Par. 9.** Section 1.338–9 is amended by revising paragraph (d) to read as follows:

§ 1.338–9 International aspects of section 338.

* * * * *

(d) *Allocation of foreign income taxes*—(1) *In general.* Except as provided in paragraph (d)(3) of this section, if a section 338 election is made for target (whether foreign or domestic), and target's taxable year under foreign law (if any) does not close at the end of the acquisition date, foreign income tax as defined in § 1.901–2(a)(1)) (other than a withholding tax as defined in section 901(k)(1)(B)) paid or accrued by new target with respect to such foreign taxable year is allocated between old target and new target. If there is more than one section 338 election with respect to target during target's foreign taxable year, foreign income tax paid or accrued with respect to that foreign taxable year is allocated among all old targets and new targets. The allocation

is made based on the respective portions of the taxable income (as determined under foreign law) for the foreign taxable year that are attributable under the principles of § 1.1502–76(b) to the period of existence of each old target and new target during the foreign taxable year.

(2) *Foreign income taxes imposed on partnerships and disregarded entities.* If a section 338 election is made for target and target holds an interest in a disregarded entity (as described in § 301.7701–2(c)(2)(i) of this chapter) or partnership, the rules of § 1.901–2(f)(4) and (5) apply to determine the person who is considered for Federal income tax purposes to pay foreign income tax imposed at the entity level on the income of the disregarded entity or partnership.

(3) *Disallowance of foreign tax credits under section 901(m).* For rules that may apply to disallow foreign tax credits by reason of a section 338 election, see section 901(m) and §§ 1.901(m)–1 through 1.901(m)–8.

(4) *Applicability date.* This paragraph (d) applies to foreign income taxes paid or accrued in taxable years beginning on or after December 28, 2021.

* * * * *

§ 1.367(b)–2 [Amended]

■ **Par. 10.** Section 1.367(b)–2 is amended by removing the last sentence of paragraph (e)(4) *Example 1.*

§ 1.367(b)–3 [Amended]

■ **Par. 11.** Section 1.367(b)–3 is amended:

■ 1. In paragraph (b)(3)(ii), by removing the last sentence of paragraph (ii) of *Example 1* and paragraph (ii) of *Example 2.*

■ 2. In paragraph (c)(5), by removing the last sentence of paragraph (iii) of *Example 1.*

■ **Par. 12.** Section 1.367(b)–4 is amended:

■ 1. By revising paragraph (b)(2)(i)(B).

■ 2. By adding a sentence to the end of paragraph (h).

The revision and addition read as follows:

§ 1.367(b)–4 Acquisition of foreign corporate stock or assets by a foreign corporation in certain nonrecognition transactions.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(B) Immediately after the exchange, a domestic corporation directly or indirectly owns 10 percent or more of the voting power or value of the transferee foreign corporation; and

* * * * *

(h) * * * Paragraph (b)(2)(i)(B) of this section applies to exchanges completed in taxable years of exchanging shareholders ending on or after November 2, 2020, and to taxable years of exchanging shareholders ending before November 2, 2020 resulting from an entity classification election made under § 301.7701–3 of this chapter that was effective on or before November 2, 2020 but was filed on or after November 2, 2020.

■ **Par. 13.** Section 1.367(b)–7 is amended:

■ 1. By adding a sentence to the end of paragraph (b)(1).

■ 2. By revising paragraph (g).

■ 3. By adding paragraph (h).

The revision and additions read as follows:

§ 1.367(b)–7 Carryover of earnings and profits and foreign income taxes in certain foreign-to-foreign nonrecognition transactions.

* * * * *

(b) * * *

(1) * * * See paragraph (g) of this section for rules applicable to taxable years of foreign corporations beginning on or after January 1, 2018, and taxable years of United States shareholders in which or with which such taxable years of foreign corporations end (''post-2017 taxable years'').

* * * * *

(g) *Post-2017 taxable years.* As a result of the repeal of section 902 effective for taxable years of foreign corporations beginning on or after January 1, 2018, all foreign target corporations, foreign acquiring corporations, and foreign surviving corporations are treated as nonpooling corporations in post-2017 taxable years. Any amounts remaining in post-1986 undistributed earnings and post-1986 foreign income taxes of any such corporation in any separate category as of the end of the foreign corporation's last taxable year beginning before January 1, 2018, are treated as earnings and taxes in a single pre-pooling annual layer in the foreign corporation's post-2017 taxable years for purposes of this section. Foreign income taxes that are related to non-previously taxed earnings of a foreign acquiring corporation and a foreign target corporation that were accumulated in taxable years before the current taxable year of the foreign corporation, or in a foreign target's taxable year that ends on the date of the section 381 transaction, are not treated as current year taxes (as defined in § 1.960–1(b)(4)) of a foreign surviving corporation in any post-2017 taxable year. In addition, foreign income taxes that are related to a hovering deficit are not treated as current year taxes of the foreign surviving corporation in any post-2017 taxable year, regardless of whether the hovering deficit is absorbed.

(h) *Applicability dates.* Except as otherwise provided in this paragraph (h), this section applies to foreign section 381 transactions that occur on or after November 6, 2006. Paragraph (g) of this section applies to taxable years of foreign corporations ending on or after November 2, 2020, and to taxable years of United States shareholders in which or with which such taxable years of foreign corporations end.

■ **Par. 14.** Section 1.367(b)–10 is amended:

■ 1. In paragraph (c)(1), by removing the language ''sections 902 or'' and adding in its place the language ''section''.

■ 2. In paragraph (e), by revising the heading and adding a sentence to the end of the paragraph.

The revision and addition read as follows:

§ 1.367(b)–10 Acquisition of parent stock or securities for property in triangular reorganizations.

* * * * *

(e) *Applicability dates.* * * * Paragraph (c)(1) of this section applies to deemed distributions that occur in taxable years ending on or after November 2, 2020.

§ 1.461–1 [AMENDED]

■ **Par. 15.** Section 1.461–1 is amended by removing the language ''paragraph (b)'' and adding in its place the language ''paragraph (g)'' in the last sentence of paragraph (a)(4).

■ **Par. 16.** Section 1.861–3 is amended:

■ 1. By revising the section heading.

■ 2. By redesignating paragraph (d) as paragraph (e).

■ 3. By adding a new paragraph (d).

■ 4. In newly redesignated paragraph (e):

■ i. By revising the heading.

■ ii. By removing ''this paragraph'' and adding ''this paragraph (e),'' in its place.

■ iii. By adding a sentence to the end of the paragraph.

The revisions and additions read as follows:

§ 1.861–3 Dividends and income inclusions under sections 951, 951A, and 1293 and associated section 78 dividends.

* * * * *

(d) *Source of income inclusions under sections 951, 951A, and 1293 and associated section 78 dividends.* For purposes of sections 861 and 862 and

§§ 1.861–1 and 1.862–1, and for purposes of applying this section, the amount included in gross income of a United States person under sections 951, 951A, and 1293 and the associated section 78 dividend for the taxable year with respect to a foreign corporation are treated as dividends received directly by the United States person from the foreign corporation that generated the inclusion. See section 904(h) and § 1.904–5(m) for rules concerning the resourcing of inclusions under sections 951, 951A, and 1293.

(e) *Applicability dates.* * * * Paragraph (d) of this section applies to taxable years ending on or after November 2, 2020.

■ **Par. 17.** Section 1.861–8 is amended:

■ 1. By removing the language ''and example (17) of paragraph (g) of this section'' from the third sentence of paragraph (b)(2).

■ 2. By revising paragraph (e)(4)(i).

■ 3. By adding paragraph (h)(4).

The revision and addition read as follows:

§ 1.861–8 Computation of taxable income from sources within the United States and from other sources and activities.

* * * * *

(e) * * *

(4) * * *

(i) *Expenses attributable to controlled services.* If a taxpayer performs a controlled services transaction (as defined in § 1.482–9(l)(1)), which includes any activity by one member of a group of controlled taxpayers (the renderer) that results in a benefit to a controlled taxpayer (the recipient), and the renderer charges the recipient for such services, section 482 and § 1.482–1 provide for an allocation where the charge is not consistent with an arm's length result. The deductions for expenses incurred by the renderer in performing such services are considered definitely related to the amounts so charged and are to be allocated to such amounts.

* * * * *

(h) * * *

(4) Paragraph (e)(4)(i) of this section applies to taxable years ending on or after November 2, 2020.

■ **Par. 18.** Section 1.861–9 is amended by adding a sentence to the end of paragraph (g)(3) and revising paragraph (k) to read as follows:

§ 1.861–9 Allocation and apportionment of interest expense and rules for asset-based apportionment.

* * * * *

(g) * * *

(3) * * * In applying § 1.861–9T(g)(3), for purposes of applying section 904 as the operative section, the statutory or residual grouping of income that assets generate, have generated, or may reasonably be expected to generate is determined after taking into account any reallocation of income required under § 1.904–4(f)(2)(vi).

* * * * *

(k) *Applicability dates.* (1) Except as provided in paragraphs (k)(2) and (3) of this section, this section applies to taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

(2) Paragraphs (b)(1)(i), (b)(8), and (e)(9) of this section apply to taxable years that end on or after December 16, 2019. For taxable years that both begin after December 31, 2017, and end on or after December 4, 2018, and also end before December 16, 2019, see § 1.861–9T(b)(1)(i) as contained in 26 CFR part 1 revised as of April 1, 2019.

(3) The last sentence of paragraph (g)(3) of this section applies to taxable years beginning on or after December 28, 2021.

■ **Par. 19.** Section 1.861–10 is amended:

■ 1. By adding paragraph (a).

■ 2. By revising paragraphs (e)(8)(v) and (f).

■ 3. By adding paragraphs (g) and (h).

The additions and revisions read as follows:

§ 1.861–10 Special allocations of interest expense.

(a) *In general.* This section applies to all taxpayers and provides exceptions to the rules of § 1.861–9 that require the allocation and apportionment of interest expense based on all assets of all members of the affiliated group. Section 1.861–10T(b) provides rules for the direct allocation of interest expense to the income generated by certain assets that are subject to qualified nonrecourse indebtedness. Section 1.861–10T(c) provides rules for the direct allocation of interest expense to income generated by certain assets that are acquired in an integrated financial transaction. Section 1.861–10T(d) provides special rules that apply to all transactions described in § 1.861–10T(b) and (c). Paragraph (e) of this section requires the direct allocation of third-party interest expense of an affiliated group to such group's investments in related controlled foreign corporations in cases involving excess related person indebtedness (as defined therein). See also § 1.861–9T(b)(5), which requires the direct allocation of amortizable bond premium. Paragraph (f) of this section provides a special rule for certain regulated utility companies. Paragraph (g) of this section is reserved. Paragraph (h) of this section sets forth applicability dates.

* * * * *

(e) * * *

(8) * * *

(v) *Classification of loans between controlled foreign corporations.* In determining the amount of related group indebtedness for any taxable year, loans outstanding from one controlled foreign corporation to a related controlled foreign corporation are not treated as related group indebtedness. For purposes of determining the foreign base period ratio under paragraph (e)(2)(iv) of this section for a taxable year that ends on or after November 2, 2020, the rules of this paragraph (e)(8)(v) apply to determine the related group debt-to-asset ratio in each taxable year included in the foreign base period, including in taxable years that end before November 2, 2020.

* * * * *

(f) *Indebtedness of certain regulated utilities.* If an automatically excepted regulated utility trade or business (as defined in § 1.163(j)–1(b)(15)(i)(A)) has qualified nonrecourse indebtedness within the meaning of the second sentence in § 1.163(j)–10(d)(2), interest expense from the indebtedness is directly allocated to the taxpayer's assets in the manner and to the extent provided in § 1.861–10T(b).

(g) [Reserved]

(h) *Applicability dates.* Except as provided in this paragraph (h), this section applies to taxable years ending on or after December 4, 2018. Paragraph (e)(8)(v) of this section applies to taxable years ending on or after November 2, 2020, and paragraph (f) of this section applies to taxable years beginning on or after December 28, 2021.

§ 1.861–13(a) [AMENDED]

■ **Par. 20.** Section 1.861–13(a) is amended by removing the language ''section 904,'' and adding the language ''sections 245A and 904,'' in its place.

■ **Par. 21.** Section 1.861–14 is amended by revising paragraphs (h) and (k) to read as follows:

§ 1.861–14 Special rules for allocating and apportioning certain expenses (other than interest expense) of an affiliated group of corporations.

* * * * *

(h) *Special rule for the allocation and apportionment of section 818(f)(1) items of a life insurance company*—(1) *In general.* Except as provided in paragraph (h)(2) of this section, life insurance company items specified in section 818(f)(1) (''section 818(f)(1) items'') are allocated and apportioned as if all members of the life subgroup (as

defined in § 1.1502–47(b)(8)) were a single corporation (''life subgroup method''). See also § 1.861–8(e)(16) for rules on the allocation of reserve expenses with respect to dividends received by a life insurance company.

(2) *Alternative separate entity treatment.* A consolidated group may choose not to apply the life subgroup method and may instead allocate and apportion section 818(f)(1) items solely among items of the life insurance company that generated the section 818(f)(1) items (''separate entity method''). A consolidated group indicates its choice to apply the separate entity method by applying this paragraph (h)(2) for purposes of the allocation and apportionment of section 818(f)(1) items on its Federal income tax return filed for its first taxable year to which this section applies. A consolidated group's use of the separate entity method constitutes a binding choice to use the method chosen for that year for all members of the consolidated group and all taxable years of such members thereafter. The choice to use the separate entity method may not be revoked without the prior consent of the Commissioner.

* * * * *

(k) *Applicability dates.* Except as provided in this paragraph (k), this section applies to taxable years beginning after December 31, 2019. Paragraph (h) of this section applies to taxable years beginning on or after December 28, 2021.

■ **Par. 22.** Section 1.861–20 is amended:

■ 1. In paragraph (b)(4), by removing the language ''301(c)(3)(A)'' and adding in its place the language ''301(c)(3)(A) or section 731(a)''.

■ 2. By revising paragraph (b)(7).

■ 3. By redesignating the paragraphs in the first column as the paragraphs in the second column:

Old paragraph	New paragraph
(b)(17)	(b)(18)
(b)(18)	(b)(19)
(b)(19)	(b)(20)
(b)(20)	(b)(21)
(b)(21)	(b)(23)
(b)(23)	(b)(24)
(b)(24)	(b)(25)
(b)(25)	(b)(26)
(b)(26)	

■ 4. By adding new paragraph (b)(17).

■ 5. By revising newly-redesignated paragraph (b)(20).

■ 6. By adding new paragraph (b)(22).

■ 7. By revising newly-redesignated paragraph (b)(25).

■ 8. By revising the first and second sentences in paragraph (c) introductory text.

■ 9. In paragraph (d)(2)(ii)(B), by adding the language '', and paragraph (d)(3)(ii)(B) of this section for rules regarding the assignment of foreign gross income arising from a distribution by a partnership'' at the end of the paragraph.

■ 10. By adding paragraph (d)(2)(ii)(D).

■ 11. In paragraph (d)(3)(i)(A), by removing the language ''foreign and Federal income tax law or an inclusion of foreign law pass-through income'' and adding the language ''foreign law and Federal income tax law, an inclusion of foreign law pass-through income, or a disposition under both foreign law and Federal income tax law'' in its place.

■ 12. In the first sentence of paragraph (d)(3)(i)(B)(*2*), by removing the language ''from which a distribution of the U.S. dividend amount is made'' and adding the language ''to which a distribution of the U.S. dividend amount is assigned'' in its place.

■ 13. In the second sentence of paragraph (d)(3)(i)(B)(*2*), by removing the language ''to which earnings equal to the U.S. return of capital amount'' and adding the language ''to which earnings of the distributing corporation'' in its place.

■ 14. By adding paragraphs (d)(3)(i)(D), (d)(3)(ii), (v) and (vi), (g)(10) through (14), and (h).

■ 15. By revising paragraph (i).

The additions and revisions read as follows:

§ 1.861–20 Allocation and apportionment of foreign income taxes.

* * * * *

(b) * * *

(7) *Foreign income tax.* The term *foreign income tax* has the meaning provided in § 1.901–2(a).

* * * * *

(17) *Previously taxed earnings and profits.* The term *previously taxed earnings and profits* has the meaning provided in § 1.960–1(b).

* * * * *

(20) *U.S. capital gain amount.* The term *U.S. capital gain amount* means gain recognized by a taxpayer on the sale, exchange, or other disposition of stock or an interest in a partnership or, in the case of a distribution with respect to stock or a partnership interest, the portion of the distribution to which section 301(c)(3)(A) or 731(a)(1), respectively, applies. A U.S. capital gain amount includes gain that is subject to section 751 and § 1.751–1, but does not include the portion of any gain recognized by a taxpayer that is included in gross income as a dividend under section 964(e) or 1248.

* * * * *

(22) *U.S. equity hybrid instrument.* The term *U.S. equity hybrid instrument* means an instrument that is treated as stock or a partnership interest for Federal income tax purposes but for foreign income tax purposes is treated as indebtedness or otherwise gives rise to the accrual of income to the holder with respect to such instrument that is not characterized as a dividend or distributive share of partnership income for foreign tax law purposes.

* * * * *

(25) *U.S. return of capital amount.* The term *U.S. return of capital amount* means, in the case of the sale, exchange, or other disposition of stock, the taxpayer's adjusted basis of the stock, or in the case of a distribution with respect to stock, the portion of the distribution to which section 301(c)(2) applies.

* * * * *

(c) * * * A foreign income tax (other than certain in lieu of taxes described in paragraph (h) of this section) is allocated and apportioned to the statutory and residual groupings that include the items of foreign gross income included in the base on which the tax is imposed. Each such foreign income tax (that is, each separate levy) is allocated and apportioned separately under the rules in paragraphs (c) through (f) of this section. * * *

* * * * *

(d) * * *

(2) * * *

(ii) * * *

(D) *Foreign law transfers between taxable units.* This paragraph (d)(2)(ii) applies to an item of foreign gross income arising from an event that foreign law treats as a transfer of property, or as giving rise to an item of accrued income, gain, deduction, or loss with respect to a transaction, between taxable units (as defined in paragraph (d)(3)(v)(E) of this section) of the same taxpayer, and that would be treated as a disregarded payment (as defined in paragraph (d)(3)(v)(E) of this section) if the transfer of property occurred, or the item accrued, for Federal income tax purposes in the same U.S. taxable year in which the foreign income tax is paid or accrued. An item of foreign gross income to which this paragraph (d)(2)(ii) applies is characterized and assigned to the grouping to which a disregarded payment in the amount of the item of foreign gross income (or the gross receipts giving rise to the item of

foreign gross income) would be assigned under the rules of paragraph (d)(3)(v) of this section if the event giving rise to the foreign gross income resulted in a disregarded payment in the U.S. taxable year in which the foreign income tax is paid or accrued. For example, an item of foreign gross income that a taxpayer recognizes by reason of a foreign law distribution (such as a stock dividend or a consent dividend) from a disregarded entity is assigned to the same statutory or residual groupings to which the foreign gross income would be assigned if a distribution of property in the amount of the taxable distribution under foreign law were made for Federal income tax purposes on the date on which the foreign law distribution occurred.

* * * * *

(3) * * *

(i) * * *

(D) *Foreign gross income items arising from a disposition of stock.* An item of foreign gross income that arises from a transaction that is treated as a sale, exchange, or other disposition for both foreign law and Federal income tax purposes of an interest that is stock in a corporation for Federal income tax purposes is assigned first, to the extent of any U.S. dividend amount that results from the disposition, to the same statutory or residual grouping (or ratably to the groupings) to which the U.S. dividend amount is assigned under Federal income tax law. If the foreign gross income item exceeds the U.S. dividend amount, the foreign gross income item is next assigned, to the extent of the U.S. capital gain amount, to the statutory or residual grouping (or ratably to the groupings) to which the U.S. capital gain amount is assigned under Federal income tax law. Any excess of the foreign gross income item over the sum of the U.S. dividend amount and the U.S. capital gain amount is assigned to the same statutory or residual grouping (or ratably to the groupings) to which earnings equal to such excess amount would be assigned if they were recognized for Federal income tax purposes in the U.S. taxable year in which the disposition occurred. These earnings are deemed to arise in the statutory and residual groupings in the same proportions as the proportions in which the tax book value of the stock is (or would be if the taxpayer were a United States person) assigned to the groupings under the asset method in § 1.861–9 in the U.S. taxable year in which the disposition occurs. See paragraph (g)(10) of this section (*Example 9*).

(ii) *Items of foreign gross income included by a taxpayer by reason of its ownership of an interest in a partnership*—(A) *Scope.* The rules of this paragraph (d)(3)(ii) apply to assign to a statutory or residual grouping certain items of foreign gross income that a taxpayer includes in foreign taxable income by reason of its ownership of an interest in a partnership. See paragraphs (d)(1) and (2) of this section for rules that apply in characterizing items of foreign gross income that are attributable to a partner's distributive share of income of a partnership. See paragraph (d)(3)(iii) of this section for rules that apply in characterizing items of foreign gross income that are attributable to an inclusion under a foreign law inclusion regime.

(B) *Foreign gross income items arising from a distribution with respect to an interest in a partnership.* If a partnership makes a distribution that is treated as a distribution of property for both foreign law and Federal income tax purposes, any foreign gross income item arising from the distribution (including foreign gross income attributable to a distribution from a partnership that foreign law classifies as a dividend from a corporation) is, to the extent of the U.S. capital gain amount arising from the distribution, assigned to the statutory and residual groupings to which the U.S. capital gain amount is assigned under Federal income tax law. If the foreign gross income item arising from the distribution exceeds the U.S. capital gain amount, such excess amount is assigned to the statutory and residual groupings to which a distributive share of income of the partnership in the amount of such excess would be assigned if such income were recognized for Federal income tax purposes in the U.S. taxable year in which the distribution is made. The items constituting this distributive share of income are deemed to arise in the statutory and residual groupings in the same proportions as the proportions in which the tax book value of the partnership interest or the partner's pro rata share of the partnership assets, as applicable, is assigned (or would be assigned if the partner were a United States person) for purposes of apportioning the partner's interest expense under § 1.861–9(e) in the U.S. taxable year in which the distribution is made.

(C) *Foreign gross income items arising from the disposition of an interest in a partnership.* An item of foreign gross income arising from a transaction that is treated as a sale, exchange, or other disposition for both foreign law and Federal income tax purposes of an interest that is an interest in a partnership for Federal income tax purposes is assigned first, to the extent of the U.S. capital gain amount arising from the disposition, to the statutory or residual grouping (or ratably to the groupings) to which the U.S. capital gain amount is assigned. If the foreign gross income item arising from the disposition exceeds the U.S. capital gain amount, such excess amount is assigned to the statutory and residual grouping (or ratably to the groupings) to which a distributive share of income of the partnership in the amount of such excess would be assigned if such income were recognized for Federal income tax purposes in the U.S. taxable year in which the disposition occurred. The items constituting this distributive share of income are deemed to arise in the statutory and residual groupings in the same proportions as the proportions in which the tax book value of the partnership interest, or the partner's pro rata share of the partnership assets, as applicable, is assigned (or would be assigned if the partner were a United States person) for purposes of apportioning the partner's interest expense under § 1.861–9(e) in the U.S. taxable year in which the disposition occurred.

* * * * *

(v) *Disregarded payments*—(A) *In general.* This paragraph (d)(3)(v) applies to assign to a statutory or residual grouping a foreign gross income item that a taxpayer includes by reason of the receipt of a disregarded payment. In the case of a taxpayer that is an individual or a domestic corporation, this paragraph (d)(3)(v) applies to a disregarded payment made between a taxable unit that is a foreign branch, a foreign branch owner, or a non-branch taxable unit, and another such taxable unit of the same taxpayer. In the case of a taxpayer that is a foreign corporation, this paragraph (d)(3)(v) applies to a disregarded payment made between taxable units that are tested units of the same taxpayer. For purposes of this paragraph (d)(3)(v), an individual or corporation is treated as the taxpayer with respect to its distributive share of foreign income taxes paid or accrued by a partnership, estate, trust or other pass-through entity. The rules of paragraph (d)(3)(v)(B) of this section apply to attribute U.S. gross income comprising the portion of a disregarded payment that is a reattribution payment to a taxable unit, and to associate the foreign gross income item arising from the receipt of the reattribution payment with the statutory and residual

groupings to which that U.S. gross income is assigned. The rules of paragraph (d)(3)(v)(C) of this section apply to assign to statutory and residual groupings items of foreign gross income arising from the receipt of the portion of a disregarded payment that is a remittance or a contribution. The rules of paragraph (d)(3)(v)(D) of this section apply to assign to statutory and residual groupings items of foreign gross income arising from disregarded payments in connection with disregarded sales or exchanges of property. Paragraph (d)(3)(v)(E) of this section provides definitions that apply for purposes of this paragraph (d)(3)(v) and paragraph (g) of this section.

(B) *Reattribution payments*—(*1*) *In general.* This paragraph (d)(3)(v)(B) assigns to a statutory or residual grouping a foreign gross income item that a taxpayer includes by reason of the receipt by a taxable unit of the portion of a disregarded payment that is a reattribution payment. The foreign gross income item is assigned to the statutory or residual groupings to which one or more reattribution amounts that constitute the reattribution payment are assigned upon receipt by the taxable unit. If a reattribution payment comprises multiple reattribution amounts and the amount of the foreign gross income item that is attributable to the reattribution payment differs from the amount of the reattribution payment, foreign gross income is apportioned among the statutory and residual groupings in proportion to the reattribution amounts in each statutory and residual grouping. The statutory or residual grouping of a reattribution amount received by a taxable unit is the grouping that includes the U.S. gross income attributed to the taxable unit by reason of its receipt of the gross reattribution amount, regardless of whether, after taking into account disregarded payments made by the taxable unit, the taxable unit has an attribution item as a result of its receipt of the reattribution amount. See paragraph (g)(13) of this section (*Example 12*).

(*2*) *Attribution of U.S. gross income to a taxable unit.* This paragraph (d)(3)(v)(B)(*2*) provides attribution rules to determine the reattribution amounts received by a taxable unit in the statutory and residual groupings in order to apply paragraph (d)(3)(v)(B)(*1*) of this section to assign foreign gross income items arising from a reattribution payment to the groupings. In the case of a taxpayer that is an individual or a domestic corporation, the attribution rules in § 1.904–4(f)(2) apply to determine the reattribution amounts received by a taxable unit in the separate categories (as defined in § 1.904–5(a)(4)(v)) in order to apply paragraph (d)(3)(v)(B)(*1*) of this section for purposes of § 1.904–6(b)(2)(i). In the case of a taxpayer that is a foreign corporation, the attribution rules in § 1.951A–2(c)(7)(ii)(B) apply to determine the reattribution amounts received by a taxable unit in the statutory and residual groupings in order to apply paragraph (d)(3)(v)(B)(*1*) of this section for purposes of §§ 1.951A–2(c)(3), 1.951A–2(c)(7), and 1.960–1(d)(3)(ii). For purposes of other operative sections (as described in § 1.861–8(f)(1)), the principles of § 1.904–4(f)(2)(vi) or § 1.951A–2(c)(7)(ii)(B), as applicable, apply to determine the reattribution amounts received by a taxable unit in the statutory and residual groupings. The rules and principles of § 1.904–4(f)(2)(vi) or § 1.951A–2(c)(7)(ii)(B), as applicable, apply to determine the extent to which a disregarded payment made by the taxable unit is a reattribution payment and the reattribution amounts that constitute a reattribution payment, and to adjust the U.S. gross income initially attributed to each taxable unit to reflect the reattribution payments that the taxable unit makes and receives. The rules in this paragraph (d)(3)(v)(B)(*2*) limit the amount of a disregarded payment that is a reattribution payment to the U.S. gross income of the payor taxable unit that is recognized in the U.S. taxable year in which the disregarded payment is made.

(*3*) *Effect of reattribution payment on foreign gross income items of payor taxable unit.* The statutory or residual grouping to which an item of foreign gross income of a taxable unit is assigned is determined without regard to reattribution payments made by the taxable unit, and without regard to whether the taxable unit has one or more attribution items after taking into account such reattribution payments. No portion of the foreign gross income of the payor taxable unit is treated as foreign gross income of the payee taxable unit by reason of the reattribution payment, notwithstanding that U.S. gross income of the payor taxable unit that is used to assign foreign gross income of the payor taxable unit to statutory and residual groupings is reattributed to the payee taxable unit under paragraph (d)(3)(v)(B)(*1*) of this section by reason of the reattribution payment. See paragraph (e) of this section for rules reducing the amount of a foreign gross income item of a taxable unit by deductions allowed under foreign law, including deductions by reason of disregarded payments made by a taxable unit that are included in the foreign gross income of the payee taxable unit.

(C) *Remittances and contributions*—(*1*) *Remittances*—(*i*) *In general.* An item of foreign gross income that a taxpayer includes by reason of the receipt of a remittance by a taxable unit is assigned to the statutory or residual groupings of the recipient taxable unit that correspond to the groupings out of which the payor taxable unit made the remittance under the rules of this paragraph (d)(3)(v)(C)(*1*)(*i*). A remittance paid by a taxable unit is considered to be made ratably out of all of the accumulated after-tax income of the taxable unit. The accumulated after-tax income of the taxable unit that pays the remittance is deemed to have arisen in the statutory and residual groupings in the same proportions as the proportions in which the tax book value of the assets of the taxable unit are (or would be if the owner of the taxable unit were a United States person) assigned for purposes of apportioning interest expense under the asset method in § 1.861–9 in the taxable year in which the remittance is made. See paragraph (g)(11) and (12) of this section (*Examples 10* and *11*). If the payor taxable unit is determined to have no assets under paragraph (d)(3)(v)(C)(*1*)(*ii*) of this section, then the foreign gross income that is included by reason of the receipt of the remittance is assigned to the residual grouping.

(*ii*) *Assets of a taxable unit.* The assets of a taxable unit are determined in accordance with § 1.987–6(b), except that for purposes of applying § 1.987–6(b)(2) under this paragraph (d)(3)(v)(C)(*1*)(*ii*), a taxable unit is deemed to be a section 987 QBU (within the meaning of § 1.987–1(b)(2)) and assets of the taxable unit include stock held by the taxable unit, the portion of the tax book value of a reattribution asset that is assigned to the taxable unit, and the taxable unit's pro rata share of the assets of another taxable unit (other than a corporation or a partnership), including the portion of any reattribution assets assigned to the other taxable unit, in which it owns an interest. If a taxable unit owns an interest in a taxable unit that is a partnership, the assets of the taxable unit that is the owner include its interest in the partnership or its pro rata share of the partnership assets, as applicable, determined under the principles of § 1.861–9(e). The portion of the tax book value of a reattribution asset that is assigned to a taxable unit is an amount that bears the same ratio to the total tax book value of the

reattribution asset as the sum of the attribution items of that taxable unit arising from gross income produced by the reattribution asset bears to the total gross income produced by the reattribution asset. The portion of a reattribution asset that is assigned to a taxable unit under this paragraph (d)(3)(v)(C)(*1*)(*ii*) is not treated as an asset of the taxable unit making the reattribution payment for purposes of applying paragraph (d)(3)(v)(C)(*1*)(*i*) of this section.

(*2*) *Contributions.* An item of foreign gross income that a taxpayer includes by reason of the receipt of a contribution by a taxable unit is assigned to the residual grouping. See, however, § 1.904–6(b)(2)(ii) (assigning certain items of foreign gross income to the foreign branch category for purposes of applying section 904 as the operative section).

(*3*) *Disregarded payment that comprises both a reattribution payment and a remittance or contribution.* If both a reattribution payment and either a remittance or a contribution result from a single disregarded payment, the foreign gross income is first attributed to the portion of the disregarded payment that is a reattribution payment to the extent of the amount of the reattribution payment, and any excess of the foreign gross income item over the amount of the reattribution payment is then to attributed to the portion of the disregarded payment that is a remittance or contribution.

(D) *Disregarded payments in connection with disregarded sales or exchanges of property.* An item of foreign gross income attributable to gain recognized under foreign law by reason of a disregarded payment received in exchange for property is characterized and assigned under the rules of paragraph (d)(2) of this section. If a taxpayer recognizes U.S. gross income as a result of a disposition of property that was previously received in exchange for a disregarded payment, any item of foreign gross income that the taxpayer recognizes as a result of that same disposition is assigned to a statutory or residual grouping under paragraph (d)(1) of this section, without regard to any reattribution of the U.S. gross income under § 1.904–4(f)(2)(vi)(A) (or the principles of § 1.904–4(f)(2)(vi)(A)) by reason of a disregarded payment described in § 1.904–4(f)(2)(vi)(B)(*2*) (or by reason of § 1.904–4(f)(2)(vi)(D)). See paragraph (d)(3)(v)(B)(*3*) of this section.

(E) *Definitions.* The following definitions apply for purposes of this paragraph (d)(3)(v) and paragraph (g) of this section.

(*1*) *Attribution item.* The term *attribution item* means the portion of an item of gross income, computed under Federal income tax law, that is attributed to a taxable unit after taking into account all reattribution payments made and received by the taxable unit.

(*2*) *Contribution.* The term *contribution* means the excess of a disregarded payment made by a taxable unit to another taxable unit that the first taxable unit owns over the portion of the disregarded payment, if any, that is a reattribution payment.

(*3*) *Disregarded entity.* The term *disregarded entity* means an entity described in § 301.7701–2(c)(2) of this chapter that is disregarded as an entity separate from its owner for Federal income tax purposes.

(*4*) *Disregarded payment.* The term *disregarded payment* means an amount of property (within the meaning of section 317(a)) that is transferred to or from a taxable unit, including a transfer of property that would be a contribution to capital described in section 118 or a transfer described in section 351 if the taxable unit were a corporation under Federal income tax law, a transfer of property that would be a distribution by a corporation to a shareholder with respect to its stock if the taxable unit were a corporation under Federal income tax law, or a payment in exchange for property or in satisfaction of an account payable, in connection with a transaction that is disregarded for Federal income tax purposes and that is reflected on the separate set of books and records of the taxable unit. A disregarded payment also includes any other amount that is reflected on the separate set of books and records of a taxable unit in connection with a transaction that is disregarded for Federal income tax purposes and that would constitute an item of accrued income, gain, deduction, or loss of the taxable unit if the transaction to which the amount is attributable were regarded for Federal income tax purposes.

(*5*) *Reattribution amount.* The term *reattribution amount* means an amount of gross income, computed under Federal income tax law, that is initially assigned to a single statutory or residual grouping that includes gross income of a taxable unit but that is, by reason of a disregarded payment made by that taxable unit, attributed to another taxable unit under paragraph (d)(3)(v)(B)(*2*) of this section.

(*6*) *Reattribution asset.* The term *reattribution asset* means an asset that produces one or more items of gross income, computed under Federal income tax law, to which a disregarded payment is allocated under the rules of paragraph (d)(3)(v)(B)(*2*) of this section.

(*7*) *Reattribution payment.* The term *reattribution payment* means the portion of a disregarded payment equal to the sum of all reattribution amounts that are attributed to the recipient of the disregarded payment.

(*8*) *Remittance.* The term *remittance* means the excess of a disregarded payment, other than an amount that is treated as a contribution under paragraph (d)(3)(v)(E)(*2*) of this section, made by a taxable unit to a second taxable unit (including a second taxable unit that shares the same owner as the payor taxable unit) over the portion of the disregarded payment, if any, that is a reattribution payment.

(*9*) *Taxable unit.* In the case of a taxpayer that is an individual or a domestic corporation, the term *taxable unit* means a foreign branch, a foreign branch owner, or a non-branch taxable unit, as defined in § 1.904–6(b)(2)(i)(B). In the case of a taxpayer that is a foreign corporation, the term *taxable unit* means a tested unit, as defined in § 1.951A–2(c)(7)(iv)(A).

(vi) *Foreign gross income included by reason of U.S. equity hybrid instrument ownership*—(A) *Foreign gross income included by reason of an accrual.* Foreign gross income included by reason of an accrual under foreign law with respect to a U.S. equity hybrid instrument is considered to arise from the same transaction or realization event as a distribution of property described in paragraph (d)(3)(i) or (ii) of this section and is assigned to the statutory and residual groupings by treating each amount accrued as a foreign law distribution made on the date of the accrual under foreign law.

(B) *Foreign gross income included by reason of a payment.* Foreign gross income included by reason of a payment of interest under foreign law with respect to a U.S. equity hybrid instrument is considered to arise from the same transaction or realization event as a distribution of property described in paragraph (d)(3)(i) or (ii) of this section and is assigned to the statutory and residual groupings by treating each payment as a distribution made on the date of the payment.

* * * * *

(g) * * *

(10) *Example 9: Gain on disposition of stock*—(i) *Facts.* USP owns all of the outstanding stock of CFC, which conducts business in Country A. In Year 1, USP sells all of the stock of CFC to US2 for $1,000x. For Country A tax purposes, USP's basis in the stock of CFC is $200x. Accordingly, USP

recognizes $800x of gain on which Country A imposes $80x of foreign income tax based on its rules for taxing capital gains of nonresidents, which satisfy the requirement in § 1.901–2(b)(5)(i)(C). For Federal income tax purposes, USP's basis in the stock of CFC is $400x. Accordingly, USP recognizes $600x of gain on the sale of the stock of CFC, of which $150x is included in the gross income of USP as a dividend under section 1248(a) that, as provided in section 1248(j), is treated as a dividend eligible for the deduction under section 245A(a). Under paragraphs (b)(20) and (21) of this section, respectively, the sale of CFC stock by USP gives rise to a $450x U.S. capital gain amount and a $150x U.S. dividend amount. Under §§ 1.904–4(d) and 1.904–5(c)(4), the $150x U.S. dividend amount is general category section 245A subgroup income, and the $450x U.S. capital gain amount is passive category income to USP. For purposes of allocating and apportioning its interest expense under §§ 1.861–9(g)(2)(i)(B) and 1.861–13, USP's stock in CFC is characterized as general category stock in the section 245A subgroup.

(ii) *Analysis.* For purposes of allocating and apportioning the $80x of Country A foreign income tax, the $800x of Country A gross income from the sale of the stock of CFC is first assigned to separate categories. Under paragraph (d)(3)(i)(D) of this section, the $800x of Country A gross income is first assigned to the separate category to which the $150x U.S. dividend amount is assigned, to the extent thereof, and is next assigned to the separate category to which the $450x U.S. capital gain amount is assigned, to the extent thereof. Accordingly, $150x of Country A gross income is assigned to the general category in the section 245A subgroup, and $450x of Country A gross income is assigned to the passive category. Under paragraph (d)(3)(i)(D) of this section, the remaining $200x of Country A gross income is assigned to the statutory and residual groupings to which earnings of CFC in that amount would be assigned if they were recognized for Federal income tax purposes in the U.S. taxable year in which the disposition occurred. These earnings are all deemed to arise in the section 245A subgroup of the general category, based on USP's characterization of its stock in CFC. Thus, under paragraph (d)(3)(i)(D) of this section the $800x of foreign gross income, and therefore the foreign taxable income, is characterized as $350x ($150x + $200x) of income in the general category section 245A subgroup and $450x of income in the passive category. This is the result even though for Country A tax purposes all $800x of Country A gross income is characterized as gain from the sale of stock, which would be passive category income under section 904(d)(2)(B)(i), because the income is assigned to a separate category based on the characterization of the gain under Federal income tax law. Under paragraph (f) of this section, the $80x of Country A tax is ratably apportioned between the general category section 245A subgroup and the passive category based on the relative amounts of foreign taxable income in each grouping. Accordingly, $35x ($80x × $350x/$800x) of the Country A tax is apportioned to the general category section 245A subgroup, and $45x ($80x × $450x/$800x) of the Country A tax is apportioned to the passive category. See also § 1.245A(d)–1 for rules that may disallow a credit or deduction for the $35x of Country A tax apportioned to the general category section 245A subgroup.

(11) *Example 10: Disregarded transfer of built-in gain property*—(i) *Facts.* USP owns FDE, a disregarded entity that is treated for Federal income tax purposes as a foreign branch operating in Country A. FDE transfers Asset F, equipment used in FDE's trade or business in Country A, for no consideration to USP in a transaction that is a remittance described in paragraph (d)(3)(v)(E) of this section for Federal income tax purposes but is treated as a distribution of Asset F from a corporation to its shareholder, USP, for Country A tax purposes. At the time of the transfer, Asset F has a fair market value of $250x and an adjusted basis of $100x for both Federal and Country A income tax purposes. Country A imposes $30x of tax on FDE with respect to the $150x of built-in gain on a deemed sale of Asset F, which is recognized for Country A tax purposes by reason of the transfer to USP. If FDE had sold Asset F for $250x in a transaction that was regarded for Federal income tax purposes, FDE would also have recognized gain of $150x for Federal income tax purposes, and that gain would have been characterized as foreign branch category income under § 1.904–4(f). Country A also imposes $25x of withholding tax, a separate levy, on USP by reason of the distribution of Asset F to USP.

(ii) *Analysis*—(A) *Net income tax on built-in gain.* For purposes of allocating and apportioning the $30x of Country A foreign income tax imposed on FDE by reason of the transfer of Asset F to USP for Country A tax purposes, under paragraph (c)(1) of this section the $150x of Country A gross income is first assigned to a separate category. Because the transfer does not result in a deemed sale for Federal income tax purposes, there is no corresponding U.S. item. However, FDE would have recognized gain of $150x, which would have been the corresponding U.S. item, if the deemed sale had been recognized for Federal income tax purposes. Therefore, under paragraph (d)(2)(ii) of this section, the $150x item of foreign gross income is characterized and assigned to the grouping to which such corresponding U.S. item would have been assigned if the deemed sale were recognized under Federal income tax law. Because the sale of Asset F in a regarded transaction would have resulted in foreign branch category income, the foreign gross income is characterized as foreign branch category income. Under paragraph (f) of this section, the $30x of Country A tax is also allocated to the foreign branch category, the statutory grouping to which the $150x of Country A gross income is assigned. No apportionment of the $30x of Country A tax is necessary because the class of gross income to which the foreign gross income is allocated consists entirely of a single statutory grouping.

(B) *Withholding tax on distribution.* For purposes of allocating and apportioning the $25x of Country A withholding tax imposed on USP by reason of the transfer of Asset F, under paragraph (c)(1) of this section the $250x of Country A gross income arising from the transfer of Asset F is first assigned to a separate category. For Federal income tax purposes, the transfer of Asset F is a remittance from FDE to USP, and thus there is no corresponding U.S. item. Under paragraph (d)(3)(v)(C)(*1*)(*i*) of this section, the item of foreign gross income is assigned to the groupings to which the income out of which the payment is made is assigned; the payment is considered to be made ratably out of all of the accumulated after-tax income of FDE, as computed for Federal income tax purposes; and the accumulated after-tax income of FDE is deemed to have arisen in the statutory and residual groupings in the same proportions as those in which the tax book value of FDE's assets in the groupings, determined in accordance with paragraph (d)(3)(v)(C)(*1*)(*ii*) of this section, are assigned for purposes of apportioning USP's interest expense. Because all of FDE's assets produce foreign branch category income, under paragraph (d)(3)(v)(C)(*1*) of this section the foreign gross income is

characterized as foreign branch category income. Under paragraph (f) of this section, the $25x of Country A withholding tax is also allocated entirely to the foreign branch category, the statutory grouping to which the $250x of Country A gross income is assigned. No apportionment of the $25x is necessary because the class of gross income to which the foreign gross income is allocated consists entirely of a single statutory grouping.

(12) *Example 11: Disregarded payment that is a remittance*—(i) *Facts.* USP wholly owns CFC1, which is a tested unit within the meaning of § 1.951A–2(c)(7)(iv)(A) (the ''CFC1 tested unit''). CFC1 wholly owns FDE, a disregarded entity that is organized in Country B, which is a tested unit within the meaning of § 1.951A–2(c)(7)(iv)(A) (the ''FDE tested unit''). The sole assets of FDE (determined in accordance with paragraph (d)(3)(v)(C)(*1*)(*ii*) of this section) are all the outstanding stock of CFC3, a controlled foreign corporation organized in Country B. In Year 1, CFC3 pays a $400x dividend to FDE that is excluded from CFC1's foreign personal holding company income (''FPHCI'') by reason of section 954(c)(6). FDE makes no payments to CFC1 and pays no Country B tax in Year 1. In Year 2, FDE makes a $400x remittance to CFC1 as defined in paragraph (d)(3)(v)(E) of this section. Under the laws of Country B, the remittance gives rise to a $400x dividend. Country B imposes a 5% ($20x) withholding tax (which is an eligible current year tax as defined in § 1.960–1(b)) on CFC1 on the dividend. In Year 2, CFC3 pays no dividends to FDE, and FDE earns no income. For Federal income tax purposes, the $400x payment from FDE to CFC1 is a disregarded payment and results in no income to CFC1. For purposes of this paragraph (g)(12) (*Example 11*), section 960(a) is the operative section and the income groups described in § 1.960–1(d)(2) are the statutory and residual groupings. See § 1.960–1(d)(3)(ii)(A) (applying § 1.960–1 to allocate and apportion current year taxes to income groups). For Federal income tax purposes, in Year 2 the stock of CFC3 owned by FDE has a tax book value of $1,000x, $750x of which is assigned under the asset method in § 1.861–9 (as applied by treating CFC1 as a United States person) to the general category tested income group described in § 1.960–1(d)(2)(ii)(C), and $250x of which is assigned to a passive category FPHCI group described in § 1.960–1(d)(2)(ii)(B)(*2*)(*i*).

(ii) *Analysis.* (A) The $20x Country B withholding tax on the Year 2 remittance from FDE is imposed on a $400x item of foreign gross income that CFC1 includes in foreign gross income by reason of its receipt of a disregarded payment. In order to allocate and apportion the $20x of Country B withholding tax under paragraph (c) of this section for purposes of § 1.960–1(d)(3)(ii)(A), paragraph (d)(3)(v) of this section applies to assign the $400x item of foreign gross dividend income to a statutory or residual grouping. Under paragraph (d)(3)(v)(C)(*1*) of this section, the $400x item of foreign gross income is assigned to the statutory or residual groupings of the CFC1 tested unit that correspond to the statutory and residual groupings out of which FDE made the remittance.

(B) Under paragraph (d)(3)(v)(C)(*1*)(*i*) of this section, FDE is considered to have made the remittance ratably out of all of its accumulated after-tax income, which is deemed to have arisen in the statutory and residual groupings in the same proportions as the proportions in which the tax book value of FDE's assets would be assigned (if CFC1 were a United States person) for purposes of apportioning interest expense under the asset method in Year 2, the taxable year in which FDE made the remittance. Accordingly, $300x ($400x × $750x/$1,000x) of the remittance is deemed made out of the general category tested income of the FDE tested unit, and $100x ($400x × $250x/$1,000x) of the remittance is deemed made out of the passive category FPHCI of the FDE tested unit.

(C) Under paragraph (d)(3)(v)(C)(*1*)(*i*) of this section, $300x of the $400x item of foreign gross income from the remittance, and therefore an equal amount of foreign taxable income, is assigned to the income group that includes general category tested income attributable to the CFC1 tested unit, and $100x of this foreign gross income item, and therefore an equal amount of foreign taxable income, is assigned to the income group that includes passive category FPHCI attributable to the CFC1 tested unit. Under paragraph (f) of this section, the $20x of Country B withholding tax is ratably apportioned between the income groups based on the relative amounts of foreign taxable income in each grouping. Accordingly, $15x ($20x × $300x/$400x) of the Country B withholding tax is apportioned to the CFC1 tested unit's general category tested income group, and $5x ($20x × $100x/$400x) of the Country B withholding tax is apportioned to the CFC1 tested unit's passive category FPHCI income group. See § 1.960–2 for rules on determining the amount of such taxes that may be deemed paid under section 960(a) and (d).

(13) *Example 12: Disregarded payment that is a reattribution payment*—(i) *Facts.* (A) USP wholly owns CFC1, a tested unit within the meaning of § 1.951A–2(c)(7)(iv)(A)(*1*) (the ''CFC1 tested unit''). CFC1 wholly owns FDE1, a disregarded entity organized in Country B, that is a tested unit within the meaning of § 1.951A–2(c)(7)(iv)(A)(*2*) (the ''FDE1 tested unit''). Country B imposes a 20 percent net income tax on its residents. CFC1 also wholly owns FDE2, a disregarded entity organized in Country C, that is a tested unit within the meaning of § 1.951A–2(c)(7)(iv)(A)(*2*) (the ''FDE2 tested unit''). Country C imposes a 15 percent net income tax on its residents. The net income tax imposed by each of Country B and Country C on their tax residents is a foreign income tax within the meaning of § 1.901–2(a) and a separate levy within the meaning of § 1.901–2(d). For purposes of this paragraph (g)(13) (*Example 12*), the operative section is the high-tax exclusion of section 951A(c)(2)(A)(i)(III) and § 1.951A–2(c)(7), and the statutory groupings are the tested income groups of each tested unit, as defined in § 1.951A–2(c)(7)(iv)(A).

(B) FDE2 owns Asset A, which is intangible property with a tax book value of $12,000x that is properly reflected on the separate set of books and records of FDE2. In Year 1, pursuant to a license agreement between FDE1 and FDE2 for the use of Asset A, FDE1 makes a disregarded royalty payment to FDE2 of $1,000x that would be deductible if regarded for Federal income tax purposes. Because it is disregarded for Federal income tax purposes, the $1,000x disregarded royalty payment by FDE1 to FDE2 results in no income to CFC1 for Federal income tax purposes. Also, in Year 1, pursuant to a sub-license agreement between FDE1 and an unrelated third party for the use of Asset A, FDE1 earns $1,200x of royalty income for Federal income tax purposes (the ''U.S. gross royalty'') for the use of Asset A. The $1,200 of royalty income received by FDE1 from the unrelated third party is excluded from CFC1's foreign personal holding company income by reason of the active business exception in section 954(c)(2) because CFC1 satisfies the requirements of § 1.954–2(d)(1). As a result, the $1,200x of royalty income that FDE1 earns from the sub-license agreement is gross tested income (as defined in § 1.951A–2(c)(1)), which is properly reflected on the separate set of books and records of FDE1.

(C) Under the laws of Country B, the transaction that gives rise to the $1,200x item of U.S. gross royalty income causes FDE1 to include a $1,200x item of gross royalty income in its Country B taxable income (the ''Country B gross royalty''). In addition, FDE1 deducts its $1,000x disregarded royalty payment to FDE2 for Country B tax purposes. For Country B tax purposes, FDE1 therefore has $200x ($1,200x − $1,000x) of taxable income on which Country B imposes $40x (20% × $200x) of net income tax.

(D) Under the laws of Country C, the $1,000x disregarded royalty payment from FDE1 to FDE2 causes FDE2 to include a $1,000x item of gross royalty income in its Country C taxable income (the ''Country C gross royalty''). FDE2 therefore has $1,000x of taxable income for Country C tax purposes, on which Country C imposes $150x (15% × $1,000x) of net income tax.

(ii) *Analysis*—(A) *Country B net income tax*—(*1*) The Country B net income tax is imposed on foreign taxable income of FDE1 that consists of a $1,200x item of Country B gross royalty income and a $1,000x item of royalty expense. For Federal income tax purposes, the FDE1 tested unit has a $1,200x item of U.S. gross royalty income that is initially attributable to it under paragraph (d)(3)(v)(B)(*2*) of this section and § 1.951A–2(c)(7)(ii)(B). The transaction that produced the $1,200x item of U.S. gross royalty income also produced the $1,200x item of Country B gross royalty income. Under paragraph (b)(2) of this section, the $1,200x item of U.S. gross royalty income is therefore the corresponding U.S. item for the $1,200x item of Country B gross royalty income of FDE1.

(*2*) The $1,000x disregarded royalty payment from FDE1 to FDE2 is allocated under paragraph (d)(3)(v)(B)(*2*) of this section and § 1.951A–2(c)(7)(ii)(B) to the $1,200x of U.S. gross income of the FDE1 tested unit to the extent of that gross income. As a result, the $1,000x disregarded royalty payment causes $1,000x of the $1,200x item of U.S. gross royalty income to be reattributed from the FDE1 tested unit to the FDE2 tested unit, and results in a $1,000x reattribution amount that is also a reattribution payment.

(*3*) The $1,200x Country B gross royalty item that is included in the Country B taxable income of FDE1 is assigned under paragraph (d)(1) of this section to the statutory or residual grouping to which the $1,200x corresponding U.S. item is initially assigned under § 1.951A–2(c)(7)(ii), namely, the FDE1 income group. This assignment is made without regard to the $1,000x reattribution payment from the FDE1 tested unit to the FDE2 tested unit; none of the FDE1 tested unit's $1,200x Country B gross royalty income is reattributed to the FDE2 tested unit for this purpose. See paragraph (d)(3)(v)(B)(*3*) of this section. Under paragraph (f) of this section, all of the $40x of Country B net income tax on the $200x of Country B taxable income is allocated to the FDE1 income group, the statutory grouping to which the $1,200x item of Country B gross royalty income of FDE1 is assigned. No apportionment of the $40x is necessary because the class of gross income to which the foreign gross income is allocated consists entirely of a single statutory grouping.

(B) *Country C net income tax.* The Country C net income tax is imposed on foreign taxable income of FDE2 that consists of a $1,000x item of Country C gross royalty income. For Federal income tax purposes, under paragraph (d)(3)(v)(B)(*2*) of this section and § 1.951A–2(c)(7)(ii)(B), the FDE2 tested unit has a reattribution amount of $1,000x of U.S. gross royalty income by reason of its receipt of the $1,000x reattribution payment from FDE1. The $1,000x item of U.S. gross royalty income that is included in the taxable income of the FDE2 tested unit by reason of the $1,000x reattribution payment is assigned under paragraph (d)(3)(v)(B)(*1*) of this section to the statutory or residual grouping to which the $1,000x reattribution amount of U.S. gross royalty income that constitutes the reattribution payment is assigned upon receipt by the FDE2 tested unit under § 1.951A–2(c)(7)(ii), namely, the FDE2 income group. Under paragraph (d)(3)(v)(B)(*1*) of this section, the $1,000x item of Country C gross royalty income is assigned to the statutory grouping to which the $1,000x corresponding U.S. item is assigned. Accordingly, under paragraph (f) of this section, all of the $150x of Country C net income tax is allocated to the FDE2 income group, the statutory grouping to which the $1,000x item of Country C gross royalty income of FDE2 is assigned. No apportionment of the $150x is necessary because the class of gross income to which the foreign gross income is allocated consists entirely of a single statutory grouping.

(14) *Example 13: Assets of a taxable unit that owns an interest in a lower-tier taxable unit*—(i) *Facts.* USP wholly owns CFC1, a tested unit within the meaning of § 1.951A–2(c)(7)(iv)(A) (the ''CFC1 tested unit''). CFC1 wholly owns FDE1, a disregarded entity that is organized in Country A, and FDE2, a disregarded entity that is organized in Country B. CFC1's interests in FDE1 and FDE2 are each tested units within the meaning of § 1.951A–2(c)(7)(iv)(A) (the ''FDE1 tested unit'' and ''FDE2 tested unit'', respectively). The FDE1 tested unit and FDE2 tested unit each own 50% of the interests in FDE3, a disregarded entity that is organized in Country C. CFC1's indirect interests in FDE3 are also a tested unit within the meaning of § 1.951A–2(c)(7)(iv)(A) (the ''FDE3 tested unit''). The FDE2 tested unit owns Asset A with a tax book value of $10,000x, and makes a reattribution payment to FDE3 that causes $5,000x of the tax book value of Asset A to be assigned to FDE3 under paragraph (d)(3)(v)(C)(*1*)(*ii*) of this section. FDE3 owns Asset B, which has a tax book value of $5,000x.

(ii) *Analysis*—(A) *Assets of the FDE3 tested unit.* The assets of the FDE3 tested unit consist of the portion of Asset A that is assigned to it under paragraph (d)(3)(v)(C)(*1*)(*ii*) of this section and any other assets determined in accordance with § 1.987–6(b). The assets of the FDE3 tested unit thus consist of $5,000x of the tax book value of Asset A and all $5,000x of the tax book value of Asset B.

(B) *Assets of the FDE2 tested unit.* The assets of the FDE2 tested unit consist of the tax book value of any assets that it owns directly plus its pro rata share of the assets of the FDE3 tested unit, including the portion of reattribution assets assigned to the FDE3 tested unit. Asset A is a reattribution asset under paragraphs (d)(3)(v)(C)(*1*)(*ii*) and (d)(3)(v)(E) of this section. The assets of the FDE2 tested unit therefore consist of the portion of Asset A that it owns directly and that was not assigned to the FDE3 tested unit (or $5,000x) plus its pro rata share of the portion of Asset A that was assigned to the FDE3 tested unit, or $2,500x (50% of $5,000x). In addition, the assets of the FDE2 tested unit include its pro rata share of the tax book value of Asset B, or $2,500x (50% of $5,000x).

(C) *Assets of the FDE1 tested unit.* The assets of the FDE1 tested unit consist of its pro rata share of the assets of the FDE3 tested unit, including the portion of reattribution assets assigned to the FDE3 tested unit. Asset A is a reattribution asset under paragraphs (d)(3)(v)(C)(*1*)(*ii*) and (d)(3)(v)(E) of this section. The assets of the FDE1 tested unit therefore consist of its pro rata share of the portion of Asset A that was reattributed to the FDE3 tested unit, or $2,500x (50% of $5,000x), plus its pro rata share of the tax book value of Asset B, or $2,500x (50% of $5,000x).

(h) *Allocation and apportionment of certain foreign in lieu of taxes described in section 903.* A tax that is a foreign

income tax by reason of § 1.903–1(c)(1) is allocated and apportioned to statutory and residual groupings in the same proportions as the foreign taxable income that comprises the excluded income (as defined in § 1.903–1(c)(1)). See paragraph (f) of this section for rules on allocating and apportioning certain withholding taxes described in § 1.903–1(c)(2).

(i) *Applicability dates.* Except as provided in this paragraph (i), this section applies to taxable years beginning after December 31, 2019. Paragraphs (b)(19) and (23) and (d)(3)(i), (ii), and (v) of this section apply to taxable years that begin after December 31, 2019, and end on or after November 2, 2020. Paragraph (h) of this section applies to taxable years beginning after December 28, 2021.

■ **Par. 23.** Section 1.901–1 is amended:

■ 1. By revising the section heading.

■ 2. By revising paragraphs (a) through (d).

■ 3. In paragraph (e), by removing the language ''a husband and wife'' and adding the language ''spouses'' in its place.

■ 4. By revising paragraphs (f) and (h)(1).

■ 5. By removing paragraph (h)(2).

■ 6. By redesignating paragraph (h)(3) as paragraph (h)(2).

■ 7. By revising the heading and second sentence in paragraph (j).

The revisions and additions read as follows:

§ 1.901–1 Allowance of credit for foreign income taxes.

(a) *In general.* Citizens of the United States, domestic corporations, certain aliens resident in the United States or Puerto Rico, and certain estates and trusts may choose to claim a credit, as provided in section 901, against the tax imposed by chapter 1 of the Internal Revenue Code (Code) for certain taxes paid or accrued to foreign countries and possessions of the United States, subject to the conditions prescribed in this section.

(1) *Citizen of the United States.* An individual who is a citizen of the United States, whether resident or nonresident, may claim a credit for—

(i) The amount of any foreign income taxes, as defined in § 1.901–2(a), paid or accrued (as the case may be, depending on the individual's method of accounting for such taxes) during the taxable year;

(ii) The individual's share of any such taxes of a partnership of which the individual is a member, or of an estate or trust of which the individual is a beneficiary; and

(iii) In the case of an individual who has made an election under section 962, the taxes deemed to have been paid under section 960 (see § 1.962–1(b)(2)).

(2) *Domestic corporation.* A domestic corporation may claim a credit for—

(i) The amount of any foreign income taxes, as defined in § 1.901–2(a), paid or accrued (as the case may be, depending on the corporation's method of accounting for such taxes) during the taxable year;

(ii) The corporation's share of any such taxes of a partnership of which the corporation is a member, or of an estate or trust of which the corporation is a beneficiary; and

(iii) The taxes deemed to have been paid under section 960.

(3) *Alien resident of the United States or Puerto Rico.* Except as provided in a Presidential proclamation described in section 901(c), an individual who is a resident alien of the United States (as defined in section 7701(b)), or an individual who is a bona fide resident of Puerto Rico (as defined in section 937(a)) during the entire taxable year, may claim a credit for—

(i) The amount of any foreign income taxes, as defined in § 1.901–2(a), paid or accrued (as the case may be, depending on the individual's method of accounting for such taxes) during the taxable year;

(ii) The individual's share of any such taxes of a partnership of which the individual is a member, or of an estate or trust of which the individual is a beneficiary; and

(iii) In the case of an individual who has made an election under section 962, the taxes deemed to have been paid under section 960 (see § 1.962–1(b)(2)).

(4) *Estates and trusts.* An estate or trust may claim a credit for—

(i) The amount of any foreign income taxes, as defined in § 1.901–2(a), paid or accrued (as the case may be, depending on the estate or trust's method of accounting for such taxes) during the taxable year to the extent not allocable to and taken into account by its beneficiaries under paragraph (a)(1)(ii), (a)(2)(ii), or (a)(3)(ii) of this section (see section 642(a)); and

(ii) In the case of an estate or trust that has made an election under section 962, the taxes deemed to have been paid under section 960 (see § 1.962–1(b)(2)).

(b) *Limitations.* Certain Code sections, including sections 245A(d) and (e)(3), 814, 901(e) through (m), 904, 906, 907, 908, 909, 911, 965(g), 999, and 6038, reduce, defer, or otherwise limit the credit against the tax imposed by chapter 1 of the Code for certain amounts of foreign income taxes.

(c) *Deduction denied if credit claimed*—(1) *In general.* Except as provided in paragraphs (c)(2) and (3) of this section, if a taxpayer chooses with respect to any taxable year to claim a credit under section 901 to any extent, such choice will apply to all of the foreign income taxes paid or accrued (as the case may be, depending on the taxpayer's method of accounting for such taxes) by the taxpayer in such taxable year, and no deduction from gross income is allowed for any portion of such taxes in any taxable year. See section 275(a)(4).

(2) *Exception for taxes not subject to section 275.* A deduction may be allowed under section 164(a)(3) for foreign income tax for which a credit is disallowed under any Code section and to which section 275 does not apply. See, for example, sections 901(f), 901(j)(3), 901(k)(7), 901(l)(4), 901(m)(6), and 908(b). For rules on the taxable year in which a deduction for foreign income taxes is allowed under section 164(a)(3), see §§ 1.446–1(c)(1)(ii), 1.461–2(a)(2), and 1.461–4(g)(6)(iii)(B).

(3) *Exception for taxes paid by an accrual basis taxpayer that relate to a prior year in which the taxpayer deducted foreign income taxes.* If a taxpayer claims a credit for foreign income taxes accrued in a taxable year (including a cash method taxpayer that elects under section 905(a) to claim a credit in the year the taxes accrue), a deduction may be claimed in that taxable year for additional foreign income taxes that are finally determined and paid as a result of a foreign tax redetermination in that taxable year if the additional foreign income taxes relate to a prior taxable year in which the taxpayer claimed a deduction, rather than a credit, for foreign income taxes paid or accrued (as the case may be, depending on the taxpayer's overall method of accounting) in that prior year.

(4) *Example.* The following example illustrates the application of paragraph (c)(3) of this section.

(i) *Facts.* U.S.C. is a domestic corporation that is engaged in a trade or business in Country X through a branch. U.S.C. uses the accrual method of accounting and a calendar year for U.S. and Country X tax purposes. For taxable Years 1 through 3, U.S.C. deducted foreign income taxes accrued in those years. In Years 4 through 6, U.S.C. claimed a credit for foreign income taxes accrued in those years. In Year 6, U.S.C. paid an additional $50x tax to Country X that relates to Year 1 because of the close of a Country X tax audit.

(ii) *Analysis.* The additional $50x Country X tax paid by U.S.C. in Year 6 that relates to Year 1 cannot be claimed by U.S.C. as a deduction on an amended return for Year 1 because the additional tax accrued in Year 6. See section 461(f)

(flush language); §§ 1.461–1(a)(2)(i) and 1.461–2(a)(2). In addition, because the additional $50x Country X tax relates to and is considered to accrue in Year 1 for foreign tax credit purposes, U.S.C. cannot claim a credit for the additional $50x Country X tax on its Federal income tax return for Year 6. See § 1.905–1(d)(1). However, pursuant to paragraph (c)(3) of this section, U.S.C. can claim a deduction for the additional $50x Country X tax that relates to Year 1 on its Federal income tax return for Year 6, even though it claims a credit for foreign income taxes that accrue in Year 6 and that relate to Year 6.

(d) *Period during which election can be made or changed*—(1) *In general.* The taxpayer may, for a particular taxable year, elect to claim a credit under section 901 (or claim a deduction in lieu of electing to claim a credit) at any time before the expiration of the period within which a claim for credit or refund of Federal income tax for such taxable year that is attributable to such credit or deduction, as the case may be, may be made (or, if longer, the period prescribed by section 6511(c) if the refund period for that taxable year is extended by an agreement to extend the assessment period under section 6501(c)(4)). Thus, an election to claim a credit for foreign income taxes paid or accrued (as the case may be, depending on the taxpayer's method of accounting for such taxes) in a particular taxable year can be made within the period prescribed by section 6511(d)(3)(A) for claiming a credit or refund of Federal income tax for that taxable year that is attributable to a credit for the foreign income taxes paid or accrued in that particular taxable year or, if longer, the period prescribed by section 6511(c) with respect to that particular taxable year. A choice to claim a deduction under section 164(a)(3), rather than a credit under section 901, for foreign income taxes paid or accrued in a particular taxable year can be made within the period prescribed by section 6511(a) or 6511(c), as applicable, for claiming a credit or refund of Federal income tax for that particular taxable year.

(2) *Manner in which election is made or changed.* A taxpayer claims a deduction or a credit for foreign income taxes paid or accrued in a particular taxable year by filing an original or amended return for that taxable year within the relevant period specified in paragraph (d)(1) of this section. A claim for a credit shall be accompanied by Form 1116 in the case of an individual, estate or trust, and by Form 1118 in the case of a corporation (and an individual, estate or trust making an election under section 962). See §§ 1.905–3 and 1.905–4 for rules requiring the filing of amended returns for all affected years when a timely change in the taxpayer's election to claim a deduction or credit results in U.S. tax deficiencies.

* * * * *

(f) *Taxes against which credit is allowed.* The credit for foreign income taxes is allowed only against the tax imposed by chapter 1 of the Code. The credit is not allowed against a tax that, under section 26(b)(2), is not treated as a tax imposed by such chapter.

* * * * *

(h) * * *

(1) Except as provided in paragraphs (c)(2) and (3) of this section, a taxpayer that claims a deduction for foreign income taxes paid or accrued (as the case may be, depending on the taxpayer's method of accounting for such taxes) for that taxable year (see sections 164 and 275); and

* * * * *

(j) *Applicability date.* * * * This section applies to foreign taxes paid or accrued in taxable years beginning on or after December 28, 2021.

■ **Par. 24.** Section 1.901–2 is amended:

■ 1. By revising paragraph (a) heading and paragraph (a)(1).

■ 2. By revising paragraph (a)(3).

■ 3. By revising paragraph (b).

■ 4. By removing and reserving paragraph (c).

■ 5. By revising paragraphs (d) and (e).

■ 6. By revising paragraph (f)(2)(ii).

■ 7. In paragraph (f)(3)(ii)(A), by removing the language ''§ 1.909–2T(b)(2)(vi)'' and adding the language ''§ 1.909–2(b)(2)(vi)'' in its place.

■ 8. In paragraph (f)(3)(iii)(B)(*2*), by removing the language ''§ 1.909–2T(b)(3)(i)'' and adding the language ''§ 1.909–2(b)(3)(i)'' in its place and by removing the language ''or accrued''.

■ 9. By revising paragraphs (f)(4) through (6) and adding paragraph (f)(7).

■ 10. By revising paragraphs (g) and (h).

The revisions and additions read as follows:

§ 1.901–2 Income, war profits, or excess profits tax paid or accrued.

(a) *Definition of foreign income tax*—(1) *Overview and scope.* Paragraphs (a) and (b) of this section define a foreign income tax for purposes of section 901. Paragraph (c) of this section is reserved. Paragraph (d) of this section contains rules describing what constitutes a separate levy. Paragraph (e) of this section provides rules for determining the amount of foreign income tax paid by a taxpayer. Paragraph (f) of this section contains rules for determining by whom foreign income tax is paid. Paragraph (g) of this section defines the terms used in this section, and in particular provides that the term ''paid'' means ''paid'' or ''accrued,'' depending on the taxpayer's method of accounting for foreign income taxes. Paragraph (h) of this section provides the applicability date for this section.

(i) *In general.* Section 901 allows a credit for the amount of income, war profits, and excess profits taxes paid during the taxable year to any foreign country, and section 903 provides that for purposes of Part III of subchapter N of the Code and sections 164(a) and 275(a), such taxes include a tax paid in lieu of a tax on income, war profits or excess profits that is otherwise generally imposed by a foreign country (collectively, for purposes of this section, a ''foreign income tax''). Whether a foreign levy is a foreign income tax is determined independently for each separate levy. A foreign tax either is or is not a foreign income tax, in its entirety, for all persons subject to the foreign tax.

(ii) *Requirements.* A foreign levy is a foreign income tax only if—

(A) It is a foreign tax; and

(B) Either:

(*1*) The foreign tax is a net income tax, as defined in paragraph (a)(3) of this section; or

(*2*) The foreign tax is a tax in lieu of an income tax, as defined in § 1.903–1(b).

(iii) *Coordination with treaties.* A foreign levy that is treated as an income tax under the relief from double taxation article of an income tax treaty entered into by the United States and the foreign country imposing the tax is a foreign income tax if paid by a citizen or resident of the United States (as determined under such income tax treaty) that elects benefits under the treaty. In addition, a foreign levy paid by a controlled foreign corporation that is modified by an applicable income tax treaty between the foreign jurisdiction of which the controlled foreign corporation is a resident and the foreign jurisdiction imposing the tax may qualify as a foreign income tax notwithstanding that the unmodified foreign levy does not satisfy the requirements in paragraph (b) of this section or the requirements of § 1.903–1(b) if the levy, as modified by such treaty, satisfies the requirements of paragraph (b) of this section or the requirements of § 1.903–1(b). See paragraph (d)(1)(iv) of this section for rules treating as a separate levy a foreign tax that is limited in its application or otherwise modified by the terms of an

income tax treaty to which the foreign country imposing the tax is a party.

* * * * *

(3) *Net income tax.* A foreign tax is a net income tax only if the foreign tax meets the net gain requirement in paragraph (b) of this section.

(b) *Net gain requirement*—(1) *In general.* A foreign tax satisfies the net gain requirement only if the tax satisfies the realization, gross receipts, cost recovery, and attribution requirements in paragraphs (b)(2), (3), (4), and (5) of this section, respectively, or if the foreign tax is a surtax described in paragraph (b)(6) of this section. Paragraphs (b)(2) through (6) of this section are applied with respect to a foreign tax solely on the basis of the foreign tax law governing the calculation of the foreign taxable base, unless otherwise provided, and without any consideration of the rate of tax imposed on the foreign taxable base.

(2) *Realization requirement*—(i) *In general.* A foreign tax satisfies the realization requirement if it is imposed upon one or more of the events described in paragraphs (b)(2)(i)(A) through (C) of this section. If a foreign tax meets the realization requirement in paragraphs (b)(2)(i)(A) through (C) of this section except with respect to one or more specific and defined classes of nonrealization events (such as, for example, imputed rental income from a personal residence used by the owner), and as judged based on the application of the foreign tax to all taxpayers subject to the foreign tax, the incidence and amounts of gross receipts attributable to such nonrealization events is insignificant relative to the incidence and amounts of gross receipts attributable to events covered by the foreign tax that do meet the realization requirement, then the foreign tax is treated as meeting the realization requirement in paragraph (b)(2) of this section (despite the fact that the foreign tax is also imposed on the basis of some nonrealization events, and that some persons subject to the foreign tax may only be taxed on nonrealization events).

(A) *Realization events.* The foreign tax is imposed upon or after the occurrence of events (''realization events'') that result in the realization of income under the income tax provisions of the Internal Revenue Code.

(B) *Pre-realization recapture events.* The foreign tax is imposed upon the occurrence of an event before a realization event (a ''pre-realization event'') that results in the recapture (in whole or part) of a tax deduction, tax credit, or other tax allowance previously accorded to the taxpayer (for example, the recapture of an incentive tax credit if required investments are not completed within a specified period).

(C) *Pre-realization timing difference events.* The foreign tax is imposed upon the occurrence of a pre-realization event, other than one described in paragraph (b)(2)(i)(B) of this section, but only if the foreign country does not, upon the occurrence of a later event, impose tax under the same or a separate levy (a ''second tax'') on the same taxpayer (for purposes of this paragraph (b)(2)(i)(C), treating a disregarded entity as defined in § 301.7701–3(b)(2)(i)(C) of this chapter as a taxpayer separate from its owner), with respect to the income on which tax is imposed by reason of such pre-realization event (or, if it does impose a second tax, a credit or other comparable relief is available against the liability for such a second tax for tax paid on the occurrence of the pre-realization event) and—

(*1*) The imposition of the tax upon such pre-realization event is based on the difference in the fair market value of property at the beginning and end of a period;

(*2*) The pre-realization event is the physical transfer, processing, or export of readily marketable property (as defined in paragraph (b)(2)(ii) of this section) and the imposition of the tax upon the pre-realization event is based on the fair market value of such property; or

(*3*) The pre-realization event relates to a deemed distribution (for example, by a corporation to a shareholder) or inclusion (for example, under a controlled foreign corporation inclusion regime) of amounts (such as earnings and profits) that meet the realization requirement in paragraph (b)(2) of this section in the hands of the person that, under foreign tax law, is deemed to distribute such amounts.

(ii) *Readily marketable property.* Property is readily marketable if—

(A) It is stock in trade or other property of a kind that properly would be included in inventory if on hand at the close of the taxable year or if it is held primarily for sale to customers in the ordinary course of business, and

(B) It can be sold on the open market without further processing or it is exported from the foreign country.

(iii) *Examples.* The following examples illustrate the rules of paragraph (b)(2) of this section:

(A) *Example 1.* Residents of Country X are subject to a tax of 10 percent on the aggregate net appreciation in fair market value during the calendar year of all shares of stock held by them at the end of the year. In addition, all such residents are subject to a Country X tax that qualifies as a net income tax within the meaning of paragraph (a)(3) of this section. Included in the base of the net income tax are gains and losses realized on the sale of stock, and the basis of stock for purposes of determining such gain or loss is its cost. The operation of the stock appreciation tax and the net income tax as applied to sales of stock is exemplified as follows: A, a resident of Country X, purchases stock in June of Year 1 for 100u (units of Country X currency) and sells it in May of Year 3 for 160u. On December 31, Year 1, the stock is worth 120u and on December 31, Year 2, it is worth 155u. Pursuant to the stock appreciation tax, A pays 2u for Year 1 (10 percent of (120u − 100u)), 3.5u for Year 2 (10 percent of (155u − 120u)), and nothing for Year 3 because no stock was held at the end of that year. For purposes of the net income tax, A must include 60u (160u − 100u) in his income for Year 3, the year of sale. Pursuant to paragraph (b)(2)(i)(C) of this section, the stock appreciation tax does not satisfy the realization requirement because Country X imposes a second tax upon the occurrence of a later event (that is, the sale of stock) with respect to the income that was taxed by the stock appreciation tax and no credit or comparable relief is available against such second tax for the stock appreciation tax paid.

(B) *Example 2.* The facts are the same as those in paragraph (b)(2)(iii)(A) of this section (the facts in *Example 1*), except that if stock was held on the December 31 last preceding the date of its sale, the basis of such stock for purposes of computing gain or loss under the net income tax is the value of the stock on such December 31. Thus, in Year 3, A includes only 5u (160u − 155u) as income from the sale for purposes of the net income tax. Because the net income tax imposed upon the occurrence of a later event (the sale) does not impose a tax with respect to the income that was taxed by the stock appreciation tax, under paragraph (b)(2)(i)(C) of this section, the stock appreciation tax satisfies the realization requirement. The result would be the same if, instead of a basis adjustment to reflect taxation pursuant to the stock appreciation tax, the Country X net income tax allowed a credit (or other comparable relief) to take account of the stock appreciation tax. If a credit mechanism is used, see also paragraph (e)(4)(i) of this section.

(C) *Example 3.* Country X imposes a tax on the realized net income of corporations that do business in Country X. Country X also imposes a branch profits tax on corporations organized under the law of a country

other than Country X that do business in Country X. The branch profits tax is imposed when realized net income is remitted or deemed to be remitted by branches in Country X to home offices outside of Country X. Because the branch profits tax is imposed subsequent to the occurrence of events that would result in realization of income by corporations subject to such tax under the income tax provisions of the Internal Revenue Code, under paragraph (b)(2)(i)(A) of this section the branch profits tax satisfies the realization requirement.

(D) *Example 4.* Country X imposes a tax on the realized net income of corporations that do business in Country X (the ''Country X corporate tax''). Country X also imposes a separate tax on shareholders of such corporations (the ''Country X shareholder tax''). The Country X shareholder tax is imposed on the sum of the actual distributions received during the taxable year by such a shareholder from the corporation's realized net income for that year (that is, income from past years is not taxed in a later year when it is actually distributed) plus the distributions deemed to be received by such a shareholder. Deemed distributions are defined as a shareholder's pro rata share of the corporation's realized net income for the taxable year, less such shareholder's pro rata share of the corporation's Country X corporate tax for that year, less actual distributions made by such corporation to such shareholder from such net income. A shareholder's receipt of actual distributions is a realization event within the meaning of paragraph (b)(2)(i)(A) of this section. The deemed distributions are not realization events, but they are described in paragraph (b)(2)(i)(C)(*3*) of this section. Accordingly, the Country X shareholder tax satisfies the realization requirement.

(3) *Gross receipts requirement*—(i) *Rule.* A foreign tax satisfies the gross receipts requirement if it is imposed on the basis of the amounts described in paragraphs (b)(3)(i)(A) through (D) of this section.

(A) Actual gross receipts.

(B) In the case of either an insignificant nonrealization event described in the second sentence of paragraph (b)(2)(i) of this section or a realization event described in paragraph (b)(2)(i)(A) of this section that does not result in actual gross receipts, deemed gross receipts in an amount that is reasonably calculated to produce an amount that is not greater than fair market value.

(C) Deemed gross receipts in the amount of a tax deduction that is recaptured by reason of a pre-realization recapture event described in paragraph (b)(2)(i)(B) of this section.

(D) The amount of deemed gross receipts arising from pre-realization timing difference events described in paragraph (b)(2)(i)(C) of this section.

(ii) *Examples.* The following examples illustrate the rules of paragraph (b)(3)(i) of this section.

(A) *Example 1: Cost-plus tax*—(*1*) *Facts.* Country X imposes a ''cost-plus tax'' on Country X corporations that serve as regional headquarters companies for affiliated nonresident corporations, and this tax is a separate levy (within the meaning of paragraph (d)(1) of this section). A headquarters company for purposes of this tax is a corporation that performs administrative, management or coordination functions solely for nonresident affiliated entities. Due to the difficulty of determining on a case-by-case basis the arm's length gross receipts that headquarters companies would charge affiliates for such services, gross receipts of a headquarters company are deemed, for purposes of this tax, to equal 110 percent of the business expenses incurred by the headquarters company.

(*2*) *Analysis.* Because the cost-plus tax is based on costs and not on actual gross receipts, the cost-plus tax does not satisfy the gross receipts requirement of paragraph (b)(3)(i) of this section.

(B) *Example 2: Actual gross receipts determined under appropriate transfer pricing methodology*—(*1*) *Facts.* Country X imposes a tax on resident corporations that meets the attribution requirement of paragraph (b)(5)(ii) of this section. The Country X tax is based on actual gross receipts, including gross receipts recorded on the taxpayer's books and records as due from related and unrelated persons. Corporation A, a resident of Country X, properly determines the arm's length transfer price for services provided to related persons using a cost-plus methodology, recording on its books and records receivables for the arm's length amounts due from those related persons and using those amounts to determine the realized gross receipts included in the base of the Country X tax.

(*2*) *Analysis.* Because the Country X tax is based on actual gross receipts, it satisfies the gross receipts requirement of paragraph (b)(3)(i) of this section.

(C) *Example 3: Petroleum taxed on extraction*—(*1*) *Facts.* Country X imposes a tax that is a separate levy (within the meaning of paragraph (d)(1) of this section) on income from the extraction of petroleum. Under the terms of that tax, gross receipts from extraction income are deemed to equal 105 percent of the fair market value of petroleum extracted.

(*2*) *Analysis.* Because it is imposed on deemed gross receipts that exceed the fair market value of the petroleum extracted, the tax on extraction income does not satisfy the gross receipts requirement of paragraph (b)(3)(i) of this section.

(4) *Cost recovery requirement*—(i) *Costs and expenses that must be recovered*—(A) *In general.* A foreign tax satisfies the cost recovery requirement if the base of the tax is computed by reducing gross receipts (as described in paragraph (b)(3) of this section) to permit recovery of the significant costs and expenses (including significant capital expenditures) described in paragraph (b)(4)(i)(C) of this section attributable, under reasonable principles, to such gross receipts. A foreign tax need not permit recovery of significant costs and expenses, such as certain personal expenses, that are not attributable, under reasonable principles, to gross receipts included in the foreign taxable base. A foreign tax whose base is gross receipts, with no reduction for costs and expenses, satisfies the cost recovery requirement only if there are no significant costs and expenses attributable to the gross receipts included in the foreign tax base that must be recovered under the rules of paragraph (b)(4)(i)(C)(*1*) of this section. See paragraph (b)(4)(iv)(A) of this section (*Example 1*). A foreign tax that provides an alternative cost allowance satisfies the cost recovery requirement only as provided in paragraph (b)(4)(i)(B) of this section. See paragraph (b)(4)(i)(D) of this section for rules regarding principles for attributing costs and expenses to gross receipts.

(B) *Alternative cost allowances*—(*1*) *In general.* Except as provided in paragraph (b)(4)(i)(B)(*2*) of this section, if foreign tax law does not permit recovery of one or more significant costs and expenses in computing the base of the foreign tax but provides an alternative cost allowance, the foreign tax satisfies the cost recovery requirement only if the alternative allowance permits recovery of an amount that by its terms may be greater, but can never be less, than the actual amounts of such significant costs and expenses (for example, under a provision identical to percentage depletion allowed under section 613). If foreign tax law provides an optional alternative cost allowance or an election to recover costs and expenses under an alternative method, the foreign tax satisfies the cost recovery requirement if the foreign tax law also expressly

provides an option to recover actual costs and expenses. See § 1.901–2(e)(5) for rules limiting the amount of foreign income tax paid to the amount due under the option that minimizes the taxpayer's liability for foreign income tax over time. If foreign tax law provides an alternative cost allowance that does not by its terms permit recovery of an amount equal to or greater than the actual amounts of significant costs and expenses, the foreign tax does not satisfy the cost recovery requirement, even if, in practice, the amounts recovered under the alternative allowance equal or exceed the amount of actual costs and expenses.

(*2*) *Small business exception.* If foreign tax law provides an alternative method for determining the amount of costs and expenses allowed in computing the taxable base of small business enterprises, the foreign tax satisfies the cost recovery requirement if the foreign tax law contains reasonable limits on the maximum size of business enterprises to which the alternative cost allowance applies (for example, business enterprises having asset values or annual gross revenues below specified thresholds). See paragraph (b)(4)(iv)(B) of this section (*Example 2*).

(C) *Significant costs and expenses*—(*1*) *Amounts that must be recovered.* Whether a cost or expense is significant for purposes of this paragraph (b)(4)(i) is determined based on whether, for all taxpayers in the aggregate to which the foreign tax applies, the item of cost or expense constitutes a significant portion of the taxpayers' total costs and expenses. Costs and expenses (as characterized under foreign law) related to capital expenditures, interest, rents, royalties, wages or other payments for services, and research and experimentation are always treated as significant costs or expenses for purposes of this paragraph (b)(4)(i). Significant costs and expenses (such as interest expense) are not considered to be recovered by reason of the time value of money attributable to the acceleration of a tax benefit or other economic benefit attributable to the timing of the recovery of other costs and expenses (such as the current expensing of debt-financed capital expenditures). Foreign tax law is considered to permit recovery of significant costs and expenses even if recovery of all or a portion of certain costs or expenses is disallowed, if such disallowance is consistent with the principles underlying the disallowances required under the Internal Revenue Code, including disallowances intended to limit base erosion or profit shifting. For example, a foreign tax is considered to permit recovery of significant costs and expenses if the foreign tax law limits interest deductions so as not to exceed 10 percent of a reasonable measure of taxable income (determined either before or after depreciation and amortization) based on principles similar to those underlying section 163(j), disallows interest and royalty deductions in connection with hybrid transactions based on principles similar to those underlying section 267A, disallows deductions attributable to gross receipts that in whole or in part are excluded, exempt or eliminated from taxable income, or disallows certain expenses based on public policy considerations similar to those disallowances contained in section 162. See paragraph (b)(4)(iv)(C) of this section (*Example 3*).

(*2*) *Amounts that need not be recovered.* A foreign tax is considered to permit recovery of significant costs and expenses even if the foreign tax law does not permit recovery of any costs and expenses attributable to wage income or to investment income that is not derived from a trade or business. In addition, in determining whether a foreign tax (the ''tested foreign tax'') meets the cost recovery requirement, it is immaterial whether the tested foreign tax allows a deduction for other taxes that would qualify as foreign income taxes (determined without regard to whether such other tax allows a deduction for the tested foreign tax). See paragraph (b)(4)(iv)(D) and (E) of this section (*Examples 4* and *5*).

(*3*) *Timing of recovery.* A foreign tax law permits recovery of significant costs and expenses even if such costs and expenses are recovered earlier or later than they are recovered under the Internal Revenue Code, unless the time of recovery is so much later (for example, after the property becomes worthless or is disposed of) as effectively to constitute a denial of such recovery. The amount of costs and expenses that is recovered under the foreign tax law is neither discounted nor augmented by taking into account the time value of money attributable to any acceleration or deferral of a tax benefit resulting from the foreign law cost recovery method compared to when tax would be paid under the Internal Revenue Code. Therefore, a foreign tax satisfies the cost recovery requirement if items deductible under the Internal Revenue Code are capitalized under the foreign tax law and recovered either immediately, on a recurring basis over time, or upon the occurrence of some future event, or if the recovery of items capitalized under the Internal Revenue Code occurs more or less rapidly than under the foreign tax law.

(D) *Attribution of costs and expenses to gross receipts.* Principles used in the foreign tax law to attribute costs and expenses to gross receipts may be reasonable even if they differ from principles that apply under the Internal Revenue Code (for example, principles that apply under section 265, 465 or 861(b) of the Internal Revenue Code). See also paragraph (b)(5) of this section for additional requirements relating to foreign tax law rules for attributing costs and expenses to gross receipts.

(ii) *Consolidation of profits and losses.* In determining whether a foreign tax satisfies the cost recovery requirement, one of the factors to be taken into account is whether, in computing the base of the tax, a loss incurred in one activity (for example, a contract area in the case of oil and gas exploration) in a trade or business is allowed to offset profit earned by the same person in another activity (for example, a separate contract area) in the same trade or business. If such an offset is allowed, it is immaterial whether the offset may be made in the taxable period in which the loss is incurred or only in a different taxable period, unless the period is such that under the circumstances there is effectively a denial of the ability to offset the loss against profit. In determining whether a foreign tax satisfies the cost recovery requirement, it is immaterial that no such offset is allowed if a loss incurred in one such activity may be applied to offset profit earned in that activity in a different taxable period, unless the period is such that under the circumstances there is effectively a denial of the ability to offset such loss against profit. In determining whether a foreign tax satisfies the cost recovery requirement, it is immaterial whether a person's profits and losses from one trade or business (for example, oil and gas extraction) are allowed to offset its profits and losses from another trade or business (for example, oil and gas refining and processing), or whether a person's business profits and losses and its passive investment profits and losses are allowed to offset each other in computing the base of the foreign tax. Moreover, it is immaterial whether foreign tax law permits or prohibits consolidation of profits and losses of related persons, unless foreign tax law requires separate entities to be used to carry on separate activities in the same trade or business. If foreign tax law requires that separate entities carry on such separate activities, the determination whether the cost recovery requirement is satisfied is made by applying the same considerations as if

such separate activities were carried on by a single entity.

(iii) *Carryovers.* In determining whether a foreign tax satisfies the cost recovery requirement, it is immaterial, except as otherwise provided in paragraph (b)(4)(ii) of this section, whether losses incurred during one taxable period may be carried over to offset profits incurred in different taxable periods.

(iv) *Examples.* The following examples illustrate the rules of paragraph (b)(4) of this section.

(A) *Example 1: Tax on gross interest income of certain residents; no deductions allowed*—(*1*) *Facts.* Country X imposes a net income tax on corporations resident in Country X. Country X imposes a second tax (the ''bank tax'') of 1 percent on the gross amount of interest income derived by banks resident in Country X; no deductions are allowed in determining the base of the bank tax. Banks resident in Country X incur substantial costs and expenses, including interest expense, attributable to their interest income.

(*2*) *Analysis.* Because the terms of the bank tax do not permit recovery of significant costs and expenses attributable to the gross receipts included in the tax base, the bank tax does not satisfy the cost recovery requirement of paragraph (b)(4)(i) of this section.

(B) *Example 2: Small business alternative allowance*—(*1*) *Facts.* Country X imposes a tax on the income of corporations resident in Country X. Under Country X tax law, corporations are generally allowed to deduct actual costs and expenses attributable to the realized gross receipts included in the Country X tax base. However, in lieu of deductions for actual costs and expenses, businesses with gross revenues of less than the Country X currency equivalent of $500,000 are allowed a flat cost allowance of 50 percent of gross revenues.

(*2*) *Analysis.* Under paragraph (b)(4)(i)(B)(*2*) of this section, the alternative cost allowance for small businesses provided under Country X tax law satisfies the cost recovery requirement.

(C) *Example 3: Permissible deduction disallowance*—(*1*) *Facts.* Country X imposes a tax on the income of corporations resident in Country X. Under Country X tax law, deductions for the significant costs and expenses attributable to the gross receipts included in the Country X tax base are allowed, except that deductions for interest expense incurred by corporations are limited to 30 percent of the corporation's earnings before income taxes, depreciation, and amortization, and unused interest expense may be carried forward for a period of 5 years. In addition, Country X tax law contains anti-hybrid rules that deny deductions for interest, royalties, rents, and services payments made by a Country X resident to a related entity outside Country X that is treated as a transparent entity in the jurisdiction in which it is organized but as a separate entity in the jurisdiction of the entity's owners (a ''reverse hybrid entity'') to the extent that the payment is not included in the income of the reverse hybrid entity or its owners.

(*2*) *Analysis.* Under paragraph (b)(4)(i)(C)(*1*) of this section, costs and expenses related to interest, rents, royalties, and payments for services are treated as significant costs or expenses that must be recoverable under Country X tax law. However, because the interest expense limitation rule and the anti-hybrid rules in Country X tax law are consistent with the principles underlying the disallowances required under the Internal Revenue Code (namely, section 163(j) and section 267A), the Country X tax satisfies the cost recovery requirement.

(D) *Example 4: Gross basis tax on wages*—(*1*) *Facts.* A foreign country imposes payroll tax on resident employees at the rate of 10 percent of the amount of gross wages; no deductions are allowed in computing the base of the payroll tax.

(*2*) *Analysis.* Although the foreign tax law does not allow for the recovery of any costs and expenses attributable to gross receipts included in the taxable base, under paragraph (b)(4)(i)(C)(*2*) of this section, because the only gross receipts included in the taxable base are from wages, the payroll tax satisfies the cost recovery requirement.

(E) *Example 5: No deduction for another net income tax*—(*1*) *Facts.* Each of Country X and Province Y (a political subdivision of Country X) imposes a tax on resident corporations, called the ''Country X income tax'' and the ''Province Y income tax,'' respectively. Each tax has an identical base, which is computed by reducing a corporation's realized gross receipts by deductions that, based on the laws of Country X and Province Y, generally permit recovery of the significant costs and expenses (including significant capital expenditures) that are attributable under reasonable principles to such gross receipts. However, the Country X income tax does not allow a deduction for the Province Y income tax for which a taxpayer is liable, nor does the Province Y income tax allow a deduction for the Country X income tax for which a taxpayer is liable.

(*2*) *Analysis.* Under paragraph (d)(1)(i) of this section, each of the Country X income tax and the Province Y income tax is a separate levy. Without regard to whether the Province Y income tax may allow a deduction for the Country X income tax, and without regard to whether the Country X income tax may allow a deduction for the Province Y income tax, both taxes would qualify as net income taxes under paragraph (a)(3) of this section. Therefore, under paragraph (b)(4)(i)(C)(*2*) of this section the fact that neither levy's base allows a deduction for the other levy is immaterial, and both levies satisfy the cost recovery requirement.

(5) *Attribution requirement.* A foreign tax satisfies the attribution requirement if the amount of gross receipts and costs that are included in the base of the foreign tax are determined based on rules described in paragraph (b)(5)(i) of this section (with respect to a separate levy imposed on nonresidents of the foreign country) or paragraph (b)(5)(ii) of this section (with respect to a separate levy imposed on residents of the foreign country).

(i) *Tax on nonresidents.* The gross receipts and costs attributable to each of the items of income of nonresidents of a foreign country that is included in the base of the foreign tax must satisfy the requirements of paragraph (b)(5)(i)(A), (B), or (C) of this section.

(A) *Income attribution based on activities.* The gross receipts and costs that are included in the base of the foreign tax are limited to gross receipts and costs that are attributable, under reasonable principles, to the nonresident's activities within the foreign country imposing the foreign tax (including the nonresident's functions, assets, and risks located in the foreign country). For purposes of the preceding sentence, attribution of gross receipts under reasonable principles includes rules similar to those for determining effectively connected income under section 864(c) but does not include rules that take into account as a significant factor the mere location of customers, users, or any other similar destination-based criterion, or the mere location of persons from whom the nonresident makes purchases in the foreign country. In addition, for purposes of the first sentence of this paragraph (b)(5)(i)(A), reasonable principles do not include rules that deem the existence of a trade or business or permanent establishment based on the activities of another person (other than an agent or other person acting on behalf of the nonresident or a pass-through entity of which the

nonresident is an owner), or that attribute gross receipts or costs to a nonresident based upon the activities of another person (other than an agent or other person acting on behalf of the nonresident or a pass-through entity of which the nonresident is an owner).

(B) *Income attribution based on source.* The amount of gross income arising from gross receipts (other than gross receipts from sales or other dispositions of property) that is included in the base of the foreign tax on the basis of source (instead of on the basis of activities or the situs of property as described in paragraphs (b)(5)(i)(A) and (C) of this section) is limited to gross income arising from sources within the foreign country that imposes the tax, and the sourcing rules of the foreign tax law are reasonably similar to the sourcing rules that apply under the Internal Revenue Code. A foreign tax law's application of such sourcing rules need not conform in all respects to the application of those sourcing rules for Federal income tax purposes. For purposes of determining whether the sourcing rules of the foreign tax law are reasonably similar to the sourcing rules that apply under the Internal Revenue Code, the character of gross income arising from gross receipts is determined under the foreign tax law (except as provided in paragraph (b)(5)(i)(B)(*3*) of this section), and the following rules apply:

(*1*) *Services.* Under the foreign tax law, gross income from services must be sourced based on where the services are performed, as determined under reasonable principles (which do not include determining the place of performance of the services based on the location of the service recipient).

(*2*) *Royalties.* A foreign tax on gross income from royalties must be sourced based on the place of use of, or the right to use, the intangible property.

(*3*) *Sales of property.* Gross income arising from gross receipts from sales or other dispositions of property (including copyrighted articles sold through an electronic medium) must be included in the foreign tax base on the basis of the rules in paragraph (b)(5)(i)(A) or (C) of this section, and not on the basis of source. In the case of sales of copyrighted articles (as determined under rules similar to § 1.861–18), a foreign tax satisfies the attribution requirement of paragraph (b)(5) of this section only if the transaction is treated as a sale of tangible property and not as a license of intangible property.

(C) *Attribution based on situs of property.* A foreign tax on gains of nonresidents from the sale or disposition of property, including shares in a corporation or an interest in a partnership or other pass-through entity, based on the situs of property satisfies the attribution requirement only as provided in this paragraph (b)(5)(i)(C). The amount of gross receipts from the sale or disposition of property that is included in the base of the foreign tax on the basis of the situs of real property (instead of on the basis of activities as described in paragraph (b)(5)(i)(A) of this section) may only include gross receipts that are attributable to the disposition of real property situated in the foreign country imposing the foreign tax (or an interest in a resident corporation or other entity that owns such real property) under rules reasonably similar to the rules in section 897. The amount of gross receipts from the sale or disposition of property other than shares in a corporation, including an interest in a partnership or other pass-through entity, that is included in the base of the foreign tax on the basis of the situs of property other than real property may only include gross receipts that are attributable to property forming part of the business property of a taxable presence in the foreign country imposing the foreign tax under rules that are reasonably similar to the rules in section 864(c).

(ii) *Tax on residents.* The base of a foreign tax imposed on residents of the foreign country imposing the foreign tax may include all of the worldwide gross receipts of the resident, but must provide that any allocation to or from the resident of income, gain, deduction, or loss with respect to transactions between such resident and organizations, trades, or businesses owned or controlled directly or indirectly by the same interests (that is, any allocation made pursuant to the foreign country's transfer pricing rules) is determined under arm's length principles, without taking into account as a significant factor the location of customers, users, or any other similar destination-based criterion.

(iii) *Examples.* The following examples illustrate the rules of paragraph (b)(5) of this section.

(A) *Example 1*—(*1*) *Facts.* Country X imposes a separate levy on nonresident companies that furnish, from a location outside of Country X, specified types of electronically supplied services to users located in Country X (the ''ESS tax''). The base of the ESS tax is computed by taking the nonresident company's overall net income related to supplying electronically supplied services, and deeming a portion of such net income to be attributable to a deemed permanent establishment of the nonresident company in Country X. The amount of the nonresident company's net income attributable to the deemed permanent establishment is determined on a formulary basis based on the percentage of the nonresident company's total users that are located in Country X.

(*2*) *Analysis.* The taxable base of the ESS tax is not computed based on a nonresident company's activities located in Country X, but instead takes into account the location of the nonresident company's users. Therefore, the ESS tax does not meet the requirement in paragraph (b)(5)(i)(A) of this section. The ESS tax also does not meet the requirement in paragraph (b)(5)(i)(B) of this section because it is not imposed on the basis of source, and it does not meet the requirement in paragraph (b)(5)(i)(C) of this section because it is not imposed on the sale or other disposition of property.

(B) *Example 2*—(*1*) *Facts.* The facts are the same as those in paragraph (b)(5)(iii)(A)(*1*) of this section (the facts in *Example 1*), except that instead of imposing the ESS tax by deeming nonresident companies to have a permanent establishment in Country X, Country X treats gross income from electronically supplied services provided to users located in Country X as sourced in Country X. The gross income sourced to Country X is reduced by costs that are reasonably attributed to such gross income, to arrive at the taxable base of the ESS tax. The amount of the nonresident's gross income and costs that are sourced to Country X is determined by multiplying the nonresident's total gross income and costs by the percentage of its total users that are located in Country X.

(*2*) *Analysis.* Country X tax law's rule for sourcing electronically supplied services is not based on where the services are performed and is instead based on the location of the service recipient. Therefore, the ESS tax, which is imposed on the basis of source, does not meet the requirement in paragraph (b)(5)(i)(B) of this section. The ESS tax also does not meet the requirement in paragraph (b)(5)(i)(A) of this section because it is not imposed on the basis of a nonresident's activities located in Country X, and it does not meet the requirement in paragraph (b)(5)(i)(C) of this section because it is not imposed on the sale or other disposition of property.

(6) *Surtax on net income tax.* A foreign tax satisfies the net gain requirement in this paragraph (b) if the base of the foreign tax is the amount of a net income tax. For example, if a tax (surtax) is computed as a percentage of

a separate levy that is itself a net income tax, then such surtax is considered to satisfy the net gain requirement.

* * * * *

(d) *Separate levies*—(1) *In general.* Each foreign levy must be analyzed separately to determine whether it is a net income tax within the meaning of paragraph (a)(3) of this section and whether it is a tax in lieu of an income tax within the meaning of § 1.903–1(b)(2). Whether a single levy or separate levies are imposed by a foreign country depends on U.S. principles and not on whether foreign tax law imposes the levy or levies pursuant to a single or separate statutes. A foreign levy is a separate levy described in this paragraph (d)(1) if it is described in paragraph (d)(1)(i), (ii), (iii), or (iv) of this section. In the case of levies that apply to dual capacity taxpayers, see also § 1.901–2A(a).

(i) *Taxing authority.* A levy imposed by one taxing authority (for example, the national government of a foreign country) is always separate from a levy imposed by another taxing authority (for example, a political subdivision of that foreign country), even if the base of the levy is the same.

(ii) *Different taxable base.* Where the base of a foreign levy is computed differently for different classes of persons subject to the levy, the levy is considered to impose separate levies with respect to each such class of persons. For example, foreign levies identical to the taxes imposed by sections 1, 11, 541, 871(a), 871(b), 881, 882, 3101 and 3111 of the Internal Revenue Code are each separate levies, because the levies are imposed on different classes of taxpayers, and the base of each of those levies contains different items than the base of each of the others. A taxable base of a separate levy may consist of a particular type of income (for example, wage income, investment income, or income from self-employment). The taxable base of a separate levy may also consist of an amount unrelated to income (for example, wage expense or assets). A separate levy may provide that items included in the base of the tax are computed separately merely for purposes of a preliminary computation and are then combined as a single taxable base. Income included in the taxable base of a separate levy may also be included in the taxable base of another levy (which may or may not also include other items of income); separate levies are considered to be imposed if the taxable bases are not combined as a single taxable base, even if the taxable bases are determined using the same computational rules. For example, a foreign levy identical to the tax imposed by section 1 is a separate levy from a foreign levy identical to the tax imposed by section 1411, because tax is imposed under each levy on a separate taxable base that is not combined with the other as a single taxable base. Where foreign tax law imposes a levy that is the sum of two or more separately computed amounts of tax, and each such amount is computed by reference to a different base, separate levies are considered to be imposed. Levies are not separate merely because different rates apply to different classes of taxpayers that are subject to the same provisions in computing the base of the tax. For example, a foreign levy identical to the tax imposed on U.S. citizens and resident alien individuals by section 1 of the Internal Revenue Code is a single levy notwithstanding that the levy has graduated rates and applies different rate schedules to unmarried individuals, married individuals who file separate returns, and married individuals who file joint returns. In addition, in general, levies are not separate merely because some provisions determining the base of the levy apply, by their terms or in practice, to some, but not all, persons subject to the levy. For example, a foreign levy identical to the tax imposed by section 11 of the Internal Revenue Code is a single levy even though some provisions apply by their terms to some but not all corporations subject to the section 11 tax (for example, section 465 is by its terms applicable to corporations described in sections 465(a)(1)(B), but not to other corporations), and even though some provisions apply in practice to some but not all corporations subject to the section 11 tax (for example, section 611 does not, in practice, apply to any corporation that does not have a qualifying interest in the type of property described in section 611(a)).

(iii) *Tax imposed on nonresidents.* A foreign levy imposed on nonresidents is always treated as a separate levy from that imposed on residents, even if the base of the tax as applied to residents and nonresidents is the same, and even if the levies are treated as a single levy under foreign tax law. In addition, a withholding tax (as defined in section 901(k)(1)(B)) that is imposed on gross income of nonresidents is treated as a separate levy as to each separate class of income described in section 61 (for example, interest, dividends, rents, or royalties) subject to the withholding tax. If two or more subsets of a separate class of income are subject to a withholding tax based on different income attribution rules (for example, if technical services are subject to tax based on the residence of the payor and other services are subject to tax based on where the services are performed), separate levies are considered to be imposed with respect to each subset of that separate class of income.

(iv) *Foreign levy modified by an applicable income tax treaty.* A foreign levy that is limited in its application by, or is otherwise modified by, an income tax treaty to which the foreign country imposing the levy is a party is a separate levy from the levy imposed under the domestic law (without regard to the treaty) of the foreign country, and is also a separate levy from the foreign levy as modified by a different income tax treaty to which the foreign country imposing the levy is a party, even if the two treaties modify the foreign levy in exactly the same manner. Accordingly, a foreign levy paid by taxpayers that qualify for and claim benefits under an income tax treaty is a separate levy from the levy as applied to taxpayers that are ineligible for, or that do not claim, benefits under that treaty, even if the two foreign levies would apply in the same manner to a particular taxpayer, and regardless of whether the unmodified foreign levy is a foreign income tax within the meaning of paragraph (a)(1)(ii) of this section.

(2) *Contractual modifications.* Notwithstanding paragraph (d)(1) of this section, if foreign tax law imposing a levy is modified for one or more persons subject to the levy by a contract entered into by such person or persons and the foreign country, then the foreign tax law is considered for purposes of sections 901 and 903 to impose a separate levy for all persons to whom such contractual modification of the levy applies, as contrasted to the levy as applied to all persons to whom such contractual modification does not apply.

(3) *Examples.* The following examples illustrate the rules of paragraph (d)(1) of this section.

(i) *Example 1: Separate taxable bases*—(A) *Facts.* A foreign statute imposes a levy on corporations equal to the sum of 15% of the corporation's realized net income plus 3% of its net worth.

(B) *Analysis.* As the levy is the sum of two separately computed amounts, each of which is computed by reference to a separate base, under paragraph (d)(1)(ii) of this section each of the portion of the levy based on income and the portion of the levy based on net worth is considered, for purposes of sections 901 and 903, to be a separate levy.

(ii) *Example 2: Separate taxable bases*—(A) *Facts.* A foreign statute imposes a levy on nonresident alien individuals analogous to the taxes imposed by section 871 of the Internal Revenue Code.

(B) *Analysis.* As the levy is imposed on separately computed amounts, each of which is computed by reference to a separate taxable base and portions of which comprise withholding tax on gross income of nonresidents, under paragraphs (d)(1)(ii) and (iii) of this section, each of the portions of the foreign levy imposed on each separate class of gross income analogous to the tax imposed by section 871(a) and the portion of the foreign levy analogous to the tax imposed by sections 871(b) and 1 is considered, for purposes of sections 901 and 903, to be a separate levy.

(iii) *Example 3: Separate taxable bases*—(A) *Facts*—(*1*) A single foreign statute or separate foreign statutes impose a foreign levy that is the sum of the products of specified rates applied to specified bases, as follows:

TABLE 1 TO PARAGRAPH (d)(3)(iii)(A)(*1*)

Base	Rate (percent)
Net income from mining	45
Net income from manufacturing	50
Net income from technical services	50
Net income from other services	45
Net income from investments	15
All other net income	50

(*2*) In computing each such base, deductible expenditures are allocated to the type of income they generate. If allocated deductible expenditures exceed the gross amount of a specified type of income, the excess may not be applied against income of a different specified type.

(B) *Analysis.* The levy is the sum of several separately computed amounts, each of which is computed by reference to a separate base. Accordingly, under paragraph (d)(1)(ii) of this section, each of the levies on mining net income, manufacturing net income, technical services net income, other services net income, investment net income and other net income is considered, for purposes of sections 901 and 903, to be a separate levy.

(iv) *Example 4: Combined taxable base after preliminary separate computation*—(A) *Facts.* The facts are the same as those in paragraph (d)(3)(iii)(A) of this section (the facts in *Example 3*), except that excess deductible expenditures allocated to one type of income are applied against other types of income to which the same rate applies.

(B) *Analysis.* Under paragraph (d)(1)(ii) of this section, the levies on mining net income and other services net income together are considered, for purposes of sections 901 and 903, to be a single levy since, despite a separate preliminary computation of the bases, by reason of the permitted application of excess allocated deductible expenditures the bases are not separately computed. For the same reason, the levies on manufacturing net income, technical services net income and other net income together are considered, for purposes of sections 901 and 903, to be a single levy. The levy on investment net income is considered, for purposes of sections 901 and 903, to be a separate levy. These results are not dependent on whether the application of excess allocated deductible expenditures to a different type of income is permitted in the same taxable period in which the expenditures are taken into account for purposes of the preliminary computation, or only in a different (for example, later) taxable period.

(v) *Example 5: Combined taxable base with income subject to different rates*—(A) *Facts.* The facts are the same as those in paragraph (d)(3)(iii)(A) of this section (the facts in *Example 3*), except that excess deductible expenditures allocated to any type of income other than investment income are applied against the other types of income (including investment income) according to a specified set of priorities of application. Excess deductible expenditures allocated to investment income are not applied against any other type of income.

(B) *Analysis.* For the same reasons as those set forth in paragraph (d)(3)(iv)(B) of this section (the analysis in *Example 4*), all of the levies are together considered, for purposes of sections 901 and 903, to be a single levy.

(vi) *Example 6: Minimum Tax*—(A) *Facts.* Country X imposes a net income tax (''Income Tax'') and a minimum tax (''Minimum Tax'') on its residents. Under Country X tax law, alternative minimum taxable income for purposes of the Minimum Tax equals the taxable income under the Income Tax increased by certain disallowed deductions. The Minimum Tax equals the excess, if any, of the alternative minimum taxable income times the Minimum Tax rate over the amount of the Income Tax.

(B) *Analysis.* Under paragraph (d)(1)(ii) of this section, the Minimum Tax is a separate levy from the Income Tax, because the taxable base of each levy is separately computed and not combined as a single taxable base. The result would be the same if under Country X tax law the Minimum Tax equaled the alternative minimum taxable income times the Minimum Tax rate, and residents of Country X were required to pay the greater of the Income Tax or the Minimum Tax (rather than the Income Tax plus the excess, if any, of the Minimum Tax over the Income Tax).

(vii) *Example 7: Diverted Profits Tax*—(A) *Facts.* Country X imposes a 20% net income tax (''Income Tax'') and a 25% ''Diverted Profits Tax'' on nonresident corporations. Under Country X tax law, taxable income under the Diverted Profits Tax is determined first by attributing gross receipts of the nonresident corporation to a hypothetical permanent establishment in Country X. Country X applies the same computational rules that apply under the Income Tax to determine the taxable income attributable to a hypothetical permanent establishment under the Diverted Profits Tax.

(B) *Analysis.* Under paragraph (d)(1)(ii) of this section, the Diverted Profits Tax is a separate levy from the Income Tax, because the taxable income under the Diverted Profits Tax is not combined with the taxable income under the Income Tax as a single taxable base.

(viii) *Example 8: Modified Income Tax*—(A) *Facts.* Country X imposes a net income tax (''Income Tax'') on nonresident corporations that carry on a trade or business in Country X through a permanent establishment. Under Country X tax law, the taxable base of the Income Tax as initially enacted is determined by attributing profits of the nonresident corporation to its permanent establishment in Country X based upon rules similar to Articles 5 and 7 of the 2016 U.S. Model Income Tax Convention. However, Country X later amends the Income Tax to provide that nonresident corporations that are engaged in certain digital transactions in Country X and earning revenues above certain thresholds are deemed to have a permanent establishment; under the Income Tax as originally enacted, such activities would not have created a permanent establishment in Country X.

(B) *Analysis.* Under paragraph (d)(1)(ii) of this section, the Income Tax as applied to nonresident corporations engaged in digital transactions and deemed to have a permanent establishment under the modified Income Tax is not a separate levy from the Income Tax as applied to the same or other nonresident corporations that would have permanent establishments

under the Income Tax as originally enacted, because income attributable to both actual and deemed permanent establishments is combined as a single taxable base.

(ix) *Example 9: Disallowed deductions*—(A) *Facts.* Country X imposes a net income tax (''Income Tax'') on resident corporations. In determining the taxable base for the Income Tax, Country X tax law has a cap on allowed interest deductions for companies engaged in the extraction, production, or refinement of oil or natural gas.

(B) *Analysis.* Under paragraph (d)(1)(ii) of this section, the Income Tax as applied to corporations engaged in the extraction, production, or refinement of oil or natural gas is not a separate levy from the Income Tax as applied to other corporations subject to the levy. The Income Tax is a single levy even though the cap on allowed interest expense deductions applies by its terms to some, but not all, corporations subject to the Income Tax.

(x) *Example 10: Different taxable base for class of taxpayers*—(A) *Facts.* Country X imposes a net income tax (''Income Tax'') and an oil tax. The oil tax applies only to resident corporations engaged in the extraction, production, or refinement of oil, and resident corporations subject to the oil tax are not subject to the Income Tax. The taxable base under the oil tax is the taxable income under the Income Tax increased by disallowed interest expense.

(B) *Analysis.* Under paragraph (d)(1)(ii) of this section, the oil tax is a separate levy from the Income Tax, because the taxable income under the oil tax is not combined with the taxable income under the Income Tax as a single taxable base. The levies are imposed on different classes of taxpayers (resident taxpayers engaged in the extraction, production, or refinement of oil, in the case of the oil tax, and all other resident corporations, in the case of the Income Tax), and the base of each of those levies contains different items.

(e) *Amount of foreign income tax that is creditable*—(1) *In general.* Credit is allowed under section 901 for the amount of foreign income tax that is paid by the taxpayer. Under paragraph (g) of this section, the term ''paid'' means ''paid'' or ''accrued,'' depending on the taxpayer's method of accounting for such taxes. The amount of foreign income tax paid by the taxpayer is determined separately for each taxpayer under the rules in this paragraph (e).

(2) *Refunds and credits*—(i) *Refundable amounts.* An amount remitted to a foreign country is not an amount of foreign income tax paid to the extent that it is reasonably certain that the amount will be refunded, rebated, abated, or forgiven. It is reasonably certain that an amount will be refunded, rebated, abated, or forgiven to the extent the amount exceeds a reasonable approximation of final foreign income tax liability to the foreign country. See section 905(c) and § 1.905–3 for the required redeterminations if amounts claimed as a credit (on either the cash or accrual basis) exceed the amount of the final foreign income tax liability.

(ii) *Credits.* Except as provided in paragraph (e)(2)(iii) of this section, an amount of foreign income tax liability is not an amount of foreign income tax paid to the extent the foreign income tax liability is reduced, satisfied, or otherwise offset by a tax credit, including a tax credit that under the foreign tax law is payable in cash only to the extent it exceeds the taxpayer's liability for foreign income tax or a tax credit acquired from another taxpayer.

(iii) *Exception for overpayments and other fully refundable credits.* An amount of foreign income tax paid is not reduced (or treated as constructively refunded) solely by reason of the fact that a credit is allowed (or may be allowed) for the amount paid to reduce the amount of a different separate levy owed by the taxpayer. See paragraphs (e)(2)(ii) and (e)(4) of this section. However, under paragraph (e)(2)(i) of this section (and taking into account any redetermination required under section 905(c) and § 1.905–3), an amount remitted with respect to a separate levy for a foreign taxable period that constitutes an overpayment of the taxpayer's final liability for that levy for that period, and that is refundable in cash at the taxpayer's option, is not an amount of tax paid. Therefore, if such an overpayment of one tax is applied as a credit against a different foreign income tax liability of the taxpayer for the same or a different taxable period, the credited amount of the overpayment may qualify as an amount paid of that different foreign income tax, if the credited amount does not exceed a reasonable approximation of the taxpayer's final foreign income tax liability for the taxable period to which the overpayment is applied. Similarly, if under the foreign tax law, the full amount of a tax credit is payable in cash at the taxpayer's option, the taxpayer's choice to apply all or a portion of the tax credit in satisfaction of a foreign income tax liability of the taxpayer is treated as a constructive payment of cash to the taxpayer in the amount so applied, followed by a constructive payment of the foreign income tax liability against which the credit is applied. An overpayment or other tax credit that under the foreign tax law is otherwise fully payable in cash at the taxpayer's option and that is applied in part in satisfaction of a foreign income tax liability is treated as an amount of foreign income tax paid notwithstanding that a portion of the amount otherwise payable in cash to the taxpayer is subject to a lien or otherwise seized in order to satisfy a different, pre-existing liability of the taxpayer to the foreign government or to a third party.

(iv) *Examples.* The following examples illustrate the rules of paragraph (e)(2) of this section.

(A) *Example 1.* The domestic law of Country X imposes a 25 percent tax described in § 1.903–1(b) on the gross amount of interest from sources in Country X that is received by a nonresident of Country X. Country X imposes the tax on the nonresident recipient and requires any resident of Country X that pays such interest to a nonresident to withhold and pay over to Country X 25 percent of such interest, which is applied to offset the recipient's liability for the 25 percent tax. A tax treaty between the United States and Country X modifies domestic law of Country X and provides that Country X may not tax interest received by a resident of the United States from a resident of Country X at a rate in excess of 10 percent of the gross amount of such interest. A resident of the United States may claim the benefit of the treaty only by applying for a refund of the excess withheld amount (15 percent of the gross amount of interest income) after the end of the taxable year. A, a resident of the United States, receives a gross amount of 100u (units of Country X currency) of interest income from a resident of Country X from sources in Country X in Year 1, from which 25u of Country X tax is withheld. A files a timely claim for refund of the 15u excess withheld amount. 15u of the amount withheld (25u − 10u) is reasonably certain to be refunded; therefore, under paragraph (e)(2)(i) of this section 15u is not considered an amount of foreign income tax paid to Country X.

(B) *Example 2.* A's initial foreign income tax liability under Country X tax law is 100u (units of Country X currency). However, under Country X tax law A's initial income tax liability is reduced in order to compute A's final tax liability by an investment credit of 15u and a credit for charitable contributions of 5u. Under paragraph

(e)(2)(ii) of this section, the amount of foreign income tax paid by A is 80u.

(C) *Example 3.* A computes foreign income tax liability in Country X for Year 1 of 100u (units of Country X currency), files a tax return on that basis, and remits 100u of tax. The day after A files that return, A files a claim for refund of 90u. The difference between the 100u of liability reflected in A's original return and the 10u of liability reflected in A's refund claim depends on whether a particular expenditure made by A is nondeductible or deductible, respectively. Based on an analysis of the Country X tax law, A's Country X tax advisors have advised A that it is not clear whether or not that expenditure is deductible. In view of the uncertainty as to the proper treatment of the item in question under Country X tax law, no portion of the 100u paid by A is reasonably certain to be refunded. If A receives a refund, A must treat the refund as required by section 905(c) of the Internal Revenue Code.

(D) *Example 4.* A levy of Country X, which qualifies as a foreign income tax within the meaning of paragraph (a)(1)(ii) of this section, provides that each person who makes payment to Country X pursuant to the levy will receive a bond to be issued by Country X with an amount payable at maturity equal to 10 percent of the amount paid pursuant to the levy. A remits 38,000u (units of Country X currency) to Country X and is entitled to receive a bond with an amount payable at maturity of 3,800u. It is reasonably certain that a refund in the form of property (the bond) will be made. The amount of that refund is equal to the fair market value of the bond. Therefore, only the portion of the 38,000u payment in excess of the fair market value of the bond is an amount of foreign income tax paid.

(3) *Subsidies*—(i) *General rule.* An amount of foreign income tax is not an amount of foreign income tax paid by a taxpayer to a foreign country to the extent that—

(A) The amount is used, directly or indirectly, by the foreign country imposing the tax to provide a subsidy by any means (including, but not limited to, a rebate, a refund, a credit, a deduction, a payment, a discharge of an obligation, or any other method) to the taxpayer, to a related person (within the meaning of section 482), to any party to the transaction, or to any party to a related transaction; and

(B) The subsidy is determined, directly or indirectly, by reference to the amount of the tax or by reference to the base used to compute the amount of the tax.

(ii) *Subsidy.* The term ''subsidy'' includes any benefit conferred, directly or indirectly, by a foreign country to one of the parties enumerated in paragraph (e)(3)(i)(A) of this section. Substance and not form shall govern in determining whether a subsidy exists. The fact that the U.S. taxpayer may derive no demonstrable benefit from the subsidy is irrelevant in determining whether a subsidy exists.

(iii) *Official exchange rate.* A subsidy described in paragraph (e)(3)(i)(B) of this section does not include the actual use of an official foreign government exchange rate converting foreign currency into dollars where a free exchange rate also exists if—

(A) The economic benefit represented by the use of the official exchange rate is not targeted to or tied to transactions that give rise to a claim for a foreign tax credit;

(B) The economic benefit of the official exchange rate applies to a broad range of international transactions, in all cases based on the total payment to be made without regard to whether the payment is a return of principal, gross income, or net income, and without regard to whether it is subject to tax; and

(C) Any reduction in the overall cost of the transaction is merely coincidental to the broad structure and operation of the official exchange rate.

(iv) *Examples.* The following examples illustrate the rules of paragraph (e)(3) of this section.

(A) *Example 1*—(*1*) *Facts.* Country X imposes a 30 percent tax on nonresident lenders with respect to interest which the nonresident lenders receive from borrowers who are residents of Country X, and it is established that this tax is a tax in lieu of an income tax within the meaning of § 1.903–1(b). Country X provides the nonresident lenders with receipts upon their payment of the 30 percent tax. Country X remits to resident borrowers an incentive payment for engaging in foreign loans, which payment is an amount equal to 20 percent of the interest paid to nonresident lenders.

(*2*) *Analysis.* Because the incentive payment is based on the interest paid, it is determined by reference to the base used to compute the tax that is imposed on the nonresident lender. The incentive payment is a subsidy under paragraph (e)(3)(i) of this section since it is provided to a party (the borrower) to the transaction and is based on the amount of tax that is imposed on the lender with respect to the transaction. Therefore, two-thirds (20 percent/30 percent) of the amount withheld by the resident borrower from interest payments to the nonresident lender is not an amount of foreign income tax paid.

(B) *Example 2*—(*1*) *Facts.* A U.S. bank lends money to a development bank in Country X. The development bank relends the money to companies resident in Country X. A withholding tax is imposed by Country X on the U.S. bank with respect to the interest that the development bank pays to the U.S. bank, and appropriate receipts are provided. On the date that the tax is withheld, fifty percent of the tax is credited by Country X to an account of the development bank. Country X requires the development bank to transfer the amount credited to the borrowing companies.

(*2*) *Analysis.* The amount successively credited to the account of the development bank and then to the account of the borrowing companies is determined by reference to the amount of the tax and the tax base. Since the amount credited to the borrowing companies is a subsidy provided to a party (the borrowing companies) to a related transaction and is based on the amount of tax and the tax base, under paragraph (e)(3)(i) of this section it is not an amount of foreign income tax paid.

(C) *Example 3*—(*1*) *Facts.* A U.S. bank lends dollars to a Country X borrower. Country X imposes a withholding tax on the lender with respect to the interest. The tax is to be paid in Country X currency, although the interest is payable in dollars. Country X has a dual exchange rate system, comprised of a controlled official exchange rate and a free exchange rate. Priority transactions such as exports of merchandise, imports of merchandise, and payments of principal and interest on foreign currency loans payable abroad to foreign lenders are governed by the official exchange rate which yields more dollars per unit of Country X currency than the free exchange rate. The Country X borrower remits the net amount of dollar interest due to the U.S. bank (interest due less withholding tax), pays the tax withheld in Country X currency to the Country X government, and provides to the U.S. bank a receipt for payment of the Country X taxes.

(*2*) *Analysis.* Under paragraph (e)(3)(iii) of this section, the use of the official exchange rate by the U.S. bank to determine foreign taxes with respect to interest is not a subsidy described in paragraph (e)(3)(i)(B) of this section. The official exchange rate is not targeted to or tied to transactions that give rise to a claim for a foreign tax credit. The use of the official exchange rate applies to the interest paid and to the principal

paid. Any benefit derived by the U.S. bank through the use of the official exchange rate is merely coincidental to the broad structure and operation of the official exchange rate.

(D) *Example 4*—(*1*) *Facts.* B, a U.S. corporation, is engaged in the production of oil and gas in Country X pursuant to a production sharing agreement among B, Country X, and the state petroleum authority of Country X. The agreement is approved and enacted into law by the Legislature of Country X. Both B and the petroleum authority are subject to the Country X income tax. Each entity files an annual income tax return and pays, to the tax authority of Country X, the amount of income tax due on its annual income. B is a dual capacity taxpayer as defined in § 1.901–2(a)(2)(ii)(A). Country X has agreed to return to the petroleum authority one-half of the income taxes paid by B by allowing it a credit in calculating its own tax liability to Country X.

(*2*) *Analysis.* The petroleum authority is a party to a transaction with B and the amount returned by Country X to the petroleum authority is determined by reference to the amount of the tax imposed on B. Therefore, under paragraph (e)(3)(i) of this section the amount returned is a subsidy, and one-half of the tax imposed on B is not an amount of foreign income tax paid.

(E) *Example 5*—(*1*) *Facts.* The facts are the same as those in paragraph (e)(3)(iv)(D)(*1*) of this section (the facts in *Example 4*), except that the state petroleum authority of Country X does not receive amounts from Country X related to tax paid by B. Instead, the authority of Country X receives a general appropriation from Country X which is not calculated with reference to the amount of tax paid by B.

(*2*) *Analysis.* Because the general appropriation is not calculated with reference to the amount of tax paid by B, it is not a subsidy described in paragraph (e)(3)(i) of this section.

(4) *Multiple levies*—(i) *In general.* If, under foreign law, a taxpayer's tentative liability for one levy (the ''reduced levy'') is or can be reduced by the amount of the taxpayer's liability for a different levy (the ''applied levy''), then the amount considered paid by the taxpayer to the foreign country pursuant to the applied levy is an amount equal to its entire liability for that applied levy (which is not considered to be reduced by the amount applied against the reduced levy), and the remainder of the total amount paid, if any, is considered paid pursuant to the reduced levy. See also paragraphs (e)(2)(ii) and (iii) of this section.

(ii) *Examples.* The following examples illustrate the rules of paragraphs (e)(2)(ii) and (iii) and (e)(4)(i) of this section.

(A) *Example 1: Tax reduced by credits*—(*1*) *Facts.* A's tentative liability for foreign income tax imposed by Country X is 100u (units of Country X currency). However, under Country X tax law, in determining A's final foreign income tax liability, its tentative liability is reduced by a 15u credit for a separate Country X levy that does not qualify as a foreign income tax and that A accrued and paid on its gross services income and is also reduced by a 5u credit for charitable contributions. Under Country X tax law, the amount of the charitable contributions credit is refundable in cash to the extent the credit exceeds the taxpayer's Country X income tax liability after applying the credit for the tax on gross services income. A timely remits the 80u due to Country X.

(*2*) *Analysis.* Under paragraphs (e)(2)(ii) and (e)(4) of this section, the amount of Country X income tax paid by A is 80u (100u tentative liability − 20u tax credits), and the amount of Country X tax on gross services income paid by A is 15u.

(B) *Example 2: Tax paid by credit for overpayment*—(*1*) *Facts.* The facts are the same as those in paragraph (e)(4)(ii)(A)(*1*) of this section (the facts in *Example 1*), except that A's final Country X income tax liability of 80u is satisfied by applying a credit for an otherwise refundable 60u overpayment from the previous taxable year of A's liability for a separate levy imposed by Country X that is also a foreign income tax and remitting the balance due of 20u.

(*2*) *Analysis.* The result is the same as in paragraph (e)(4)(ii)(A)(*2*) of this section (the analysis in *Example 1*). Under paragraph (e)(2)(iii) of this section, the portion of A's Country X income tax liability that was satisfied by applying the 60u overpayment of A's different foreign income tax liability for the previous taxable year qualifies as an amount of Country X income tax paid, because that refundable overpayment exceeded (and so is not treated as a payment of) A's different foreign income tax liability for the previous taxable year.

(5) *Noncompulsory amounts*—(i) *In general.* An amount remitted to a foreign country (a ''foreign payment'') is not a compulsory payment, and thus is not an amount of foreign income tax paid, to the extent that the foreign payment exceeds the amount of liability for foreign income tax under the foreign tax law (as defined in paragraph (g) of this section). A foreign payment does not exceed the amount of such liability if the foreign payment is determined by the taxpayer in a manner that is consistent with a reasonable interpretation and application of the substantive and procedural provisions of foreign tax law (including applicable tax treaties) in such a way as to reduce, over time, the taxpayer's reasonably expected liability under foreign tax law for foreign income tax, and if the taxpayer exhausts all effective and practical remedies, including invocation of competent authority procedures available under applicable tax treaties, to reduce, over time, the taxpayer's liability for foreign income tax (including liability pursuant to a foreign tax audit adjustment). See paragraphs (e)(5)(ii) through (v) of this section. Whether a taxpayer has satisfied its obligation to minimize the aggregate amount of its liability for foreign income taxes over time is determined without regard to the present value of a deferred tax liability or other time value of money considerations. However, a taxpayer is not required to reduce its foreign income tax liability to the extent the reasonably expected, arm's length costs of reducing the liability would exceed the amount by which the liability could be reduced. For this purpose, such costs may include an additional liability for a different foreign tax (but not U.S. taxes) that is not a foreign income tax only to the extent the amount of the additional liability is determined in a manner consistent with the rules of this paragraph (e)(5). A taxpayer is not required to alter its form of doing business, its business conduct, or the form of any business transaction in order to reduce its liability under foreign law for foreign income tax.

(ii) *Reasonable application of foreign tax law.* An interpretation or application of foreign tax law is not reasonable if there is actual notice or constructive notice (for example, a published court decision) to the taxpayer that the interpretation or application is likely to be erroneous. In interpreting foreign tax law, a taxpayer may generally rely on advice obtained in good faith from competent foreign tax advisors to whom the taxpayer has disclosed the relevant facts. Except as provided in paragraphs (e)(5)(i) and (e)(5)(iv) of this section, voluntarily forgoing a tax benefit to which a taxpayer is entitled under the foreign tax law results in a foreign payment in excess of the taxpayer's liability for foreign income tax.

(iii) *Effect of foreign tax law elections*—(A) *In general.* Where foreign tax law includes options or elections whereby a taxpayer's foreign income tax

liability may be shifted, in whole or part, to a different year or years, the taxpayer's use or failure to use such options or elections does not result in a foreign payment in excess of the taxpayer's liability for foreign income tax. Except as provided in paragraph (e)(5)(iii)(B) of this section, where foreign tax law provides a taxpayer with options or elections in computing its liability for foreign income tax whereby a taxpayer's foreign income tax liability may be permanently decreased in the aggregate over time, the taxpayer's failure to use such options or elections results in a foreign payment in excess of the taxpayer's liability for foreign income tax.

(B) *Exception for certain options or elections*—(*1*) *Entity classification elections.* If foreign tax law provides an option or election to treat an entity as fiscally transparent or non-fiscally transparent, a taxpayer's decision to use or not use such option or election is not considered to increase the taxpayer's liability for foreign income tax over time for purposes of this paragraph (e)(5).

(*2*) *Foreign consolidation, group relief, or other loss sharing regime.* If foreign tax law provides an option or election for one foreign entity to join in the filing of a consolidated return with another foreign entity, or to surrender its loss in order to offset the income of another foreign entity pursuant to a foreign group relief or other loss-sharing regime, a taxpayer's decision whether to file a consolidated return, whether to surrender a loss, or whether to use a surrendered loss, is not considered to increase the taxpayer's liability for foreign income tax over time for purposes of this paragraph (e)(5).

(C) *Alternative creditable levies.* If under foreign tax law a taxpayer has the option to determine its foreign income tax liability under only one of multiple separate levies, each of which qualifies as a foreign income tax, then the amount of foreign income tax paid equals the smallest liability of the amounts that would be due under each of the alternative levies, regardless of which levy the taxpayer uses to determine its foreign income tax liability.

(iv) *Exception for increase in liability in connection with anti-hybrid rules*—(A) *In general.* If a taxpayer (the ''first taxpayer'') that makes a payment to another taxpayer (the ''second taxpayer'') is permitted to increase the first taxpayer's liability for foreign income tax (for example, by waiving an otherwise allowable deduction), and doing so results in a greater decrease in the amount of liability for foreign income tax of the second taxpayer by reason of the deactivation of a hybrid mismatch rule that would otherwise apply to the second taxpayer, then the increase in the first taxpayer's liability is not considered to result in a foreign payment in excess of the first taxpayer's liability for foreign income tax for purposes of this paragraph (e)(5).

(B) *Definition of hybrid mismatch rule.* The term *hybrid mismatch rule* means foreign tax law rules substantially similar to sections 245A(e) and 267A and includes rules the purpose of which is to eliminate the deduction/no-inclusion outcome of hybrid and branch mismatch arrangements. Examples of such rules include rules based on, or substantially similar to, the recommendations contained in OECD/G–20, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2: 2015 Final Report* (October 2015), and OECD/G–20, *Neutralising the Effects of Branch Mismatch Arrangements, Action 2: Inclusive Framework on BEPS* (July 2017).

(v) *Exhaustion of remedies.* In determining whether a taxpayer has exhausted all effective and practical remedies, a remedy is effective and practical only if the cost of pursuing it (including the reasonably expected risk of incurring an offsetting or additional foreign income tax or other tax liability) is reasonable considering the amount at issue and the likelihood of success. An available remedy is considered effective and practical if an economically rational taxpayer would pursue it whether or not a compulsory payment of the amount at issue would be eligible for a U.S. foreign tax credit. A settlement by a taxpayer of two or more issues will be evaluated on an overall basis, not on an issue-by-issue basis, in determining whether an amount is a compulsory payment.

(vi) *Examples.* The following examples illustrate the rules of paragraph (e)(5) of this section.

(A) *Example 1.* A, a corporation organized and doing business solely in the United States, owns all of the stock of B, a corporation organized in Country X. In Year 1, A buys merchandise from unrelated persons for $1,000,000, and shortly thereafter resells that merchandise to B for $600,000. Later in Year 1, B resells the merchandise to unrelated persons for $1,200,000. Under the Country X income tax, which is a net income tax within the meaning of paragraph (a)(3) of this section, all corporations organized in Country X are subject to a tax equal to 3 percent of their net income. In computing its Year 1 Country X income tax liability, B reports $600,000 ($1,200,000 − $600,000) of profit from the purchase and resale of merchandise. The Country X tax law requires that transactions between related persons be reported at arm's length prices, and a reasonable interpretation of this requirement, as it has been applied in Country X, would consider B's arm's length purchase price of the merchandise purchased from A to be $1,050,000. When it computes its Country X tax liability B is aware that $600,000 is not an arm's length price (by Country X standards). B's knowing use of a non-arm's length price (by Country X standards) of $600,000, instead of a price of $1,050,000 (an arm's length price under Country X's law), is not consistent with a reasonable interpretation and application of Country X tax law, determined in such a way as to reduce over time B's reasonably expected liability for Country X income tax. Accordingly, $13,500 (3 percent of $450,000 ($1,050,000 − $600,000)), the amount of Country X income tax remitted by B to Country X that is attributable to the purchase of the merchandise from B's parent at less than an arm's length price, is in excess of the amount of B's liability for Country X income tax, and thus is not an amount of foreign income tax paid.

(B) *Example 2.* A, a corporation organized and doing business solely in the United States, owns all of the stock of B, a corporation organized in Country X. Country X has in force an income tax treaty with the United States. The tax treaty provides that the profits of related persons shall be determined as if the persons were not related. A and B deal extensively with each other. A and B, with respect to a series of transactions involving both of them, treat A as having $300,000 of income and B as having $700,000 of income for purposes of A's United States income tax and B's Country X income tax, respectively. B has no actual or constructive notice that its treatment of these transactions under Country X tax law is likely to be erroneous. Subsequently, the Internal Revenue Service reallocates $200,000 of this income from B to A under the authority of section 482 and the tax treaty. This reallocation constitutes actual notice to A and constructive notice to B that B's interpretation and application of Country X's tax law and the tax treaty is likely to be erroneous. B does not exhaust all effective and practical remedies to obtain a refund of the amount remitted by B to Country X that is attributable to the reallocated $200,000 of income. Under paragraph (e)(5)(i) of this section, this amount is in excess of the amount of B's liability for Country X income tax and thus is not an amount of foreign income tax paid.

(C) *Example 3.* The facts are the same as those in paragraph (e)(5)(vi)(B) of this section (the facts in *Example 2*), except that B files a claim for refund (an administrative proceeding) of Country X tax and A or B invokes the competent authority procedures of the tax treaty, the cost of which is reasonable in view of the amount at issue and the likelihood of success. Nevertheless, B does not obtain any refund of Country X income tax. The cost of pursuing any judicial remedy in Country X would be unreasonable in light of the amount at issue and the likelihood of B's success, and B does not pursue any such remedy. Under paragraph (e)(5)(i) of this section, the entire amount paid by B to Country X is a compulsory payment and thus is an amount of foreign income tax paid by B.

(D) *Example 4.* The facts are the same as those in paragraph (e)(5)(vi)(B) of this section (the facts in *Example 2*), except that, when the Internal Revenue Service makes the reallocation, the Country X statute of limitations on refunds has expired, and neither the internal law of Country X nor the tax treaty authorizes the Country X tax authorities to pay a refund that is barred by the statute of limitations. B does not file a claim for refund, and neither A nor B invokes the competent authority procedures of the tax treaty. Because the Country X tax authorities would be barred by the statute of limitations from paying a refund, B has no effective and practical remedies. Under paragraph (e)(5)(i) of this section, the entire amount paid by B to Country X is a compulsory payment and thus is an amount of foreign income tax paid by B.

(E) *Example 5.* A is a U.S. person doing business in Country X. In computing its income tax liability to Country X, A is permitted, at its election, to recover the cost of machinery used in its business either by deducting that cost in the year of acquisition or by depreciating that cost on the straight-line method over a period of 2, 4, 6 or 10 years. A elects to depreciate machinery over 10 years. This election merely shifts A's tax liability to different years (compared to the timing of A's tax liability under a different depreciation period); it does not result in a payment in excess of the amount of A's liability for Country X income tax in any year since the amount of Country X income tax paid by A is consistent with a reasonable interpretation of Country X tax law in such a way as to reduce over time A's reasonably expected liability for Country X income tax. Because the standard of paragraph (e)(5)(i) of this section refers to A's reasonably expected liability, not its actual liability, events actually occurring in subsequent years (for example, whether A has sufficient profit in such years so that such depreciation deductions actually reduce A's Country X tax liability or whether the Country X tax rates change) are immaterial.

(F) *Example 6.* The domestic law of Country X imposes a 25 percent tax described in § 1.903–1(b) on the gross amount of interest from sources in Country X that is received by a nonresident of Country X. Country X tax law imposes the tax on the nonresident recipient and requires any resident of Country X that pays such interest to a nonresident to withhold and pay over to Country X 25 percent of such interest, which is applied to offset the recipient's liability for the 25 percent tax. A tax treaty between the United States and Country X overrides domestic law of Country X and provides that Country X may not tax interest received by a resident of the United States from a resident of Country X at a rate in excess of 10 percent of the gross amount of such interest. A resident of the United States may claim the benefit of the tax treaty only by applying for a refund of the excess withheld amount (15 percent of the gross amount of interest income) after the end of the taxable year. A, a resident of the United States, receives a gross amount of 100u (units of Country X currency) of interest income from a resident of Country X from sources in Country X in Year 1, from which 25u of Country X tax is withheld. A does not file a timely claim for refund. Under paragraph (e)(5)(i) of this section, 15u of the amount withheld (25u − 10u) is not a compulsory payment and thus is not an amount of foreign income tax paid.

(G) *Example 7: Reasonable steps to minimize creditable tax—larger noncreditable tax cost—(1) Facts.* Corporations resident in Country X are subject to a 20% generally applicable net income tax, which qualifies as a foreign income tax under paragraph (a)(1)(ii) of this section (''Income Tax''), and a separate levy equal to 25% of certain deductible payments above a specified threshold made to related parties that are not residents of Country X, which does not qualify as a foreign income tax under paragraph (a)(1)(ii) of this section (''Base Erosion Tax''). CFC, a Country X corporation, makes payments to nonresident related parties that exceed the specified threshold of the Base Erosion Tax by 100u (units of Country X currency), which if claimed as deductions would result in a Base Erosion Tax of 25u (.25 × 100u), and would also result in 300u of taxable income for purposes of the Income Tax, thus resulting in Income Tax of 60u (.20 × 300u). If in computing its liability for Income Tax CFC does not claim deductions for the 100u of excess related party payments, its liability for the Base Erosion Tax would be zero, and its liability for Income Tax would be 80u (.20 × 400u).

(*2*) *Analysis.* If CFC chooses not to deduct the 100u of excess related party payments that would subject it to the Base Erosion Tax and pays 80u of Income Tax, the amount of foreign income tax paid under paragraph (e)(5) of this section is 80u. Under paragraph (e)(5)(i) of this section, although CFC could reduce its liability for Income Tax from 80u to 60u by claiming the deductions, no portion of the Income Tax remitted is a noncompulsory payment because reducing the Income Tax by 20u would incur a Base Erosion Tax of 25u, which exceeds the amount of the potential reduction.

(H) *Example 8: Reasonable steps to minimize creditable tax—smaller noncreditable tax cost—(1) Facts.* The facts are the same as those in paragraph (e)(5)(vi)(G)(*1*) of this section (the facts in *Example 7*) except that the rate of the Base Erosion Tax is 20% and the rate of the Income Tax is 25%. Accordingly, if CFC claims the 100u of excess deductions its liability for Base Erosion Tax would be 20u (.20 × 100u), and its liability for Income Tax would be 75u (.25 × 300u). If CFC chooses not to claim the 100u of excess deductions its liability for Base Erosion Tax would be zero, and its liability for Income Tax would be 100u (.25 × 400u).

(*2*) *Analysis.* If CFC chooses not to claim the 100u of excess deductions in computing its liability for Income Tax and pays 100u of Income Tax, the amount of foreign income tax paid under paragraph (e)(5) of this section is 75u. CFC's additional payment of 25u is not an amount of Income Tax paid, because CFC could have reduced its Income Tax liability by 25u by claiming the excess deductions and paying 20u of Base Erosion Tax.

(I) *Example 9: Alternative creditable taxes—(1) Facts.* The facts are the same as those in paragraph (e)(5)(vi)(G)(*1*) of this section (the facts in *Example 7*), except that Country X does not have a Base Erosion Tax, and it allows resident corporations to elect to pay either the Income Tax or a separate levy using an alternative cost allowance (the ''Alternative Tax''), which qualifies as a tax in lieu of an income tax under § 1.903–1(b)(2). CFC's liability under the Income Tax is 80u, and its liability under the Alternative Tax is 100u. CFC chooses to pay the 100u of Alternative Tax rather than the 80u of Income Tax.

(*2*) *Analysis.* Under paragraph (e)(5)(iii)(C) of this section, the amount of foreign income tax paid by CFC is 80u, the smaller of the amounts due under the two alternative foreign income taxes.

(vii) *Structured passive investment arrangements*—(A) *In general.* Notwithstanding paragraph (e)(5)(i) of this section, an amount paid to a foreign country (a ''foreign payment'') is not a compulsory payment, and thus is not an amount of foreign income tax paid, if the foreign payment is attributable (within the meaning of paragraph (e)(5)(vii)(B)(*1*)(*ii*) of this section) to a structured passive investment arrangement (as described in paragraph (e)(5)(vii)(B) of this section).

(B) *Conditions.* An arrangement is a structured passive investment arrangement if all of the following conditions are satisfied:

(*1*) *Special purpose vehicle (SPV).* An entity that is part of the arrangement meets the following requirements:

(*i*) Substantially all of the gross income (for U.S. tax purposes) of the entity, if any, is passive investment income, and substantially all of the assets of the entity are assets held to produce such passive investment income.

(*ii*) There is a foreign payment attributable to income of the entity (as determined under the laws of the foreign country to which such foreign payment is made), including the entity's share of income of a lower-tier entity that is a branch or pass-through entity under the laws of such foreign country, that, if the foreign payment were an amount of foreign income tax paid, would be paid in a U.S. taxable year in which the entity meets the requirements of paragraph (e)(5)(vii)(B)(*1*)(*i*) of this section. A foreign payment attributable to income of an entity includes a foreign payment attributable to income that is required to be taken into account by an owner of the entity, if the entity is a branch or pass-through entity under the laws of such foreign country. A foreign payment attributable to income of the entity also includes a withholding tax (within the meaning of section 901(k)(1)(B)) imposed on a dividend or other distribution (including distributions made by a pass-through entity or an entity that is disregarded as an entity separate from its owner for U.S. tax purposes) with respect to the equity of the entity.

(*2*) *U.S. party.* A person would be eligible to claim a credit under section 901(a) (including a credit for foreign taxes deemed paid under section 960) for all or a portion of the foreign payment described in paragraph (e)(5)(vii)(B)(*1*)(*ii*) of this section if the foreign payment were an amount of foreign income tax paid.

(*3*) *Direct investment.* The U.S. party's proportionate share of the foreign payment or payments described in paragraph (e)(5)(vii)(B)(*1*)(*ii*) of this section is (or is expected to be) substantially greater than the amount of credits, if any, that the U.S. party reasonably would expect to be eligible to claim under section 901(a) for foreign income taxes attributable to income generated by the U.S. party's proportionate share of the assets owned by the SPV if the U.S. party directly owned such assets. For this purpose, direct ownership shall not include ownership through a branch, a permanent establishment or any other arrangement (such as an agency arrangement or dual resident status) that would result in the income generated by the U.S. party's proportionate share of the assets being subject to tax on a net basis in the foreign country to which the payment is made. A U.S. party's proportionate share of the assets of the SPV shall be determined by reference to such U.S. party's proportionate share of the total value of all of the outstanding interests in the SPV that are held by its equity owners and creditors. A U.S. party's proportionate share of the assets of the SPV, however, shall not include any assets that produce income subject to gross basis withholding tax.

(*4*) *Foreign tax benefit.* The arrangement is reasonably expected to result in a credit, deduction, loss, exemption, exclusion or other tax benefit under the laws of a foreign country that is available to a counterparty or to a person that is related to the counterparty (determined under the principles of paragraph (e)(5)(vii)(C)(*7*) of this section by applying the tax laws of a foreign country in which the counterparty is subject to tax on a net basis). However, a foreign tax benefit in the form of a credit is described in this paragraph (e)(5)(vii)(B)(*4*) only if the amount of any such credit corresponds to 10 percent or more of the amount of the U.S. party's share (for U.S. tax purposes) of the foreign payment referred to in paragraph (e)(5)(vii)(B)(*1*)(*ii*) of this section. In addition, a foreign tax benefit in the form of a deduction, loss, exemption, exclusion or other tax benefit is described in this paragraph (e)(5)(vii)(B)(*4*) only if such amount corresponds to 10 percent or more of the foreign base with respect to which the U.S. party's share (for U.S. tax purposes) of the foreign payment is imposed. For purposes of the preceding two sentences, if an arrangement involves more than one U.S. party or more than one counterparty or both, the aggregate amount of foreign tax benefits available to all of the counterparties and persons related to such counterparties is compared to the aggregate amount of all of the U.S. parties' shares of the foreign payment or foreign base, as the case may be. Where a U.S. party indirectly owns interests in an SPV that are treated as equity interests for both U.S. and foreign tax purposes, a foreign tax benefit available to a foreign entity in the chain of ownership that begins with the SPV and ends with the first-tier entity in the chain does not correspond to the U.S. party's share of the foreign payment attributable to income of the SPV to the extent that such benefit relates to earnings of the SPV that are distributed with respect to equity interests in the SPV that are owned directly or indirectly by the U.S. party for purposes of both U.S. and foreign tax law.

(*5*) *Counterparty.* The arrangement involves a counterparty. A counterparty is a person that, under the tax laws of a foreign country in which the person is subject to tax on the basis of place of management, place of incorporation or similar criterion or otherwise subject to a net basis tax, directly or indirectly owns or acquires equity interests in, or assets of, the SPV. However, a counterparty does not include the SPV or a person with respect to which for U.S. tax purposes the same domestic corporation, U.S. citizen or resident alien individual directly or indirectly owns more than 80 percent of the total value of the stock (or equity interests) of each of the U.S. party and such person. A counterparty also does not include a person with respect to which for U.S. tax purposes the U.S. party directly or indirectly owns more than 80 percent of the total value of the stock (or equity interests), but only if the U.S. party is a domestic corporation, a U.S. citizen or a resident alien individual. In addition, a counterparty does not include an individual who is a U.S. citizen or resident alien.

(*6*) *Inconsistent treatment.* The United States and an applicable foreign country treat one or more of the aspects of the arrangement listed in paragraph (e)(5)(vii)(B)(*6*)(*i*) through (*iv*) of this section differently under their respective tax systems, and for one or more tax years when the arrangement is in effect one or both of the following two conditions applies; either the amount of income attributable to the SPV that is recognized for U.S. tax purposes by the SPV, the U.S. party or parties, and persons related to a U.S. party or parties is materially less than the amount of income that would be

recognized if the foreign tax treatment controlled for U.S. tax purposes; or the amount of credits claimed by the U.S. party or parties (if the foreign payment described in paragraph (e)(5)(vii)(B)(*1*)(*ii*) of this section were an amount of foreign income tax paid) is materially greater than it would be if the foreign tax treatment controlled for U.S. tax purposes:

(*i*) The classification of the SPV (or an entity that has a direct or indirect ownership interest in the SPV) as a corporation or other entity subject to an entity-level tax, a partnership or other flow-through entity or an entity that is disregarded for tax purposes.

(*ii*) The characterization as debt, equity or an instrument that is disregarded for tax purposes of an instrument issued by the SPV (or an entity that has a direct or indirect ownership interest in the SPV) to a U.S. party, a counterparty or a person related to a U.S. party or a counterparty.

(*iii*) The proportion of the equity of the SPV (or an entity that directly or indirectly owns the SPV) that is considered to be owned directly or indirectly by a U.S. party and a counterparty.

(*iv*) The amount of taxable income that is attributable to the SPV for one or more tax years during which the arrangement is in effect.

(C) *Definitions.* The following definitions apply for purposes of paragraph (e)(5)(vii) of this section.

(*1*) *Applicable foreign country.* An *applicable foreign country* means each foreign country to which a foreign payment described in paragraph (e)(5)(vii)(B)(*1*)(*ii*) of this section is made or which confers a foreign tax benefit described in paragraph (e)(5)(vii)(B)(*4*) of this section.

(*2*) *Counterparty.* The term *counterparty* means a person described in paragraph (e)(5)(vii)(B)(*5*) of this section.

(*3*) *Entity.* The term *entity* includes a corporation, trust, partnership or disregarded entity described in § 301.7701–2(c)(2)(i).

(*4*) *Indirect ownership. Indirect ownership* of stock or another equity interest (such as an interest in a partnership) shall be determined in accordance with the principles of section 958(a)(2), regardless of whether the interest is owned by a U.S. or foreign entity.

(*5*) *Passive investment income*—(*i*) *In general.* The term *passive investment income* means income described in section 954(c), as modified by this paragraph (e)(5)(vii)(C)(*5*)(*i*) and paragraph (e)(5)(vii)(C)(*5*)(*ii*) of this section. In determining whether income is described in section 954(c), paragraphs (c)(1)(H), (c)(3), and (c)(6) of section 954 shall be disregarded. Sections 954(c), 954(h), and 954(i) shall be applied at the entity level as if the entity (as defined in paragraph (e)(5)(vii)(C)(*3*) of this section) were a controlled foreign corporation (as defined in section 957(a)). For purposes of determining if sections 954(h) and 954(i) apply for purposes of this paragraph (e)(5)(vii)(C)(*5*)(*i*) and paragraph (e)(5)(vii)(C)(*5*)(*ii*) of this section, any income of an entity attributable to transactions that, assuming the entity is an SPV, are with a person that is a counterparty, or with persons that are related to a counterparty within the meaning of paragraph (e)(5)(vii)(B)(*4*) of this section, shall not be treated as qualified banking or financing income or as qualified insurance income, and shall not be taken into account in applying sections 954(h) and 954(i) for purposes of determining whether other income of the entity is excluded from section 954(c)(1) under section 954(h) or 954(i), but only if any such person (or a person that is related to such person within the meaning of paragraph (e)(5)(vii)(B)(*4*) of this section) is eligible for a foreign tax benefit described in paragraph (e)(5)(vii)(B)(*4*) of this section. In addition, in applying section 954(h) for purposes of this paragraph (e)(5)(vii)(C)(*5*)(*i*) and paragraph (e)(5)(vii)(C)(*5*)(*ii*) of this section, section 954(h)(3)(E) shall not apply, section 954(h)(2)(A)(ii) shall be satisfied only if the entity conducts substantial activity with respect to its business through its own employees, and the term ''any foreign country'' shall be substituted for ''home country'' wherever it appears in section 954(h).

(*ii*) *Income attributable to lower-tier entities; holding company exception.* Income of an upper-tier entity that is attributable to an equity interest in a lower-tier entity, including dividends, an allocable share of partnership income, and income attributable to the ownership of an interest in an entity that is disregarded as an entity separate from its owner is passive investment income unless substantially all of the upper-tier entity's assets consist of qualified equity interests in one or more lower-tier entities, each of which is engaged in the active conduct of a trade or business and derives more than 50 percent of its gross income from such trade or business, and substantially all of the upper-tier entity's opportunity for gain and risk of loss with respect to each such interest in a lower-tier entity is shared by the U.S. party (or persons that are related to a U.S. party) and, assuming the entity is an SPV, a counterparty (or persons that are related to a counterparty) (''holding company exception''). If an arrangement involves more than one U.S. party or more than one counterparty or both, then substantially all of the upper-tier entity's opportunity for gain and risk of loss with respect to its interest in any lower-tier entity must be shared (directly or indirectly) by one or more U.S. parties (or persons related to such U.S. parties) and, assuming the upper-tier entity is an SPV, one or more counterparties (or persons related to such counterparties). Substantially all of the upper-tier entity's opportunity for gain and risk of loss with respect to its interest in any lower-tier entity is not shared if the opportunity for gain and risk of loss is borne (directly or indirectly) by one or more U.S. parties (or persons related to such U.S. party or parties) or, assuming the upper-tier entity is an SPV, by one or more counterparties (or persons related to such counterparty or counterparties). Whether and the extent to which a person is considered to share in an upper-tier entity's opportunity for gain and risk of loss is determined based on all the facts and circumstances, provided, however, that a person does not share in an upper-tier entity's opportunity for gain and risk of loss if its equity interest in the upper-tier entity was acquired in a sale-repurchase transaction or if its interest is treated as debt for U.S. tax purposes. If a U.S. party owns an interest in an entity indirectly through a chain of entities, the application of the holding company exception begins with the lowest-tier entity in the chain that may satisfy the holding company exception and proceeds upward; provided, however, that the opportunity for gain and risk of loss borne by any upper-tier entity in the chain that is a counterparty shall be disregarded to the extent borne indirectly by a U.S. party. An upper-tier entity that satisfies the holding company exception is itself considered to be engaged in the active conduct of a trade or business and to derive more than 50 percent of its gross income from such trade or business for purposes of applying the holding company exception to the owners of such entity. A lower-tier entity that is engaged in a banking, financing, or similar business shall not be considered to be engaged in the active conduct of a trade or business unless the income derived by such entity would be excluded from section 954(c)(1) under section 954(h) or 954(i)

as modified by paragraph (e)(5)(vii)(C)(*5*)(*i*) of this section.

(*6*) *Qualified equity interest.* With respect to an interest in a corporation, the term *qualified equity interest* means stock representing 10 percent or more of the total combined voting power of all classes of stock entitled to vote and 10 percent or more of the total value of the stock of the corporation or disregarded entity, but does not include any preferred stock (as defined in section 351(g)(3)). Similar rules shall apply to determine whether an interest in an entity other than a corporation is a qualified equity interest.

(*7*) *Related person.* Two persons are related if—

(*i*) One person directly or indirectly owns stock (or an equity interest) possessing more than 50 percent of the total value of the other person; or

(*ii*) The same person directly or indirectly owns stock (or an equity interest) possessing more than 50 percent of the total value of both persons.

(*8*) *Special purpose vehicle (SPV).* The term *SPV* means the entity described in paragraph (e)(5)(vii)(B)(*1*) of this section.

(*9*) *U.S. party.* The term *U.S. party* means a person described in paragraph (e)(5)(vii)(B)(*2*) of this section.

(D) *Examples.* The following examples illustrate the rules of paragraph (e)(5)(vii) of this section. No inference is intended as to whether a taxpayer would be eligible to claim a credit under section 901(a) if a foreign payment were an amount of foreign income tax paid. The examples set forth below do not limit the application of other principles of existing law to determine the proper tax consequences of the structures or transactions addressed in the regulations.

(*1*) *Example 1: U.S. borrower transaction*—(*i*) *Facts.* A domestic corporation (USP) forms a Country M corporation (Newco), contributing $1.5 billion in exchange for 100% of the stock of Newco. Newco, in turn, loans the $1.5 billion to a second Country M corporation (FSub) wholly owned by USP. USP then sells its entire interest in Newco to a Country M corporation (FP) for the original purchase price of $1.5 billion, subject to an obligation to repurchase the interest in five years for $1.5 billion. The sale has the effect of transferring ownership of the Newco stock to FP for Country M tax purposes. Assume the sale-repurchase transaction is structured in a way that qualifies as a collateralized loan for U.S. tax purposes. Therefore, USP remains the owner of the Newco stock for U.S. tax purposes. All of FSub's income is subpart F income. In Year 1, FSub pays Newco $120 million of interest. Newco pays $36 million to Country M with respect to such interest income and distributes the remaining $84 million to FP. Under Country M law, the $84 million distribution is excluded from FP's income. None of FP's stock is owned, directly or indirectly, by USP or any shareholders of USP that are domestic corporations, U.S. citizens, or resident alien individuals. Under an income tax treaty between Country M and the United States, Country M does not impose Country M tax on interest received by U.S. residents from sources in Country M.

(*ii*) *Result.* The $36 million payment by Newco to Country M is not a compulsory payment, and thus is not an amount of foreign income tax paid because the foreign payment is attributable to a structured passive investment arrangement. First, Newco is an SPV because all of Newco's income is passive investment income described in paragraph (e)(5)(iv)(C)(5) of this section; Newco's only asset, a note, is held to produce such income; the payment to Country M is attributable to such income; and if the payment were an amount of foreign income tax paid it would be paid in a U.S. taxable year in which Newco meets the requirements of paragraph (e)(5)(vii)(B)(*1*)(*i*) of this section. Second, if the foreign payment were treated as an amount of foreign income tax paid, USP would be deemed to pay the foreign payment under section 960(a) and, therefore, would be eligible to claim a credit for such payment under section 901(a). Third, USP would not pay any Country M tax if it directly owned Newco's loan receivable. Fourth, the distribution from Newco to FP is exempt from tax under Country M law, and the exempt amount corresponds to more than 10% of the foreign base with respect to which USP's share (which is 100% under U.S. tax law) of the foreign payment was imposed. Fifth, FP is a counterparty because FP owns stock of Newco under Country M law and none of FP's stock is owned by USP or shareholders of USP that are domestic corporations, U.S. citizens, or resident alien individuals. Sixth, FP is the owner of 100% of Newco's stock for Country M tax purposes, while USP is the owner of 100% of Newco's stock for U.S. tax purposes, and the amount of credits claimed by USP if the payment to Country M were an amount of foreign income tax paid is materially greater than it would be if Country M tax treatment controlled for U.S. tax purposes such that FP, rather than USP, owned 100% of Newco's stock. Because the payment to Country M is not an amount of foreign income tax paid, USP is not deemed to pay any Country M tax under section 960(a). USP includes $84 million in income under subpart F with respect to Newco and also has interest expense of $84 million. FSub's income and earnings and profits are reduced by $120 million of interest expense.

(*2*) *Example 2: U.S. borrower transaction*—(*i*) *Facts.* The facts are the same as those in paragraph (e)(5)(vii)(D)(*1*)(*i*) of this section (the facts in *Example 1*), except that FSub is a wholly-owned subsidiary of Newco. In addition, assume FSub is engaged in the active conduct of manufacturing and selling widgets and derives more than 50% of its gross income from such business.

(*ii*) *Result.* The result is the same as in paragraph (e)(5)(vii)(D)(*1*)(*ii*) of this section (the result in *Example 1*), except that Newco's income is tested income rather than subpart F income, and if the $36 million foreign payment were an amount of foreign income tax paid USP would be deemed to pay a portion of the foreign payment under section 960(d), rather than 960(a). Although Newco wholly owns FSub, which is engaged in the active conduct of manufacturing and selling widgets and derives more than 50% of its income from such business, Newco's income that is attributable to Newco's equity interest in FSub is passive investment income because the sale-repurchase transaction limits FP's interest in Newco and its assets to that of a creditor, so that substantially all of Newco's opportunity for gain and risk of loss with respect to its stock in FSub is borne by USP. See paragraph (e)(5)(vii)(C)(*5*)(*ii*) of this section. Accordingly, Newco's stock in FSub is held to produce passive investment income. Thus, Newco is an SPV because all of Newco's income is passive investment income described in paragraph (e)(5)(vii)(C)(*5*) of this section, Newco's assets are held to produce such income, the payment to Country M is attributable to such income, and if the payment were an amount of foreign income tax paid it would be paid in a U.S. taxable year in which Newco meets the requirements of paragraph (e)(5)(vii)(B)(*1*)(*i*) of this section.

(*3*) *Example 3: U.S. borrower transaction*—(*i*) *Facts.* A domestic corporation (USP) loans $750 million to its wholly-owned domestic subsidiary (Sub). USP and Sub form a Country M partnership (Partnership) to which each contributes $750 million. Partnership loans all of its $1.5 billion of capital to Issuer, a wholly-owned Country M

affiliate of USP, in exchange for a note and coupons providing for the payment of interest at a fixed rate over a five-year term. Partnership sells all of the coupons to Coupon Purchaser, a Country N partnership owned by a Country M corporation (Foreign Bank) and a wholly-owned Country M subsidiary of Foreign Bank, for $300 million. At the time of the coupon sale, the fair market value of the coupons sold is $290 million and, pursuant to section 1286(b)(3), Partnership's basis allocated to the coupons sold is $290 million. Several months later and prior to any interest payments on the note, Foreign Bank and its subsidiary sell all of their interests in Coupon Purchaser to an unrelated Country O corporation for $280 million. None of Foreign Bank's stock or its subsidiary's stock is owned, directly or indirectly, by USP or Sub or by any shareholders of USP or Sub that are domestic corporations, U.S. citizens, or resident alien individuals. Assume that both the United States and Country M respect the sale of the coupons for tax law purposes. In the year of the coupon sale, for Country M tax purposes USP's and Sub's shares of Partnership's profits total $300 million, a payment of $60 million to Country M is made with respect to those profits, and Foreign Bank and its subsidiary, as partners of Coupon Purchaser, are entitled to deduct the $300 million purchase price of the coupons from their taxable income. For U.S. tax purposes, USP and Sub recognize their distributive shares of the $10 million premium income and claim a direct foreign tax credit for their shares of the $60 million payment to Country M. Country M imposes no additional tax when Foreign Bank and its subsidiary sell their interests in Coupon Purchaser. Country M also does not impose Country M tax on interest received by U.S. residents from sources in Country M.

(*ii*) *Result.* The payment to Country M is not a compulsory payment, and thus is not an amount of foreign income tax paid, because the foreign payment is attributable to a structured passive investment arrangement. First, Partnership is an SPV because all of Partnership's income is passive investment income described in paragraph (e)(5)(vii)(C)(*5*) of this section; Partnership's only asset, Issuer's note, is held to produce such income; the payment to Country M is attributable to such income; and if the payment were an amount of foreign income tax paid, it would be paid in a U.S. taxable year in which Partnership meets the requirements of paragraph (e)(5)(vii)(B)(*1*)(*i*) of this section. Second, if the foreign payment were an amount of tax paid, USP and Sub would be eligible to claim a credit for such payment under section 901(a). Third, USP and Sub would not pay any Country M tax if they directly owned Issuer's note. Fourth, for Country M tax purposes, Foreign Bank and its subsidiary deduct the $300 million purchase price of the coupons and are exempt from Country M tax on the $280 million received upon the sale of Coupon Purchaser, and the deduction and exemption correspond to more than 10% of the $300 million base with respect to which USP's and Sub's 100% share of the foreign payments was imposed. Fifth, Foreign Bank and its subsidiary are counterparties because they indirectly acquired assets of Partnership, the interest coupons on Issuer's note, and are not directly or indirectly owned by USP or Sub or shareholders of USP or Sub that are domestic corporations, U.S. citizens, or resident alien individuals. Sixth, the amount of taxable income of Partnership for one or more years is different for U.S. and Country M tax purposes, and the amount of income attributable to USP and Sub for U.S. tax purposes is materially less than the amount of income they would recognize if the Country M tax treatment of the coupon sale controlled for U.S. tax purposes. Because the payment to Country M is not an amount of foreign income tax paid, USP and Sub are not considered to pay tax under section 901. USP and Sub have income of $10 million in the year of the coupon sale.

(*4*) *Example 4: Active business; no SPV*—(*i*) *Facts.* A, a domestic corporation, wholly owns B, a Country X corporation engaged in the manufacture and sale of widgets. On January 1, Year 1, C, also a Country X corporation, loans $400 million to B in exchange for an instrument that is debt for U.S. tax purposes and equity in B for Country X tax purposes. As a result, C is considered to own stock of B for Country X tax purposes. B loans $55 million to D, a Country Y corporation wholly owned by A. In year 1, B has $166 million of net income attributable to its sales of widgets and $3.3 million of interest income attributable to the loan to D. Substantially all of B's assets are used in its widget business. Country Y does not impose tax on interest paid to nonresidents. B makes a payment of $50.8 million to Country X with respect to B's net income. Country X does not impose tax on dividend payments between Country X corporations. None of C's stock is owned, directly or indirectly, by A or by any shareholders of A that are domestic corporations, U.S. citizens, or resident alien individuals.

(*ii*) *Result.* B is not an SPV within the meaning of paragraph (e)(5)(vii)(B)(*1*) of this section because the amount of interest income received from D does not constitute substantially all of B's income and the $55 million note from D does not constitute substantially all of B's assets. Accordingly, the $50.8 million payment to Country X is not attributable to a structured passive investment arrangement.

(*5*) *Example 5: U.S. lender transaction*—(*i*) *Facts.* A Country X corporation (Foreign Bank) contributes $2 billion to a newly-formed Country X company (Newco) in exchange for 90% of the common stock of Newco and securities that are treated as debt of Newco for U.S. tax purposes and preferred stock of Newco for Country X tax purposes. A domestic corporation (USP) contributes $1 billion to Newco in exchange for 10% of Newco's common stock and securities that are treated as preferred stock of Newco for U.S. tax purposes and debt of Newco for Country X tax purposes. Newco loans the $3 billion to a wholly-owned, Country X subsidiary of Foreign Bank (FSub) in return for a $3 billion, seven-year note paying interest currently. The Newco securities held by USP represent more than 50% of the voting power in Newco and more than 50% of the value of the securities in Newco that are treated as equity for U.S. tax purposes. The Newco securities held by USP entitle the holder to fixed distributions of $4 million per year, and the Newco securities held by Foreign Bank entitle the holder to receive $82 million per year, payable only on maturity of the $3 billion FSub note in Year 7. At the end of Year 5, pursuant to a prearranged plan, Foreign Bank acquires USP's Newco stock and securities for a prearranged price of $1 billion. Country X does not impose tax on dividends received by one Country X corporation from a second Country X corporation. Under an income tax treaty between Country X and the United States, Country X does not impose Country X tax on interest received by U.S. residents from sources in Country X. None of Foreign Bank's stock is owned, directly or indirectly, by USP or any shareholders of USP that are domestic corporations, U.S. citizens, or resident alien individuals. In each of Years 1 through 7, FSub pays Newco $124 million of interest on the $3 billion note. Newco distributes $4 million to USP in each of Years 1 through 5. The distributions are deductible for Country X tax purposes, and Newco pays Country X $36 million with respect to $120 million of taxable income from the

FSub note in each year. For U.S. tax purposes, in each year Newco's subpart F income and earnings and profits are increased by $124 million of interest income and reduced by accrued interest expense with respect to the Newco securities held by Foreign Bank.

(*ii*) *Result.* The $36 million payment to Country X is not a compulsory payment, and thus is not an amount of foreign income tax paid, because the foreign payment is attributable to a structured passive investment arrangement. First, Newco is an SPV because all of Newco's income is passive investment income described in paragraph (e)(5)(vii)(C)(*5*) of this section; Newco's only asset, a note of FSub, is held to produce such income; the payment to Country X is attributable to such income; and if the payment were an amount of foreign income tax paid it would be paid in a U.S. taxable year in which Newco meets the requirements of paragraph (e)(5)(vii)(B)(*1*)(*i*) of this section. Second, if the foreign payment were an amount of foreign income tax paid, USP would be deemed to pay its pro rata share of the foreign payment under section 960(a) in each of Years 1 through 5 and, therefore, would be eligible to claim a credit under section 901(a). Third, USP would not pay any Country X tax if it directly owned its proportionate share of Newco's assets, a note of FSub. Fourth, for Country X tax purposes, Foreign Bank is eligible to receive a tax-free distribution of $82 million attributable to each of Years 1 through 5, and that amount corresponds to more than 10% of the foreign base with respect to which USP's share of the foreign payment was imposed. Fifth, Foreign Bank is a counterparty because it owns stock of Newco for Country X tax purposes and none of Foreign Bank's stock is owned, directly or indirectly, by USP or shareholders of USP that are domestic corporations, U.S. citizens, or resident alien individuals. Sixth, the United States and Country X treat various aspects of the arrangement differently, including whether the Newco securities held by Foreign Bank and USP are debt or equity. The amount of credits claimed by USP if the payment to Country X were an amount of foreign income tax paid is materially greater than it would be if the Country X tax treatment controlled for U.S. tax purposes such that the securities held by USP were treated as debt or the securities held by Foreign Bank were treated as equity, and the amount of income recognized by Newco for U.S. tax purposes is materially less than the amount of income recognized for Country X tax purposes. Because the payment to Country X is not an amount of foreign income tax paid, USP is not deemed to pay any Country X tax under section 960(a). USP has a subpart F inclusion of $4 million in each of Years 1 through 5.

(*6*) *Example 6: Holding company; no SPV*—(*i*) *Facts.* A, a Country X corporation, and B, a domestic corporation, each contribute $1 billion to a newly-formed Country X entity (C) in exchange for 50% of the common stock of C. C is treated as a corporation for Country X purposes and a partnership for U.S. tax purposes. C contributes $1.95 billion to a newly-formed Country X corporation (D) in exchange for 100% of D's common stock. C loans its remaining $50 million to D. Accordingly, C's sole assets are stock and debt of D. D uses the entire $2 billion to engage in the business of manufacturing and selling widgets. In Year 1, D derives $300 million of income from its widget business and derives $2 million of interest income. Also in Year 1, C has dividend income of $200 million and interest income of $3.2 million with respect to its investment in D. Country X does not impose tax on dividends received by one Country X corporation from a second Country X corporation. C makes a payment of $960,000 to Country X with respect to C's net income.

(*ii*) *Result.* C qualifies for the holding company exception described in paragraph (e)(5)(vii)(C)(*5*)(*ii*) of this section because C holds a qualified equity interest in D, D is engaged in an active trade or business and derives more than 50% of its gross income from such trade or business, C's interest in D constitutes substantially all of C's assets, and A and B share in substantially all of C's opportunity for gain and risk of loss with respect to D. As a result, C's dividend income from D is not passive investment income and C's stock in D is not held to produce such income. Accordingly, C is not an SPV within the meaning of paragraph (e)(5)(vii)(B)(*1*) of this section, and the $960,000 payment to Country X is not attributable to a structured passive investment arrangement.

(*7*) *Example 7: Holding company; no SPV*—(*i*) *Facts.* The facts are the same as those in paragraph (e)(5)(vii)(D)(*6*)(*i*) of this section (the facts in *Example 6*), except that instead of loaning $50 million to D, C contributes the $50 million to E in exchange for 10% of the stock of E. E is a Country Y corporation that is not engaged in the active conduct of a trade or business. Also in Year 1, D pays no dividends to C, E pays $3.2 million in dividends to C, and C makes a payment of $960,000 to Country X with respect to C's net income.

(*ii*) *Result.* C qualifies for the holding company exception described in paragraph (e)(5)(vii)(C)(*5*)(*ii*) of this section because C holds a qualified equity interest in D, D is engaged in an active trade or business and derives more than 50% of its gross income from such trade or business, C's interest in D constitutes substantially all of C's assets, and A and B share in substantially all of C's opportunity for gain and risk of loss with respect to D. As a result, less than substantially all of C's assets are held to produce passive investment income. Accordingly, C is not an SPV because it does not meet the requirements of paragraph (e)(5)(vii)(B)(*1*) of this section, and the $960,000 payment to Country X is not attributable to a structured passive investment arrangement.

(*8*) *Example 8: Holding company; no SPV*—(*i*) *Facts.* The facts are the same as those in paragraph (e)(5)(vii)(D)(*6*)(*i*) of this section (the facts in *Example 6*), except that B's $1 billion investment in C consists of 30% of C's common stock and 100% of C's preferred stock. A's $1 billion investment in C consists of 70% of C's common stock. B sells its preferred stock to F, a Country X corporation, subject to a repurchase obligation. Assume that under Country X tax law, but not U.S. tax law, F is treated as the owner of the preferred shares and receives a distribution in Year 1 of $50 million. The remaining earnings are distributed 70% to A and 30% to B.

(*ii*) *Result.* C qualifies for the holding company exception described in paragraph (e)(5)(vii)(C)(*5*)(*ii*) of this section because C holds a qualified equity interest in D, D is engaged in an active trade or business and derives more than 50% of its gross income from such trade or business, and C's interest in D constitutes substantially all of C's assets. Additionally, although F does not share in C's opportunity for gain and risk of loss with respect to C's interest in D because F acquired its interest in C in a sale-repurchase transaction, B (the U.S. party) and in the aggregate A and F (who would be counterparties assuming C were an SPV) share in substantially all of C's opportunity for gain and risk of loss with respect to D and such opportunity for gain and risk of loss is not borne exclusively either by B or by A and F in the aggregate. Accordingly, C's shares in D are not held to produce passive investment income and the $200 million dividend from D is not passive investment income. C is not an SPV within the meaning of paragraph (e)(5)(vii)(B)(*1*) of

this section, and the $960,000 payment to Country X is not attributable to a structured passive investment arrangement.

(*9*) *Example 9: Asset holding transaction*—(*i*) *Facts.* A domestic corporation (USP) contributes $6 billion of Country Z debt obligations to a Country Z entity (DE) in exchange for all of the class A and class B stock of DE. DE is a disregarded entity for U.S. tax purposes and a corporation for Country Z tax purposes. A corporation unrelated to USP and organized in Country Z (FC) contributes $1.5 billion to DE in exchange for all of the class C stock of DE. DE uses the $1.5 billion contributed by FC to redeem USP's class B stock. The terms of the class C stock entitle its holder to all income from DE, but FC is obligated immediately to contribute back to DE all distributions on the class C stock. USP and FC enter into a contract under which USP agrees to buy after five years the class C stock for $1.5 billion and an agreement under which USP agrees to pay FC periodic payments on $1.5 billion. The transaction is structured in such a way that, for U.S. tax purposes, there is a loan of $1.5 billion from FC to USP, and USP is the owner of the class C stock and the class A stock. In Year 1, DE earns $400 million of interest income on the Country Z debt obligations. DE makes a payment to Country Z of $100 million with respect to such income and distributes the remaining $300 million to FC. FC contributes the $300 million back to DE. None of FC's stock is owned, directly or indirectly, by USP or shareholders of USP that are domestic corporations, U.S. citizens, or resident alien individuals. Assume that Country Z imposes a withholding tax on interest income derived by U.S. residents. Country Z treats FC as the owner of the class C stock. Pursuant to Country Z tax law, FC is required to report the $400 million of income with respect to the $300 million distribution from DE, but is allowed to claim credits for DE's $100 million payment to Country Z. For Country Z tax purposes, FC is entitled to current deductions equal to the $300 million contributed back to DE.

(*ii*) *Result.* The payment to Country Z is not a compulsory payment, and thus is not an amount of foreign income tax paid, because the payment is attributable to a structured passive investment arrangement. First, DE is an SPV because all of DE's income is passive investment income described in paragraph (e)(5)(vii)(C)(*5*) of this section; all of DE's assets are held to produce such income; the payment to Country Z is attributable to such income; and if the payment were an amount of tax paid it would be paid in a U.S. taxable year in which DE meets the requirements of paragraph (e)(5)(vii)(B)(*1*)(*i*) of this section. Second, if the payment were an amount of foreign income tax paid, USP would be eligible to claim a credit for such amount under section 901(a). Third, USP's proportionate share of DE's foreign payment of $100 million is substantially greater than the amount of credits USP would be eligible to claim if it directly held its proportionate share of DE's assets, excluding any assets that would produce income subject to gross basis withholding tax if directly held by USP. Fourth, FC is entitled to claim a credit under Country Z tax law for the payment and recognizes a deduction for the $300 million contributed to DE under Country Z law. The credit claimed by FC corresponds to more than 10% of USP's share (for U.S. tax purposes) of the foreign payment and the deductions claimed by FC correspond to more than 10% of the base with respect to which USP's share of the foreign payment was imposed. Fifth, FC is a counterparty because FC is considered to own equity of DE under Country Z law and none of FC's stock is owned, directly or indirectly, by USP or shareholders of USP that are domestic corporations, U.S. citizens, or resident alien individuals. Sixth, the United States and Country Z treat certain aspects of the transaction differently, including the proportion of equity owned in DE by USP and FC, and the amount of credits claimed by USP if the Country Z payment were an amount of tax paid is materially greater than it would be if the Country Z tax treatment controlled for U.S. tax purposes such that FC, rather than USP, owned the class C stock. Because the payment to Country Z is not an amount of foreign income tax paid, USP is not considered to pay tax under section 901. USP has $400 million of interest income.

(*10*) *Example 10: Loss surrender*—(*i*) *Facts.* The facts are the same as those in paragraph (e)(5)(vii)(D)(9)(*i*) of this section (the facts in *Example 9*), except that the deductions attributable to the arrangement contribute to a loss recognized by FC for Country Z tax purposes, and pursuant to a group relief regime in Country Z FC elects to surrender the loss to its Country Z subsidiary.

(*ii*) *Result.* The results are the same as in paragraph (e)(5)(vii)(D)(*9*)(*ii*) of this section (the results in *Example 9*). The surrender of the loss to a related party is a foreign tax benefit that corresponds to the base with respect to which USP's share of the foreign payment was imposed.

(*11*) *Example 11: Joint venture; no foreign tax benefit*—(*i*) *Facts.* FC, a Country X corporation, and USC, a domestic corporation, each contribute $1 billion to a newly-formed Country X entity (C) in exchange for stock of C. FC and USC are entitled to equal 50% shares of all of C's income, gain, expense and loss. C is treated as a corporation for Country X purposes and a partnership for U.S. tax purposes. In Year 1, C earns $200 million of net passive investment income, makes a payment to Country X of $60 million with respect to that income, and distributes $70 million to each of FC and USC. Country X does not impose tax on dividends received by one Country X corporation from a second Country X corporation.

(*ii*) *Result.* FC's tax-exempt receipt of $70 million, or its 50% share of C's profits, is not a foreign tax benefit within the meaning of paragraph (e)(5)(vii)(B)(*4*) of this section because it does not correspond to any part of the foreign base with respect to which USC's share of the foreign payment was imposed. Accordingly, the $60 million payment to Country X is not attributable to a structured passive investment arrangement.

(*12*) *Example 12: Joint venture; no foreign tax benefit*—(*i*) *Facts.* The facts are the same as those in paragraph (e)(5)(vii)(D)(*11*)(*i*) of this section (the facts in *Example 11*), except that C in turn contributes $2 billion to a wholly-owned and newly-formed Country X entity (D) in exchange for stock of D. D is treated as a corporation for Country X purposes and disregarded as an entity separate from its owner for U.S. tax purposes. C has no other assets and earns no other income. In Year 1, D earns $200 million of passive investment income, makes a payment to Country X of $60 million with respect to that income, and distributes $140 million to C.

(*ii*) *Result.* C's tax-exempt receipt of $140 million is not a foreign tax benefit within the meaning of paragraph (e)(5)(vii)(B)(*4*) of this section because it does not correspond to any part of the foreign base with respect to which USC's share of the foreign payment was imposed. Fifty percent of C's foreign tax exemption is not a foreign tax benefit within the meaning of paragraph (e)(5)(vii)(B)(*4*) of this section because it relates to earnings of D that are distributed with respect to an equity interest in D that is owned indirectly by USC under both U.S. and foreign tax law. The remaining 50% of C's foreign tax exemption, as well as FC's tax-

exempt receipt of $70 million from C, is also not a foreign tax benefit because it does not correspond to any part of the foreign base with respect to which USC's share of the foreign payment was imposed. Accordingly, the $60 million payment to Country X is not attributable to a structured passive investment arrangement.

(6) *Soak-up taxes*—(i) *In general.* An amount remitted to a foreign country is not an amount of foreign income tax paid to the extent that liability for the foreign income tax is dependent (by its terms or otherwise) on the availability of a credit for the tax against income tax liability to another country. Liability for foreign income tax is dependent on the availability of a credit for the foreign income tax against income tax liability to another country only if and to the extent that the foreign income tax would not be imposed but for the availability of such a credit.

(ii) *Examples.* The following examples illustrate the application of paragraph (e)(6)(i) of this section.

(A) *Example 1: Tax rates dependent on availability of credit*—(*1*) *Facts.* Country X imposes a tax on the receipt of royalties from sources in Country X by nonresidents of Country X. The tax is 15% of the gross amount of such royalties unless the recipient is a resident of the United States or of country A, B, C, or D, in which case the tax is 20% of the gross amount of such royalties. Like the United States, each of countries A, B, C, and D allows its residents a credit against the income tax otherwise payable to it for income taxes paid to other countries.

(*2*) *Analysis.* Because the 20% rate applies only to residents of countries that allow a credit for taxes paid to other countries and the 15% rate applies to residents of countries that do not allow such a credit, one-fourth of the Country X tax would not be imposed on residents of the United States but for the availability of such a credit. One-fourth of the Country X tax imposed on residents of the United States who receive royalties from sources in Country X is dependent on the availability of a credit for the Country X tax against income tax liability to another country and, accordingly, under paragraph (e)(6)(i) of this section that amount is not an amount of foreign income tax paid.

(B) *Example 2: Tax not dependent on availability of credit*—(*1*) *Facts.* Country X imposes a net income tax on the realized net income of nonresidents of Country X from carrying on a trade or business in Country X. Although Country X tax law does not prohibit other nonresidents from carrying on business in Country X, United States persons are the only nonresidents of Country X that carry on business in Country X. The Country X tax would be imposed in its entirety on a nonresident of Country X irrespective of the availability of a credit for the Country X tax against income tax liability to another country.

(*2*) *Analysis.* Because no portion of the Country X tax liability is dependent on the availability of a credit for such tax in another country, under paragraph (e)(6)(i) of this section no portion of the Country X tax is a soak-up tax.

(C) *Example 3: Tax holiday denied to corporations with shareholders eligible for credit*—(*1*) *Facts.* Country X imposes a net income tax on the realized net income of all corporations incorporated in Country X. Country X allows a tax holiday to qualifying corporations incorporated in Country X that are owned by nonresidents of Country X, pursuant to which no Country X tax is imposed on the net income of a qualifying corporation for the first 10 years of its operations in Country X. A corporation qualifies for the tax holiday if it meets certain minimum investment criteria and if the development office of Country X certifies that in its opinion the operations of the corporation will be consistent with specified development goals of Country X. The development office will not issue this certification to any corporation owned by persons resident in countries that allow a credit to shareholders (such as a deemed paid credit under section 960) for Country X tax paid by a corporation incorporated in Country X. In practice, tax holidays are granted to a large number of corporations, but the Country X net income tax is imposed on a significant number of other corporations incorporated in Country X (for example, those owned by Country X persons and those which have had operations for more than 10 years) in addition to corporations denied a tax holiday because their shareholders qualify for a credit for the Country X tax against income tax liability to another country.

(*2*) *Analysis.* Under paragraph (e)(6)(i) of this section, no portion of the Country X tax paid by Country X corporations denied a tax holiday because they have U.S. shareholders is dependent on the availability of a credit for the Country X tax against income tax liability to another country, because a significant number of other Country X corporations pay the Country X tax irrespective of the availability of a credit to their shareholders.

(D) *Example 4: Tax deferral allowed for corporations with shareholders eligible for credit*—(*1*) *Facts.* The facts are the same as those in paragraph (e)(6)(ii)(C)(*1*) of this section (the facts of *Example 3*), except that Country X corporations owned by persons resident in countries that allow a credit for Country X tax when dividends are distributed by the corporations are granted a provisional tax holiday. Under the provisional tax holiday, instead of relieving such a corporation from Country X tax for 10 years, liability for such tax is deferred until the Country X corporation distributes dividends.

(*2*) *Analysis.* Because a significant number of other Country X corporations pay the Country X tax irrespective of the availability of a credit to their shareholders, the result is the same as in paragraph (e)(6)(ii)(C)(*2*) of this section.

(E) *Example 5: Tax based on greater of tax in lieu of income tax or amount eligible for credit*—(*1*) *Facts.* Pursuant to a contract with Country X, A, a domestic corporation engaged in manufacturing activities in Country X, must pay tax to Country X equal to the greater of 5u (units of Country X currency) per item produced, or the maximum amount creditable by A against its U.S. income tax liability for that year with respect to income from its Country X operations. Also pursuant to the contract, A is exempted from Country X's otherwise generally-imposed net income tax. The contractual tax is a tax in lieu of income tax as defined in § 1.903–1(b). In Year 1, A produces 16 items, which would result in Country X tax of $16 \times 5u = 80u$, and taking into account the section 904 limitation, the maximum amount of Country X tax that A can claim as a credit against its U.S. income tax liability is 125u. Accordingly, A's contractual liability for Country X tax in lieu of income tax is 125u, the greater of the two amounts.

(*2*) *Analysis.* Under paragraph (e)(6)(i) of this section, the amount of tax paid by A that is dependent on the availability of a credit against income tax of another country is $125u - 80u = 45u$, the amount that would not be imposed but for the availability of a credit.

(f) * * *

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(ii) *Examples.* The following examples illustrate the rules of paragraphs (f)(1) and (2)(i) of this section.

(A) *Example 1.* Under a loan agreement between A, a resident of Country X, and B, a United States person, A agrees to pay B a certain amount of interest net of any tax that Country X may impose on B with respect to its interest income. Country X

imposes a 10 percent tax on the gross amount of interest income received by nonresidents of Country X from sources in Country X, and it is established that this tax is a tax in lieu of an income tax within the meaning of § 1.903–1(b). Under the law of Country X this tax is imposed on the nonresident recipient, and any resident of Country X that pays such interest to a nonresident is required to withhold and pay over to Country X 10 percent of the amount of such interest, which is applied to offset the recipient's liability for the tax. Because legal liability for the tax is imposed on the recipient of such interest income, B is the taxpayer with respect to the Country X tax imposed on B's interest income from B's loan to A. Accordingly, B's interest income for Federal income tax purposes includes the amount of Country X tax that is imposed on B with respect to such interest income and that is paid on B's behalf by A pursuant to the loan agreement, and, under paragraph (f)(2)(i) of this section, such tax is considered for purposes of section 903 to be paid by B.

(B) *Example 2.* The facts are the same as those in paragraph (f)(2)(ii)(A) of this section (the facts in *Example 1*), except that in collecting and receiving the interest B is acting as a nominee for, or agent of, C, who is a United States person. Because C (not B) is the beneficial owner of the interest, legal liability for the tax is imposed on C, not B (C's nominee or agent). Thus, C is the taxpayer with respect to the Country X tax imposed on C's interest income from C's loan to A. Accordingly, C's interest income for Federal income tax purposes includes the amount of Country X tax that is imposed on C with respect to such interest income and that is paid on C's behalf by A pursuant to the loan agreement. Under paragraph (f)(2)(i) of this section, such tax is considered for purposes of section 903 to be paid by C. No such tax is considered paid by B.

(C) *Example 3.* Country X imposes a tax called the ''Country X income tax.'' A, a United States person engaged in construction activities in Country X, is subject to that tax. Country X has contracted with A for A to construct a naval base. A is a dual capacity taxpayer (as defined in paragraph (a)(2)(ii)(A) of this section) and, in accordance with paragraphs (a)(1) and (c)(1) of § 1.901–2A, A has established that the Country X income tax as applied to dual capacity persons and the Country X income tax as applied to persons other than dual capacity persons together constitute a single levy. A has also established that that levy is a net income tax within the meaning of paragraph (a)(3) of this section. Pursuant to the terms of the contract, Country X has agreed to assume any Country X tax liability that A may incur with respect to A's income from the contract. For Federal income tax purposes, A's income from the contract includes the amount of tax liability that is imposed by Country X on A with respect to its income from the contract and that is assumed by Country X; and for purposes of section 901 the amount of such tax liability assumed by Country X is considered to be paid by A. By reason of paragraph (f)(2)(i) of this section, Country X is not considered to provide a subsidy, within the meaning of paragraph (e)(3) of this section, to A.

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(4) *Taxes imposed on partnerships and disregarded entities*—(i) *Partnerships.* If foreign law imposes tax at the entity level on the income of a partnership, the partnership is considered to be legally liable for such tax under foreign law and therefore is considered to pay the tax for Federal income tax purposes. The rules of this paragraph (f)(4)(i) apply regardless of which person is obligated to remit the tax, which person actually remits the tax, or which person the foreign country could proceed against to collect the tax in the event all or a portion of the tax is not paid. See §§ 1.702–1(a)(6) and 1.704–1(b)(4)(viii) for rules relating to the determination of a partner's distributive share of such tax.

(ii) *Disregarded entities.* If foreign law imposes tax at the entity level on the income of an entity described in § 301.7701–2(c)(2)(i) of this chapter (a *disregarded entity*), the person (as defined in section 7701(a)(1)) who is treated as owning the assets of the disregarded entity for Federal income tax purposes is considered to be legally liable for such tax under foreign law. Such person is considered to pay the tax for Federal income tax purposes. The rules of this paragraph (f)(4)(ii) apply regardless of which person is obligated to remit the tax, which person actually remits the tax, or which person the foreign country could proceed against to collect the tax in the event all or a portion of the tax is not paid.

(5) *Allocation of taxes in the case of certain ownership or classification changes*—(i) *In general.* If a partnership, disregarded entity, or corporation undergoes one or more covered events during its foreign taxable year that do not result in a closing of the foreign taxable year, then a portion of the foreign income tax (other than a withholding tax described in section 901(k)(1)(B)) paid by a person under paragraphs (f)(1) through (4) of this section with respect to the continuing foreign taxable year in which such covered event or events occur is allocated to and among all persons that were predecessor entities or prior owners during such foreign taxable year. The allocation is made based on the respective portions of the taxable income (as determined under foreign law) for the continuing foreign taxable year that are attributable under the principles of § 1.1502–76(b) to the period of existence or ownership of each predecessor entity or prior owner during the continuing foreign taxable year. Foreign income tax allocated to a person that is a predecessor entity is treated (other than for purposes of section 986) as paid by the person as of the close of the last day of its last U.S. taxable year. Foreign income tax allocated to a person that is a prior owner, for example a transferor of a disregarded entity, is treated (other than for purposes of section 986) as paid by the person as of the close of the last day of its U.S. taxable year in which the covered event occurred.

(ii) *Covered event.* For purposes of this paragraph (f)(5), a covered event is a partnership termination under section 708(b)(1), a transfer of a disregarded entity, or a change in the entity classification of a disregarded entity or a corporation.

(iii) *Predecessor entity and prior owner.* For purposes of this paragraph (f)(5), a predecessor entity is a partnership or a corporation that undergoes a covered event as described in paragraph (f)(5)(ii) of this section. A prior owner is a person that either transfers a disregarded entity or owns a disregarded entity immediately before a change in the entity classification of the disregarded entity as described in paragraph (f)(5)(ii) of this section.

(iv) *Partnership variances.* In the case of a change in any partner's interest in the partnership (a variance), except as otherwise provided in section 706(d)(2) (relating to certain cash basis items) or 706(d)(3) (relating to tiered partnerships), foreign tax paid by the partnership during its U.S. taxable year in which the variance occurs is allocated between the portion of the U.S. taxable year ending on, and the portion of the U.S. taxable year beginning on the day after, the day of the variance. The allocation is made under the principles of this paragraph (f)(5) as if the variance were a covered event.

(6) *Allocation of foreign taxes in connection with elections under section 336(e) or 338 or § 1.245A–5(e).* For rules relating to the allocation of foreign taxes in connection with elections made

pursuant to section 336(e), see § 1.336–2(g)(3)(ii). For rules relating to the allocation of foreign taxes in connection with elections made pursuant to section 338, see § 1.338–9(d). For rules relating to the allocation of foreign taxes in connection with elections made pursuant to § 1.245A–5(e)(3)(i), see § 1.245A–5(e)(3)(i)(B).

(7) *Examples.* The following examples illustrate the rules of paragraphs (f)(3) through (6) of this section.

(i) *Example 1*—(A) *Facts.* A, a United States person, owns 100 percent of B, an entity organized in Country X. B owns 100 percent of C, also an entity organized in Country X. B and C are corporations for U.S. and foreign tax purposes that use the ''u'' as their functional currency. Pursuant to a consolidation regime, Country X imposes a net income tax described in paragraph (a)(3) of this section on the combined income of B and C within the meaning of paragraph (f)(3)(ii) of this section. In year 1, C pays 25u of interest to B. If B and C did not report their income on a combined basis for Country X tax purposes, the interest paid from C to B would result in 25u of interest income to B and 25u of deductible interest expense to C. For purposes of reporting the combined income of B and C, Country X first requires B and C to determine their own income (or loss) on a separate schedule. For this purpose, however, neither B nor C takes into account the 25u of interest paid from C to B because the income of B and C is included in the same combined base. The separate income of B and C reported on their Country X schedules for year 1, which do not reflect the 25u intercompany payment, is 100u and 200u, respectively. The combined income reported for Country X purposes is 300u (the sum of the 100u separate income of B and 200u separate income of C).

(B) *Result.* On the separate schedules described in paragraph (f)(3)(iii)(A) of this section, B's separate income is 100u and C's separate income is 200u. Under paragraph (f)(3)(iii)(B)(*1*) of this section, the 25u interest payment from C to B is taken into account for purposes of determining B's and C's portions of the combined income under paragraph (f)(3)(iii) of this section, because B and C would have taken the items into account if they did not compute their income on a combined basis. Thus, B's portion of the combined income is 125u (100u plus 25u) and C's portion of the combined income is 175u (200u less 25u). The result is the same regardless of whether the 25u interest payment from C to B is deductible for U.S. Federal income tax purposes. See paragraph (f)(3)(iii)(B)(*2*) of this section.

(ii) *Example 2*—(A) *Facts.* A, a United States person, owns 100 percent of B, an entity organized in Country X. B is a corporation for Country X tax purposes, and a disregarded entity for U.S. income tax purposes. B owns 100 percent of C and D, entities organized in country X that are corporations for both U.S. and Country X tax purposes. B, C, and D use the ''u'' as their functional currency and file on a combined basis for Country X income tax purposes. Country X imposes a net income tax described in paragraph (a)(3) of this section at the rate of 30 percent on the taxable income of corporations organized in Country X. Under the Country X combined reporting regime, income (or loss) of C and D is attributed to, and treated as income (or loss) of, B. B has the sole obligation to pay Country X income tax imposed with respect to income of B and income of C and D that is attributed to, and treated as income of, B. Under Country X tax law, Country X may proceed against B, but not C or D, if B fails to pay over to Country X all or any portion of the Country X income tax imposed with respect to such income. In year 1, B has income of 100u, C has income of 200u, and D has a net loss of (60u). Under Country X tax law, B is considered to have 240u of taxable income with respect to which 72u of Country X income tax is imposed. Country X does not provide mandatory rules for allocating D's loss.

(B) *Result.* Under paragraph (f)(3)(ii) of this section, the 72u of Country X tax is considered to be imposed on the combined income of B, C, and D. Because Country X tax law does not provide mandatory rules for allocating D's loss between B and C, under paragraph (f)(3)(iii)(C) of this section D's (60u) loss is allocated pro rata: 20u to B ((100u/300u) × 60u) and 40u to C ((200u/300u) × 60u). Under paragraph (f)(3)(i) of this section, the 72u of Country X tax must be allocated pro rata among B, C, and D. Because D has no income for Country X tax purposes, no Country X tax is allocated to D. Accordingly, 24u (72u × (80u/240u)) of the Country X tax is allocated to B, and 48u (72u × (160u/240u)) of such tax is allocated to C. Under paragraph (f)(4)(ii) of this section, A is considered to have legal liability for the 24u of Country X tax allocated to B under paragraph (f)(3) of this section.

(g) *Definitions.* For purposes of this section and §§ 1.901–2A and 1.903–1, the following definitions apply.

(1) *Foreign country and possession (territory) of the United States.* The term *foreign country* means any foreign state, any possession (territory) of the United States, and any political subdivision of any foreign state or of any possession (territory) of the United States. The term *possession* (or *territory*) *of the United States* means American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.

(2) *Foreign levy.* The term *foreign levy* means a levy imposed by a foreign country.

(3) *Foreign tax.* The term *foreign tax* means a foreign levy that is a tax as defined in paragraph (a)(2) of this section.

(4) *Foreign tax law.* The term *foreign tax law* means the laws of the foreign country imposing a foreign tax, including a separate levy that is modified by an applicable income tax treaty. The foreign tax law is construed on the basis of the foreign country's statutes, regulations, case law, and administrative rulings or other official pronouncements, as modified by an applicable income tax treaty.

(5) *Paid, payment, and paid by.* The term *paid* means ''paid'' or ''accrued''; the term *payment* means ''payment'' or ''accrual''; and the term *paid by* means ''paid by'' or ''accrued by or on behalf of,'' depending on the taxpayer's method of accounting for foreign income taxes. In the case of a taxpayer that claims a foreign tax credit, the taxpayer's method of accounting for foreign income taxes refers to whether the taxpayer claims the foreign tax credit for taxes paid (that is, remitted) or taxes accrued (as determined under § 1.905–1(d)) during the taxable year. The term *paid* does not include foreign taxes deemed paid under section 904(c) or section 960.

(6) *Resident and nonresident.* The terms *resident* and *nonresident,* when used in the context of the foreign tax law of a foreign country, have the meaning provided in paragraphs (g)(6)(i) and (ii) of this section.

(i) *Resident.* An individual is a resident of a foreign country if the individual is liable to income tax in such country by reason of the individual's residence, domicile, citizenship, or similar criterion under such country's foreign tax law. An entity (including a corporation, partnership, trust, estate, or an entity that is disregarded as an entity separate from its owner for Federal income tax purposes) is a resident of a foreign country if the entity is liable to tax on its income (regardless of whether tax is actually imposed) under the laws of the foreign country by reason of the entity's place of incorporation or place of management in that country (or in a

political subdivision or local authority thereof), or by reason of a criterion of similar nature, or if the entity is of a type that is specifically identified as a resident in an income tax treaty with the United States to which the foreign country is a party.

(ii) *Nonresident.* A nonresident with respect to a foreign country is any individual or entity that is not a resident of such foreign country.

(7) *Taxpayer.* The term *taxpayer* has the meaning set forth in paragraph (f)(1) of this section.

(h) *Applicability dates.* Except as otherwise provided in this paragraph (h), this section applies to foreign taxes paid (within the meaning of paragraph (g) of this section) in taxable years beginning on or after December 28, 2021. For foreign taxes paid to Puerto Rico by reason of section 1035.05 of the Puerto Rico Internal Revenue Code of 2011, as amended (13 L.P.R.A. § 30155) (treating certain income, gain or loss as effectively connected with the active conduct of a trade or business with Puerto Rico), this section applies to foreign taxes paid (within the meaning of paragraph (g) of this section) in taxable years beginning on or after January 1, 2023. For foreign taxes described in the preceding sentence that are paid in taxable years beginning before January 1, 2023, see § 1.901–2 as contained in 26 CFR part 1 revised as of April 1, 2021.

■ **Par. 25.** Section 1.903–1 is revised to read as follows:

§ 1.903–1 Taxes in lieu of income taxes.

(a) *Overview.* Section 903 provides that the term ''income, war profits, and excess profits taxes'' includes a tax paid in lieu of a tax on income, war profits, or excess profits that is otherwise generally imposed by any foreign country. Paragraphs (b) and (c) of this section define a tax described in section 903. Paragraph (d) of this section provides examples illustrating the application of this section. Paragraph (e) of this section sets forth the applicability date of this section. For purposes of this section and §§ 1.901–2 and 1.901–2A, a tax described in section 903 is referred to as a ''tax in lieu of an income tax'' or an ''in lieu of tax'' and the definitions in § 1.901–2(g) apply for purposes of this section. Determinations of the amount of a tax in lieu of an income tax that is paid by a person and determinations of the person by whom such tax is paid are made under § 1.901–2(e) and (f), respectively. Section 1.901–2A contains additional rules applicable to dual capacity taxpayers (as defined in § 1.901–2(a)(2)(ii)(A)).

(b) *Definition of tax in lieu of an income tax*—(1) *In general.* Paragraphs (b)(2) and (c) of this section provide the requirements for a foreign levy to qualify as a tax in lieu of an income tax. The rules of this section are applied independently to each separate levy (within the meaning of §§ 1.901–2(d) and 1.901–2A(a)). A foreign tax either is or is not a tax in lieu of an income tax in its entirety for all persons subject to the tax. It is immaterial whether the base of the in lieu of tax bears any relation to realized net gain. The base of the foreign tax may, for example, be gross income, gross receipts or sales, or the number of units produced or exported. The foreign country's reason for imposing a foreign tax on a base other than net income (for example, because of administrative difficulty in determining the amount of income that would otherwise be subject to a net income tax) is immaterial, although paragraph (c)(1) of this section generally requires a showing that the foreign country made a deliberate and cognizant choice to impose the in lieu of tax instead of a net income tax (see paragraph (c)(1)(iii) of this section).

(2) *Requirements.* A foreign levy is a tax in lieu of an income tax only if—

(i) It is a foreign tax; and

(ii) It satisfies the substitution requirement of paragraph (c) of this section.

(c) *Substitution requirement*—(1) *In general.* A foreign tax (the ''tested foreign tax'') satisfies the substitution requirement if, based on the foreign tax law, the requirements in paragraphs (c)(1)(i) through (iv) of this section are satisfied with respect to the tested foreign tax, or the tested foreign tax is a covered withholding tax described in paragraph (c)(2) of this section.

(i) *Existence of generally-imposed net income tax.* A separate levy that is a net income tax (as described in § 1.901–2(a)(3)) is generally imposed by the same foreign country (the ''generally-imposed net income tax'') that imposes the tested foreign tax.

(ii) *Non-duplication.* Neither the generally-imposed net income tax nor any other separate levy that is a net income tax is also imposed, in addition to the tested foreign tax, by the same foreign country on any persons with respect to any portion of the income to which the amounts (such as sales or units of production) that form the base of the tested foreign tax relate (the ''excluded income''). Therefore, a tested foreign tax does not meet the requirement of this paragraph (c)(1)(ii) if a net income tax imposed by the same foreign country applies to the excluded income of any persons that are subject to the tested foreign tax, even if not all persons subject to the tested foreign tax are subject to the net income tax.

(iii) *Close connection to excluded income.* But for the existence of the tested foreign tax, the generally-imposed net income tax would otherwise have been imposed on the excluded income. The requirement in the preceding sentence is met only if the imposition of such tested foreign tax bears a close connection to the failure to impose the generally-imposed net income tax on the excluded income; the relationship cannot be merely incidental, tangential, or minor. A close connection must be established with proof that the foreign country made a cognizant and deliberate choice to impose the tested foreign tax instead of the generally-imposed net income tax. Such proof must be based on foreign tax law, or the legislative history of either the tested foreign tax or the generally-imposed net income tax that describes the provisions excluding taxpayers subject to the tested foreign tax from the generally-imposed net income tax. Thus, a close connection exists if the generally-imposed net income tax would apply by its terms to the excluded income, but for the fact that the excluded income is expressly excluded, and the tested foreign tax is enacted contemporaneously with the generally-imposed net income tax. A close connection also exists if the generally-imposed net income tax by its terms does not apply to, but does not expressly exclude, the excluded income, and the tested foreign tax is enacted contemporaneously with the generally-imposed net income tax. Where the tested foreign tax is not enacted contemporaneously with the generally-imposed net income tax and the generally-imposed net income tax is not amended contemporaneously with the enactment of the tested foreign tax to exclude the excluded income or to narrow the scope of the generally-imposed net income tax so as not to apply to the excluded income, a close connection can be established only by reference to the legislative history of the tested foreign tax (or a predecessor in lieu of tax). Not all income derived by persons subject to the tested foreign tax need be excluded income, provided the tested foreign tax applies only to amounts that relate to the excluded income.

(iv) *Jurisdiction to tax excluded income.* If the generally-imposed net income tax, or a hypothetical new tax that is a separate levy with respect to the generally-imposed net income tax, were applied to the excluded income, such generally-imposed net income tax or separate levy would meet the

attribution requirement described in § 1.901–2(b)(5).

(2) *Covered withholding tax.* A tested foreign tax is a covered withholding tax if, based on the foreign tax law, the requirements in paragraphs (c)(1)(i) and (c)(2)(i) through (iii) of this section are met with respect to the tested foreign tax. See also § 1.901–2(d)(1)(iii) for rules treating withholding taxes as separate levies with respect to each class of income subject to the tax or with respect to each subset of a class of income that is subject to different income attribution rules.

(i) *Withholding tax on nonresidents.* The tested foreign tax is a withholding tax (as defined in section 901(k)(1)(B)) that is imposed on gross income of persons who are nonresidents of the foreign country imposing the tested foreign tax. It is immaterial whether the tested foreign tax is withheld by the payor or is imposed directly on the nonresident taxpayer.

(ii) *Non-duplication.* The tested foreign tax is not in addition to any net income tax that is imposed by the foreign country on any portion of the net income attributable to the gross income that is subject to the tested foreign tax. Therefore, a tested foreign tax does not meet the requirement of this paragraph (c)(2)(ii) if by its terms it applies to gross income of nonresidents that are also subject to a net income tax imposed by the same foreign country on the same income, even if not all nonresidents subject to the tested foreign tax are also subject to the net income tax.

(iii) *Source-based attribution requirement.* The income subject to the tested foreign tax satisfies the attribution requirement described in § 1.901–2(b)(5)(i)(B).

(d) *Examples.* The following examples illustrate the rules of this section.

(1) *Example 1: Tax on gross income from services; non-duplication requirement*—(i) *Facts.* Country X imposes a tax at the rate of 3 percent on the gross receipts of companies, wherever resident, from furnishing specified types of electronically supplied services to customers located in Country X (the ''ESS tax''). No deductions are allowed in determining the taxable base of the ESS tax. In addition to the ESS tax, Country X imposes a net income tax within the meaning of § 1.901–2(a)(3) on resident companies (the ''resident income tax'') and also imposes a net income tax within the meaning of § 1.901–2(a)(3) on the income of nonresident companies that is attributable, under reasonable principles, to the nonresident's permanent establishment within Country X (the ''nonresident income tax''). Under Country X tax law, a permanent establishment is defined in the same manner as under the 2016 U.S. Model Income Tax Convention. Both the resident income tax and the nonresident income tax, which are separate levies under § 1.901–2(d)(1)(iii), qualify as generally-imposed net income taxes. Under Country X tax law, the ESS tax applies to both resident and nonresident companies regardless of whether the company is also subject to the resident income tax or the nonresident income tax, respectively.

(ii) *Analysis.* Under § 1.901–2(d)(1)(iii), the ESS tax comprises two separate levies, one imposed on resident companies (the ''resident ESS tax''), and one imposed on nonresident companies (the ''nonresident ESS tax''). Under paragraph (c)(1)(ii) of this section, neither the resident ESS tax nor the nonresident ESS tax satisfies the substitution requirement, because by its terms the income to which the gross receipts subject to the ESS tax relate is also subject to one of the two generally-imposed net income taxes imposed by Country X. Similarly, under paragraph (c)(2)(ii) of this section, the nonresident ESS tax is not a covered withholding tax because by its terms it is imposed in addition to the nonresident income tax. The fact that nonresident taxpayers that do not have a permanent establishment in Country X are in practice subject to the nonresident ESS tax but not to the nonresident income tax on the gross receipts included in the base of the nonresident ESS tax is not relevant to the determination of whether the ESS tax meets the substitution requirement under paragraph (c)(1) of this section. Therefore, neither the resident ESS tax nor the nonresident ESS tax is a tax in lieu of an income tax.

(2) *Example 2: Tax on gross income from services; attribution of income*—(i) *Facts.* The facts are the same as those in paragraph (d)(1)(i) of this section (the facts in *Example 1*), except that under Country X tax law, the nonresident ESS tax is imposed only if the nonresident company does not have a permanent establishment in Country X. If the nonresident company has a Country X permanent establishment, the nonresident income tax applies to the profits attributable to that permanent establishment. In addition, the statutory language and legislative history to the nonresident ESS tax demonstrate that Country X made a cognizant and deliberate choice to impose the nonresident ESS tax instead of the nonresident income tax with respect to the gross receipts that are subject to the nonresident ESS tax.

(ii) *Analysis*—(A) *General application of substitution requirement.* The nonresident ESS tax meets the requirements in paragraphs (c)(1)(i) and (ii) of this section because Country X has two generally-imposed net income taxes and neither generally-imposed net income tax nor any other separate levy that is a net income tax is imposed by Country X on a nonresident's income to which gross receipts that form the base of the nonresident ESS tax relate (which is the excluded income). The statutory language and legislative history to the nonresident ESS tax demonstrate that Country X made a cognizant and deliberate choice not to impose the nonresident income tax on the excluded income. Therefore, the nonresident ESS tax meets the requirement in paragraph (c)(1)(iii) of this section because, but for the existence of the tested foreign tax, the nonresident income tax would otherwise have been imposed on the excluded income. However, the nonresident ESS tax does not meet the requirement in paragraph (c)(1)(iv) of this section, because if Country X had chosen to apply the nonresident income tax (rather than the nonresident ESS tax) to the excluded income, the modified nonresident income tax would fail the attribution requirement in § 1.901–2(b)(5). First, the modified tax would not satisfy the requirement in § 1.901–2(b)(5)(i)(A) because the modified tax would not apply to income attributable under reasonable principles to the nonresident's activities within the foreign country, since the modified tax is determined by taking into account the location of customers. Second, the modified tax would not satisfy the requirement in § 1.901–2(b)(5)(i)(B) because the excluded income is from services performed outside of Country X. Third, the modified tax would not satisfy the requirement in § 1.901–2(b)(5)(i)(C) because the excluded income is not from sales or dispositions of real property located in Country X or from property forming part of the business property of a taxable presence in Country X. Because the Country X nonresident income tax as applied to the excluded income would fail to meet the attribution requirement in § 1.901–2(b)(5), as required by paragraph (c)(1)(iv) of this section, the nonresident ESS tax does not satisfy the substitution requirement in paragraph (c)(1) of this section.

(B) *Covered withholding tax analysis.* The nonresident ESS tax meets the requirement in paragraph (c)(1)(i) of this section because there exists a generally-imposed net income tax. It also meets the requirements in paragraphs (c)(2)(i)

and (ii) of this section because it is a withholding tax on gross receipts of nonresidents and the income attributable to those gross receipts is not subject to a net income tax. However, the nonresident ESS tax does not meet the requirement in paragraph (c)(2)(iii) of this section because the services income subject to the nonresident ESS tax is from electronically supplied services performed outside of Country X. See § 1.901–2(b)(5)(i)(B). Therefore, the nonresident ESS tax is not a covered withholding tax under paragraph (c)(2) of this section. Because the nonresident ESS tax does not satisfy the substitution requirement of paragraph (c) of this section, it is not a tax in lieu of an income tax.

(3) *Example 3: Withholding tax on royalties; attribution requirement*—(i) *Facts.* YCo, a resident of Country Y, is a controlled foreign corporation wholly-owned by USP, a domestic corporation. In Year 1, YCo grants a license to XCo, a resident of Country X unrelated to YCo or USP, for the right to use YCo's intangible property (IP) throughout the world, including in Country X. Under Country X's domestic tax law, all royalties paid by a resident of Country X to a nonresident are sourced in Country X and are subject to a 30% withholding tax on the gross income, regardless of whether the nonresident payee has a taxable presence in Country X. Country X's withholding tax on royalties is a separate levy under § 1.901–2(d)(1)(iii). In Year 1, XCo withholds 30u (units of Country X currency) tax from 100u of royalties owed and paid to YCo under the licensing arrangement, of which 50u is attributable to XCo's use of the YCo IP in Country X and 50u is attributable to use of the YCo IP outside Country X. The United States and Country X have an income tax treaty (U.S.-Country X treaty); under the royalties article of the treaty, Country X agreed to impose its withholding tax on royalties paid to a U.S. resident only on royalties paid for IP used in Country X. Country X and Country Y do not have an income tax treaty.

(ii) *Analysis.* Under § 1.901–2(d)(1)(iv), the Country X withholding tax on royalties, as modified by the U.S.-Country X treaty, is a separate levy from the unmodified Country X withholding tax to which YCo was subject (because YCo is not a U.S. resident eligible for benefits under the U.S.-Country X treaty). The Country X withholding tax on royalties, unmodified by the U.S.-Country X treaty, does not meet the attribution requirement in § 1.901–2(b)(5)(i)(B) because Country X's source rule for royalties (based upon residence of the payor) is not reasonably similar to the sourcing rules that apply under the Internal Revenue Code. Thus, under paragraph (c)(2)(iii) of this section, the Country X withholding tax paid by YCo is not a covered withholding tax, and none of the 30u of Country X withholding tax paid by YCo with respect to the 100u of royalties for the use of the IP is a payment of foreign income tax.

(4) *Example 4: Withholding tax on royalties; attribution requirement*—(i) *Facts.* The facts are the same as in paragraph (d)(3)(i) of this section (the facts of *Example 3*), except that XCo only uses the IP in Country X and the 100u of royalties paid to YCo in Year 1 is all attributable to XCo's use of the IP in Country X.

(ii) *Analysis.* The result is the same as in paragraph (d)(3) of this section (the analysis of *Example 3*). Because Country X's source rule for royalties (based upon residence of the payor) is not reasonably similar to the sourcing rules that apply under the Internal Revenue Code, the withholding tax paid by YCo does not meet the attribution requirement in § 1.901–2(b)(5)(i)(B). Under paragraph (c)(2)(iii) of this section, the Country X withholding tax paid by YCo is not a covered withholding tax, and none of the 30u of Country X withholding tax paid by YCo with respect to the 100u of royalties for IP used in Country X is a payment of foreign income tax.

(5) *Example 5: Multiple in-lieu-of taxes*—(i) *Facts.* Country X imposes a net income tax within the meaning of § 1.901–2(a)(3) on the income of nonresident companies that is attributable, under reasonable principles, to the nonresident's activities within Country X (the ''trade or business tax''). The trade or business tax applies to all nonresident corporations that engage in business in Country X except for nonresident corporations that engage in insurance activities, which are instead subject to two different taxes (''insurance taxes''). The insurance taxes apply to nonresident corporations that engage in insurance activities that are attributable, under reasonable principles, to the nonresident's activities within Country X. The insurance taxes do not satisfy the cost recovery requirement in § 1.901–2(b)(4). The trade or business tax and the two insurance taxes were enacted contemporaneously, and the statutory language of the trade or business tax expressly excludes gross income derived by nonresident corporations engaged in insurance activities from the trade or business tax.

(ii) *Analysis.* The insurance taxes meet the requirements in paragraphs (c)(1)(i) and (ii) of this section because Country X has a generally-imposed net income tax, the trade or business tax, and neither the trade or business tax nor any other separate levy that is a net income tax is imposed by Country X on a nonresident's gross income to which the amounts that form the base of the insurance taxes (the ''excluded income'') relate. The Country X tax law expressly provides that the trade or business tax does not apply to nonresident corporations engaged in insurance activities. In addition, the two insurance taxes were enacted contemporaneously with the trade or business tax. Therefore, it is demonstrated that Country X made a cognizant and deliberate choice to impose the insurance taxes in lieu of the generally-imposed trade or business tax, and the insurance taxes meet the requirement in paragraph (c)(1)(iii) of this section. If the trade or business tax also applied to the excluded income, the trade or business tax would meet the requirement in § 1.901–2(b)(5)(i)(A), because it would apply only to income attributable, under reasonable principles, to the nonresident's activities within the foreign country. Thus, the insurance taxes meet the requirement in paragraph (c)(1)(iv) of this section. Therefore, the insurance taxes satisfy the substitution requirement in paragraph (c)(1) of this section.

(6) *Example 6: Later-enacted in-lieu-of tax; close connection requirement*—(i) *Facts.* The facts are the same as those in paragraph (d)(5)(i) of this section (the facts in *Example 5*), except that one of the two insurance taxes applies only to nonresident corporations engaged in the life insurance business in Country X and was enacted five years after the enactment of the trade or business tax and the other insurance tax enacted contemporaneously with the trade or business tax. The legislative history to the later-enacted insurance tax shows that Country X intended to increase the tax imposed on nonresident corporations engaged in life insurance activities and, instead of amending the first insurance tax to increase the rate applicable to life insurance companies, it enacted the second insurance tax that only applies to life insurance corporations.

(ii) *Analysis.* The later-enacted insurance tax meets the requirements in paragraphs (c)(1)(i) and (ii) of this section because Country X has a generally-imposed net income tax, the trade or business tax, and neither the trade or business tax nor any other separate levy that is a net income tax is imposed by Country X on the income

attributable to the activities that form the base of the later-enacted insurance tax. The later-enacted insurance tax meets the requirement in paragraph (c)(1)(iii) of this section because the legislative history to the later-enacted insurance tax demonstrates that Country X made a cognizant and deliberate choice to impose the later-enacted insurance tax on life insurance companies instead of the trade or business tax. The later-enacted insurance tax also meets the requirement of paragraph (c)(1)(iv) of this section for the reasons set forth in paragraph (d)(5)(ii) of this section. Therefore, the later-enacted insurance tax satisfies the substitution requirement in paragraph (c)(1) of this section.

(7) *Example 7: Excise tax creditable against net income tax*—(i) *Facts.* Country X imposes an excise tax that does not satisfy the cost recovery requirement in § 1.901–2(b)(4), and a net income tax within the meaning of § 1.901–2(a)(3). The excise tax, which is payable independently of the net income tax, is allowed as a credit against the net income tax. In Year 1, A has a tentative net income tax liability of 100u (units of Country X currency) but is allowed a credit for 30u of excise tax that it paid that year.

(ii) *Analysis.* Pursuant to § 1.901–2(e)(4), the amount of excise tax A has paid to Country X is 30u and the amount of net income tax A has paid to Country X is 70u. The excise tax paid by A does not satisfy the substitution requirement set forth in paragraph (c)(1) of this section because the excise tax is imposed in addition to, and not in substitution for, the generally-imposed net income tax.

(e) *Applicability dates.* Except as otherwise provided in this paragraph (e), this section applies to foreign taxes paid (within the meaning of § 1.901–2(g)(5)) in taxable years beginning on or after December 28, 2021. For foreign taxes paid to Puerto Rico under section 3070.01 of the Puerto Rico Internal Revenue Code of 2011, as amended (13 L.P.R.A. § 31771) (imposing an excise tax on a controlled group member's acquisition from another group member of certain personal property manufactured or produced in Puerto Rico and certain services performed in Puerto Rico), this section applies to foreign taxes paid (within the meaning of § 1.901–2(g)(5)) in taxable years beginning on or after January 1, 2023. For foreign taxes described in the preceding sentence that are paid in taxable years beginning before January 1, 2023, see § 1.903–1 as contained in 26 CFR part 1 revised as of April 1, 2021.

■ **Par. 26.** Section 1.904–4 is amended:
■ 1. By revising paragraph (b)(2)(i)(A).
■ 2. By revising the last sentence of paragraph (c)(4).
■ 3. In paragraph (f)(1)(i) introductory text, by removing the language ''paragraph (f)(1)(ii) of this section'' and adding in its place the language ''paragraph (f)(1)(ii), (iii), or (iv) of this section''.
■ 4. By adding paragraphs (f)(1)(iii) and (iv).
■ 5. By removing and reserving paragraphs (f)(2)(ii) and (iii).
■ 6. By revising paragraphs (f)(2)(vi)(A) and (f)(2)(vi)(B)(*1*)(*ii*).
■ 7. By adding paragraph (f)(2)(vi)(G).
■ 8. By revising paragraph (f)(3)(v).
■ 9. In the second sentence of paragraph (f)(3)(vii)(B), by removing the language ''treated as carried out pursuant to'' and adding in its place the language ''carried out constitute''.
■ 10. By redesignating paragraphs (f)(3)(viii) and (ix) as paragraphs (f)(3)(ix) and (xii), respectively.
■ 11. By adding a new paragraph (f)(3)(viii).
■ 12. In newly redesignated paragraph (f)(3)(ix), by removing the language ''paragraph (f)(3)(viii)'' and adding the language ''paragraph (f)(3)(ix)'' in its place.
■ 13. By redesignating paragraph (f)(3)(x) as paragraph (f)(3)(xiii).
■ 14. By adding new paragraphs (f)(3)(x) and (xi).
■ 15. In paragraphs (f)(4)(i)(B)(*1*) and (*2*), by removing the language ''paragraph (f)(3)(viii)'' and adding the language ''paragraph (f)(3)(ix)'' in its place.
■ 16. In paragraphs (f)(4)(iv)(B)(*1*) and (f)(4)(v)(B)(*2*), by removing the language ''paragraph (f)(3)(x)'' and adding the language ''paragraph (f)(3)(xiii)'' in its place.
■ 17. By adding paragraphs (f)(4)(xiii) through (xvi) and (q)(3).

The additions and revisions read as follows:

§ 1.904–4 Separate application of section 904 with respect to certain categories of income.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(A) Income received or accrued by any person that is of a kind that would be foreign personal holding company income (as defined in section 954(c), taking into account any exceptions or exclusions to section 954(c), including, for example, section 954(c)(3), (c)(6), (h), or (i)) if the taxpayer were a controlled foreign corporation, including any amount of gain on the sale or exchange of stock in excess of the amount treated as a dividend under section 1248;

* * * * *

(c) * * *

(4) * * * The grouping rules of paragraphs (c)(3)(i) through (iv) of this section also apply separately to income attributable to each tested unit, as defined in § 1.951A–2(c)(7)(iv), of a controlled foreign corporation, and to each foreign QBU of a noncontrolled 10-percent owned foreign corporation or any other look-through entity defined in § 1.904–5(i), or of any United States person.

* * * * *

(f) * * *

(1) * * *

(iii) *Income arising from U.S. activities excluded from foreign branch category income.* Gross income that is attributable to a foreign branch and that arises from activities carried out in the United States by any foreign branch, including income that is reflected on a foreign branch's separate books and records, is not assigned to the foreign branch category. Instead, such income is assigned to the general category or a specified separate category under the rules of this section. However, under paragraph (f)(2)(vi) of this section, gross income (including U.S. source gross income) attributable to activities carried on outside the United States by the foreign branch may be assigned to the foreign branch category by reason of a disregarded payment to a foreign branch from a foreign branch owner or another foreign branch that is allocable to income recorded on the books and records of the payor foreign branch or foreign branch owner.

(iv) *Income arising from stock excluded from foreign branch category income*—(A) *In general.* Except as provided in paragraph (f)(1)(iv)(B) of this section, gross income that is attributable to a foreign branch and that comprises items of income arising from stock of a corporation (whether foreign or domestic), including gain from the disposition of such stock or any inclusion under section 951(a), 951A(a), 1248, or 1293(a), is not assigned to the foreign branch category. Instead, such income is assigned to the general category or a specified separate category under the rules of this section.

(B) *Exception for dealer property.* Paragraph (f)(1)(iv)(A) of this section does not apply to gain recognized from dispositions of stock of a corporation, if the stock would be dealer property (as defined in § 1.954–2(a)(4)(v)) if the foreign branch were a controlled foreign corporation.

* * * * *

(2) * * *

(vi) * * *

(A) *In general.* If a foreign branch makes a disregarded payment to its foreign branch owner or a second foreign branch, and the disregarded payment is allocable to gross income that would be attributable to the foreign branch under the rules in paragraphs (f)(2)(i) through (v) of this section, the gross income attributable to the foreign branch is adjusted downward (but not below zero) to reflect the allocable amount of the disregarded payment, and the gross income attributable to the foreign branch owner or the second foreign branch is adjusted upward by the same amount as the downward adjustment, translated (if necessary) from the foreign branch's functional currency to U.S. dollars (or the second foreign branch's functional currency, as applicable) at the spot rate (as defined in § 1.988–1(d)) on the date of the disregarded payment. For rules addressing multiple disregarded payments in a taxable year, see paragraph (f)(2)(vi)(F) of this section. Similarly, if a foreign branch owner makes a disregarded payment to its foreign branch and the disregarded payment is allocable to gross income attributable to the foreign branch owner, the gross income attributable to the foreign branch owner is adjusted downward (but not below zero) to reflect the allocable amount of the disregarded payment, and the gross income attributable to the foreign branch is adjusted upward by the same amount as the downward adjustment, translated (if necessary) from U.S. dollars to the foreign branch's functional currency at the spot rate on the date of the disregarded payment. An adjustment to the amount of attributable gross income under this paragraph (f)(2)(vi) does not change the total amount, character, or source of the United States person's gross income; does not change the amount of a United States person's income in any separate category other than the foreign branch and general categories (or a specified separate category associated with the foreign branch and general categories); and has no bearing on the analysis of whether an item of gross income is eligible to be resourced under an income tax treaty.

(B) * * *

(*1*) * * *

(*ii*) Disregarded payments from a foreign branch to its foreign branch owner or to another foreign branch are allocable to gross income attributable to the payor foreign branch to the extent a deduction for that payment or any disregarded cost recovery deduction relating to that payment, if regarded, would be allocated and apportioned to gross income attributable to the payor foreign branch under the principles of §§ 1.861–8 through 1.861–14T and 1.861–17 (without regard to exclusive apportionment) by treating foreign source gross income and U.S. source gross income in each separate category (determined before the application of this paragraph (f)(2)(vi) to the disregarded payment at issue) each as a statutory grouping.

* * * * *

(G) *Effect of disregarded payments made and received by non-branch taxable units*—(*1*) *In general.* For purposes of determining the amount, source, and character of gross income attributable to a foreign branch and its foreign branch owner under paragraph (f)(2) of this section, the rules of paragraph (f)(2) of this section apply to a non-branch taxable unit as though the non-branch taxable unit were a foreign branch or a foreign branch owner, as appropriate, to attribute gross income to the non-branch taxable unit and to further attribute, under this paragraph (f)(2)(vi)(G), the income of a non-branch taxable unit to one or more foreign branches or to a foreign branch owner. See paragraph (f)(4)(xvi) of this section (*Example 16*).

(*2*) *Foreign branch group income.* The income of a foreign branch group is attributed to the foreign branch that owns the group. The income of a foreign branch group is the aggregate of the U.S. gross income that is attributed, under the rules of this paragraph (f)(2), to each member of the foreign branch group, determined after accounting for all disregarded payments made and received by each member of the foreign branch group.

(*3*) *Foreign branch owner group income.* The income of a foreign branch owner group is attributed to the foreign branch owner that owns the group. The income of a foreign branch owner group income is the aggregate of the U.S. gross income that is attributed, under the rules of this paragraph (f)(2), to each member of the foreign branch owner group, determined after accounting for all disregarded payments made and received by each member of the foreign branch owner group.

(3) * * *

(v) *Disregarded payment.* A disregarded payment includes an amount of property (within the meaning of section 317(a)) that is transferred to or from a non-branch taxable unit, foreign branch, or foreign branch owner, including a payment in exchange for property or in satisfaction of an account payable, or a remittance or contribution, in connection with a transaction that is disregarded for Federal income tax purposes and that is reflected on the separate set of books and records of a non-branch taxable unit (other than an individual or domestic corporation) or a foreign branch. A disregarded payment also includes any other amount that is reflected on the separate set of books and records of a non-branch taxable unit (other than an individual or a domestic corporation) or a foreign branch in connection with a transaction that is disregarded for Federal income tax purposes and that would constitute an item of accrued income, gain, deduction, or loss of the non-branch taxable unit (other than an individual or a domestic corporation) or the foreign branch if the transaction to which the amount is attributable were regarded for Federal income tax purposes.

* * * * *

(viii) *Foreign branch group.* The term *foreign branch group* means a foreign branch and one or more non-branch taxable units (other than an individual or a domestic corporation), to the extent that the foreign branch owns the non-branch taxable unit directly or indirectly through one or more other non-branch taxable units.

* * * * *

(x) *Foreign branch owner group.* The term *foreign branch owner group* means a foreign branch owner and one or more non-branch taxable units (other than an individual or a domestic corporation), to the extent that the foreign branch owner owns the non-branch taxable unit directly or indirectly through one or more other non-branch taxable units.

(xi) *Non-branch taxable unit.* The term *non-branch taxable unit* has the meaning provided in § 1.904–6(b)(2)(i)(B).

* * * * *

(4) * * *

(xiii) *Example 13: Disregarded payment from domestic corporation to foreign branch*—(A) *Facts.* P, a domestic corporation, owns FDE, a disregarded entity that is a foreign branch. FDE's functional currency is the U.S. dollar. In Year 1, P accrues and records on its books and records for Federal income tax purposes $400x of gross income from the license of intellectual property to unrelated parties that is not passive category income, all of which is U.S. source income. P also accrues $600x of foreign source passive category interest income. P compensates FDE for services that FDE performs in a foreign country with an arm's length payment of $350x, which FDE records on its books and records; the transaction is disregarded

for Federal income tax purposes. Absent the application of paragraph (f)(2)(vi) of this section, the $400x of gross income earned by P from the license would be general category income that would not be attributable to FDE. If the $350x disregarded payment from P to FDE were regarded for Federal income tax purposes, the deduction for the payment would be allocated and apportioned entirely to P's $400x of general category gross licensing income under the principles of §§ 1.861–8 and 1.861–8T (treating U.S. source general category gross income and foreign source passive category gross income each as a statutory grouping). P and FDE incur no other expenses.

(B) *Analysis.* The $350x disregarded payment from P, a United States person, to FDE, its foreign branch, is not recorded on FDE's separate books and records (as adjusted to conform to Federal income tax principles) under paragraph (f)(2)(i) of this section because it is disregarded for Federal income tax purposes. The disregarded payment is allocable to gross income attributable to P because a deduction for the payment, if it were regarded, would be allocated and apportioned to the $400x of P's U.S. source licensing income. Accordingly, under paragraphs (f)(2)(vi)(A) and (f)(2)(vi)(B)(*3*) of this section, the amount of gross income attributable to the FDE foreign branch (and the gross income attributable to P) is adjusted in Year 1 to take the disregarded payment into account. Accordingly, $350x of P's $400x U.S. source general category gross income from the license is attributable to the FDE foreign branch for purposes of this section. Therefore, $350x of the U.S. source gross income that P earned with respect to its license in Year 1 constitutes U.S. source gross income that is assigned to the foreign branch category and $50x remains U.S. source general category income. P's $600x of foreign source passive category interest income is unchanged.

(xiv) *Example 14: Regarded payment from non-consolidated domestic corporation to a foreign branch*—(A) *Facts.* The facts are the same as those in paragraph (f)(4)(xiii)(A) of this section (the facts in *Example 13*), except P wholly owns USS, and USS (rather than P) owns FDE. P and USS do not file a consolidated return. USS has no gross income other than the $350x foreign source services income from the $350x payment it receives from P, through FDE.

(B) *Analysis.* The $350x services payment from P, a United States person, to FDE, a foreign branch of USS, is not a disregarded payment because the transaction is regarded for Federal income tax purposes. Under §§ 1.861–8 and 1.861–8T, P's $350x deduction for the services payment is allocated and apportioned to its U.S. source general category gross income. The payment of $350x from P to USS is services income attributable to FDE, and foreign branch category income of USS under paragraph (f)(2)(i) of this section. Accordingly, USS has $350x of foreign source foreign branch category gross income. P has $600x of foreign source passive category income and $400x of U.S. source general category gross income and a $350x deduction for the services payment, resulting in $50x of U.S. source general category taxable income to P.

(xv) *Example 15: Regarded payment from a member of a consolidated group to a foreign branch of another member of the consolidated group*—(A) *Facts.* The facts are the same as those in paragraph (f)(4)(xiv)(A) of this section (the facts in *Example 14*), except that P and USS are members of an affiliated group that files a consolidated return pursuant to section 1502 (P group).

(B) *Analysis*—(*1*) *Definitions under § 1.1502–13.* Under § 1.1502–13(b)(1), the $350x services payment from P to FDE, a foreign branch of USS, is an intercompany transaction between P and USS; USS is the selling member, P is the buying member, P has a deduction of $350x for the services payment that is a corresponding item, and USS has $350x of income that is an intercompany item. The payment is not a disregarded payment because the transaction is regarded for Federal income tax purposes.

(*2*) *Timing and attributes under § 1.1502–13*—(*i*) *Separate entity versus single entity analysis.* Under a separate entity analysis, the result is the same as in paragraph (f)(4)(xiv)(B) of this section (the analysis in *Example 14*), whereby P has $600x of foreign source passive category income and $50x of U.S. source general category income, and USS has $350x of foreign source foreign branch category income. In contrast, under a single entity analysis, the result is the same as in paragraph (f)(4)(xiii)(B) of this section (the analysis in *Example 13*), whereby P has $600x of foreign source passive category income, $50x of U.S. source general category income, and $350x of U.S. source foreign branch category income.

(*ii*) *Application of the matching rule.* Under the matching rule in § 1.1502–13(c), the timing, character, source, and other attributes of USS's $350x intercompany item and P's $350x corresponding item are redetermined to produce the effect of transactions between divisions of a single corporation, as if the services payment had been made to a foreign branch of that corporation. Accordingly, all of USS's foreign source income of $350x is redetermined to be U.S. source, rather than foreign source, income. Therefore, for purposes of § 1.1502–4(c)(1), the P group has $600x of foreign passive category income, $50x of U.S. source general category income, and $350x of U.S. source foreign branch category income.

(xvi) *Example 16: Disregarded payment made from non-branch taxable unit*—(A) *Facts.* The facts are the same as those in paragraph (f)(4)(xiii)(A) of this section (the facts in *Example 13*), except that P also wholly owns FDE1, a disregarded entity that is a non-branch taxable unit. In addition, FDE1 (rather than P) is the entity that properly accrues and records on its books and records the $400x of U.S. source general category income from the license of intellectual property and the $600x of foreign source passive category interest income, and FDE1 (rather than P) is the entity that makes the $350x payment, which is disregarded for Federal income tax purposes, to FDE in compensation for services.

(B) *Analysis.* Under paragraph (f)(2)(vi)(G) of this section, the rules of paragraph (f)(2) of this section apply to attribute gross income to FDE1, a non-branch taxable unit, as though FDE1 were a foreign branch. Under these rules, the $400x of licensing income and the $600 of interest income are initially attributable to FDE1. This income is adjusted in Year 1 to account for the $350x disregarded payment, which is allocable to the $400x of licensing income of FDE1. Accordingly, $50x of the $400x of U.S. source general category licensing income is attributable to FDE1 and $350x of this income is attributable to the FDE foreign branch. To determine the income that is attributable to P, the foreign branch owner, and FDE, the foreign branch, the income that is attributed to FDE1, after taking into account all of the disregarded payments that it makes and receives, must be further attributed to one or more foreign branches or a foreign branch owner under paragraph (f)(2)(vi)(G) of this section. Under paragraph (f)(2)(vi)(G) of this section, the income of FDE1 is attributed to the foreign branch group or foreign branch owner group of which it is a member. Because FDE1 is wholly owned by P, FDE is a member solely of the foreign branch owner group that is owned by P. See definition of ''foreign branch owner group'' in § 1.904–4(f)(3). All the income that is attributed to FDE1 under

paragraph (f)(2) of this section, namely, the $50x of U.S. source general category licensing income and the $600x of foreign source passive category interest income, is further attributed to P. See § 1.904–4(f)(2)(vi)(G)(*3*). Therefore, the result is the same as in paragraph (f)(4)(xiii)(B) of this section (the analysis in *Example 13*).

* * * * *

(q) * * *

(3) Paragraph (f) of this section applies to taxable years that begin after December 31, 2019, and end on or after November 2, 2020.

■ **Par. 27.** Section 1.904–6 is amended by adding paragraph (b)(2) and revising paragraph (g) to read as follows:

§ 1.904–6 Allocation and apportionment of foreign income taxes.

* * * * *

(b) * * *

(2) *Disregarded payments*—(i) *In general*—(A) *Assignment of foreign gross income.* Except as provided in paragraph (b)(2)(ii) of this section, if a taxpayer that is an individual or a domestic corporation includes an item of foreign gross income by reason of the receipt of a disregarded payment by a foreign branch or foreign branch owner (as those terms are defined in § 1.904–4(f)(3)), or a non-branch taxable unit, the foreign gross income item is assigned to a separate category under § 1.861–20(d)(3)(v).

(B) *Definition of non-branch taxable unit.* The term *non-branch taxable unit* means a person or interest that is described in paragraph (b)(2)(i)(B)(*1*) or (*2*) of this section, respectively.

(*1*) *Persons.* A non-branch taxable unit described in this paragraph (b)(2)(i)(B)(*1*) means a person that is not otherwise a foreign branch owner and that is a U.S. individual, a domestic corporation, or a foreign or domestic partnership (or other pass-through entity, as defined in § 1.904–5(a)(4)) an interest in which is owned, directly or indirectly through one or more other partnerships (or other pass-through entities), by a U.S. individual or a domestic corporation.

(*2*) *Interests.* A non-branch taxable unit described in this paragraph (b)(2)(i)(B)(*2*) means an interest of a foreign branch owner or an interest of a person described in paragraph (b)(2)(i)(B)(*1*) of this section that is not otherwise a foreign branch, and that is either a disregarded entity or a branch, as defined in § 1.267A–5(a)(2), including a branch described in § 1.951A–2(c)(7)(iv)(A)(*3*) (modified by substituting the term ''person'' for ''controlled foreign corporation'').

(ii) *Foreign branch group contributions*—(A) *In general.* If a taxpayer includes an item of foreign gross income by reason of a foreign branch group contribution, the foreign gross income is assigned to the foreign branch category, or, in the case of a foreign branch owner that is a partnership, to the partnership's general category income that is attributable to the foreign branch. See, however, §§ 1.861–20(d)(3)(v)(C)(*2*), 1.960–1(d)(3)(ii)(A), and 1.960–1(e) for rules providing that foreign income tax on a disregarded payment that is a contribution from a controlled foreign corporation to a taxable unit is assigned to the residual grouping and cannot be deemed paid under section 960.

(B) *Foreign branch group contribution.* A foreign branch group contribution is a contribution (as defined in § 1.861–20(d)(3)(v)(E)) made by a member of a foreign branch owner group to a member of a foreign branch group that the payor owns, made by a member of a foreign branch group to another member of that group that the payor owns, or made by a member of a foreign branch group to a member of a different foreign branch group that the payor owns. For purposes of this paragraph (b)(2)(ii)(B), the terms *foreign branch group* and *foreign branch owner group* have the meanings provided in § 1.904–4(f)(3).

* * * * *

(g) *Applicability dates.* Except as otherwise provided in this paragraph (g), this section applies to taxable years that begin after December 31, 2019. Paragraph (b)(2) of this section applies to taxable years that begin after December 31, 2019, and end on or after November 2, 2020.

■ **Par. 28.** Revise 1.905–1 to read as follows:

§ 1.905–1 When credit for foreign income taxes may be taken.

(a) *Scope.* This section provides rules regarding when the credit for foreign income taxes (as defined in § 1.901–2(a)) may be taken, based on a taxpayer's method of accounting for such taxes. Paragraph (b) of this section provides the general rule. Paragraph (c) of this section sets forth rules for determining the taxable year in which taxpayers using the cash receipts and disbursement method of accounting for income (''cash method'') may claim a foreign tax credit. Paragraph (d) of this section sets forth rules for determining the taxable year in which taxpayers using the accrual method of accounting for income (''accrual method'') may claim a foreign tax credit. Paragraph (e) of this section provides rules for taxpayers using the cash method to claim foreign tax credits on the accrual basis pursuant to the election provided under section 905(a). Paragraph (f) of this section provides rules for when foreign income tax expenditures of a pass-through entity can be taken as a credit by the entity's partners, shareholders, or owners. Paragraph (g) of this section provides rules for when a foreign tax credit can be taken with respect to blocked income. Paragraph (h) provides the applicability dates for this section.

(b) *General rule.* The credit for foreign income taxes provided in subpart A, part III, subchapter N, chapter 1 of the Code (the ''foreign tax credit'') may be taken either on the return for the year in which the foreign income taxes accrued or on the return for the year in which the foreign income taxes were paid (that is, remitted), depending on whether the taxpayer uses the accrual or the cash receipts and disbursements method of accounting for purposes of computing taxable income and filing returns. However, regardless of the year in which the credit is claimed under the taxpayer's method of accounting for foreign income taxes, the foreign tax credit is allowed only to the extent the foreign income taxes are ultimately both owed and remitted to the foreign country (in the case of a taxpayer claiming the foreign tax credit on the accrual basis, within the time prescribed by section 905(c)(2)). See section 905(b) and §§ 1.901–1(a) and 1.901–2(e). Because the taxpayer's liability for foreign income tax may accrue (that is, become fixed and determinable) in a different taxable year than that in which the tax is paid (that is, remitted), the taxpayer's entitlement to the credit may be perfected, or become subject to adjustment, by reason of events that occur in a taxable year after the taxable year in which the credit is allowed. See section 905(c) and § 1.905–3(a) for rules relating to changes to the taxpayer's foreign income tax liability that require a redetermination of the allowable foreign tax credit and the taxpayer's U.S. tax liability.

(c) *Rules for cash method taxpayers*—(1) *Credit allowed in year paid.* Except as provided in paragraph (e) of this section, a taxpayer who uses the cash method of accounting may claim a foreign tax credit only in the taxable year in which the foreign income taxes are paid. Generally, foreign income taxes are considered paid in the taxable year in which the taxes are remitted to the foreign country. However, foreign withholding taxes described in section 901(k)(1)(B), as well as foreign net income taxes described in § 1.901–

2(a)(3)(i) that are withheld from the taxpayer's gross income by the payor, are treated as paid in the year in which they are withheld. Foreign income taxes that have been withheld or remitted but which are not considered an amount of tax paid for purposes of section 901 under the rules of § 1.901–2(e) (for example, because the amount withheld or remitted was not a compulsory payment), however, are not eligible for a foreign tax credit. See §§ 1.901–2(e) and 1.905–3(b)(1)(ii)(B) (*Example 2*).

(2) *Payment of contested foreign tax liability.* Under § 1.901–2(e)(2)(i), a foreign income tax liability that is contested by the taxpayer is not a reasonable approximation of the taxpayer's final foreign income tax liability and, therefore, is not considered an amount of tax paid for purposes of section 901 until the contest is resolved. Thus, except as provided in paragraph (c)(3) of this section, a foreign tax credit for a contested foreign income tax liability (or portion thereof) that has been remitted to the foreign country cannot be claimed until such time as the contest is resolved and the tax is considered paid. Once the contest is resolved and the foreign income tax liability is finally determined, the tax liability is treated as paid in the taxable year in which the foreign tax was remitted. See paragraph (c)(1) of this section; see also section 6511(d)(3) and § 301.6511(d)–3 of this chapter for a special 10-year period of limitations for claiming a credit or refund of U.S. tax that is attributable to foreign income taxes for which a credit is allowed under section 901, which for taxpayers claiming credits on the cash basis runs from the unextended due date of the return for the taxable year in which the foreign income taxes are paid (within the meaning of paragraph (c) of this section).

(3) *Election to claim a provisional credit for contested taxes remitted before contest is resolved.* A taxpayer claiming foreign tax credits on the cash basis may, under the conditions provided in this paragraph (c)(3), elect to claim a foreign tax credit for a contested foreign income tax liability (or a portion thereof) in the year the contested amount (or a portion thereof) is remitted to the foreign country, notwithstanding that the liability is not finally determined and so is not considered an amount of tax paid. Such election applies only for contested foreign income taxes that are remitted in a taxable year in which the taxpayer elects under section 901(a) to claim a credit, instead of a deduction under section 164(a)(3), for taxes paid in such year. To make the election, a taxpayer must file a Form 1116 (Foreign Tax Credit (Individual, Estate, or Trust)) or Form 1118 (Foreign Tax Credit—Corporations), and the agreement described in paragraphs (d)(4)(ii) and (iii) of this section. In addition, the taxpayer must, for each subsequent taxable year up to and including the taxable year in which the contest is resolved, file the annual notice described in paragraph (d)(4)(iv) of this section. Any portion of a contested foreign income tax liability for which a provisional credit is claimed under this paragraph (c)(3) that is subsequently refunded by the foreign country results in a foreign tax redetermination under § 1.905–3(a).

(4) *Adjustments to taxes claimed as a credit in the year paid.* A refund of foreign income taxes for which a foreign tax credit has been claimed on the cash basis, or a subsequent determination that the amount paid exceeds the taxpayer's liability for foreign income tax, requires a redetermination of foreign income taxes paid and the taxpayer's U.S. tax liability pursuant to section 905(c) and § 1.905–3. See § 1.905–3(a) and 1.905–3(b)(1)(ii)(G) (*Example 7*). Additional foreign income taxes paid that relate back to a prior year in which foreign income taxes were claimed as a credit on the cash basis, including by reason of the settlement of a dispute with the foreign tax authority, may be claimed as a credit only in the year the additional taxes are paid (within the meaning of paragraph (c) of this section). The payment of such additional taxes does not result in a redetermination pursuant to section 905(c) or § 1.905–3 of the foreign income taxes paid in any prior year, although a redetermination of U.S. tax liability may be required due, for example, to a carryback of unused foreign tax under section 904(c) and § 1.904–2.

(d) *Rules for accrual method taxpayers*—(1) *Credit allowed in year accrued*—(i) *In general.* A taxpayer who uses the accrual method of accounting may claim a foreign tax credit only in the taxable year in which the foreign income taxes are considered to accrue for foreign tax credit purposes under the rules of this paragraph (d). Foreign income taxes accrue in the taxable year in which all the events have occurred that establish the fact of the liability and the amount of the liability can be determined with reasonable accuracy. See §§ 1.446–1(c)(1)(ii)(A) and 1.461–4(g)(6)(iii)(B). For purposes of the preceding sentence, a foreign income tax that is contingent on a future distribution of earnings does not meet the all events test until the earnings are distributed. A foreign income tax liability determined on the basis of a foreign taxable year becomes fixed and determinable at the close of the taxpayer's foreign taxable year. Therefore, foreign income taxes that are computed based on items of income, deduction, and loss that arise in a foreign taxable year accrue in the United States taxable year with or within which the taxpayer's foreign taxable year ends. Foreign withholding taxes that are paid with respect to a foreign taxable year and that represent advance payments of a foreign net income tax liability determined on the basis of that foreign taxable year accrue at the close of the foreign taxable year. Foreign withholding taxes imposed on a payment giving rise to an item of foreign gross income accrue on the date the payment from which the tax is withheld is made (or treated as made under foreign tax law).

(ii) *Relation-back rule for adjustments to taxes claimed as a credit in year accrued.* Additional tax paid as a result of a change in the foreign tax liability, including additional tax paid when a contest with a foreign tax authority is resolved, relates back and is considered to accrue at the end of the foreign taxable year with respect to which the tax is imposed (the ''relation-back year''). Additional withholding tax paid as a result of a change in the amount of an item of foreign gross income (such as pursuant to a foreign transfer pricing adjustment) also relates back and is considered to accrue in the year in which the payment from which the additional tax is withheld is made (or considered to have been made under foreign tax law). Foreign income taxes that are not paid within 24 months after the close of the taxable year in which they were accrued are treated as refunded pursuant to § 1.905–3(a); when subsequently paid, the foreign income taxes are allowed as a credit in the relation-back year. See § 1.905–3(b)(1)(ii)(E) (*Example 5*). For special rules that apply to determine when foreign income tax is considered to accrue in the case of certain ownership and entity classification changes, see §§ 1.336–2(g)(3)(ii), 1.338–9(d), 1.901–2(f)(5), and 1.1502–76.

(2) *Special rule for 52–53 week U.S. taxable years.* If a taxpayer has elected pursuant to section 441(f) to use a U.S. taxable year consisting of 52–53 weeks, and such U.S. taxable year closes within six calendar days of the end of the taxpayer's foreign taxable year, the determination of when foreign income taxes accrue under paragraph (d)(1) of this section is made by deeming the

taxpayer's U.S. taxable year to end on the last day of its foreign taxable year.

(3) *Accrual of contested foreign tax liability.* A contested foreign income tax liability is finally determined and accrues for purposes of paragraph (d)(1) of this section when the contest is resolved. However, pursuant to section 905(c)(2), no credit is allowed for any accrued tax that is not paid within 24 months of the close of the relation-back year until the tax is actually remitted and considered paid. Thus, except as provided in paragraph (d)(4) of this section, a foreign tax credit for a contested foreign income tax liability cannot be claimed until such time as both the contest is resolved and the tax is considered paid, even if the contested liability (or portion thereof) has previously been remitted to the foreign country. Once the contest is resolved and the foreign income tax liability is finally determined and paid, the tax liability accrues, and is considered to accrue in the relation-back year for purposes of the foreign tax credit. See paragraph (d)(1) of this section; see also section 6511(d)(3) and § 301.6511(d)–3 of this chapter for a special 10-year period of limitations for claiming a credit or refund of U.S. tax that is attributable to foreign income taxes for which a credit is allowed under section 901, which for taxpayers claiming credits on the accrual basis runs from the unextended due date of the return for the taxable year in which the foreign income taxes accrued (within the meaning of this paragraph (d)).

(4) *Election to claim a provisional credit for contested taxes remitted before accrual*—(i) *Conditions of election.* A taxpayer may, under the conditions provided in this paragraph (d)(4), elect to claim a foreign tax credit for a contested foreign income tax liability (or a portion thereof) in the relation-back year when the contested amount (or a portion thereof) is remitted to the foreign country, notwithstanding that the liability is not finally determined and so has not accrued. This election is available only for contested foreign income taxes that relate to a taxable year in which the taxpayer has elected under section 901(a) to claim a credit, instead of a deduction under section 164(a)(3), for foreign income taxes that accrue in such year. If the election is made by a taxpayer with respect to contested foreign income taxes of a controlled foreign corporation, such taxes are treated as deemed paid in the relation-back year and the controlled foreign corporation may deduct the taxes in computing its taxable income in the relation-back year. To make the election, a taxpayer must file an amended return for the taxable year to which the contested tax relates, together with a Form 1116 (Foreign Tax Credit (Individual, Estate, or Trust)) or Form 1118 (Foreign Tax Credit—Corporations), and the agreement described in paragraph (d)(4)(ii) of this section. In addition, the taxpayer must, for each subsequent taxable year up to and including the taxable year in which the contest is resolved, file the annual notice described in paragraph (d)(4)(iii) of this section. Any portion of a contested foreign income tax liability for which a provisional credit is claimed under this paragraph (d)(4) that is subsequently refunded by the foreign country results in a foreign tax redetermination under § 1.905–3(a).

(ii) *Contents of provisional foreign tax credit agreement.* The provisional foreign tax credit agreement must contain the following:

(A) A statement that the document is an election and an agreement under the provisions of paragraph (d)(4) of this section;

(B) A description of the contested foreign income tax liability, including the name (or other identifier) of the foreign tax or taxes being contested, the name of the country imposing the tax, the name and identifying number of the payor of the contested tax, the amount of the contested tax, and the U.S. taxable year(s) and the income to which the contested foreign income tax liability relates;

(C) The amount of the contested foreign income tax liability in paragraph (d)(4)(ii)(B) of this section that has been remitted to the foreign country and the date of the remittance(s);

(D) An agreement by the taxpayer, for a period of three years from the later of the filing or the due date (with extensions) of the return for the taxable year in which the taxpayer notifies the Internal Revenue Service of the resolution of the contest, not to assert the statute of limitations on assessment as a defense to the assessment of additional taxes or interest related to the contested foreign income tax liability described in paragraph (d)(4)(ii)(B) of this section that may arise from a determination that the taxpayer failed to exhaust all effective and practical remedies to minimize its foreign income tax liability, so that the amount of the contested foreign income tax is not a compulsory payment and is not considered paid within the meaning of § 1.901–2(e)(5);

(E) A statement that the taxpayer agrees to comply with all the conditions and requirements of paragraph (d)(4) of this section, including to provide notice to the Internal Revenue Service upon the resolution of the contest; and

(F) Any additional information as may be prescribed by the Commissioner of Internal Revenue in Internal Revenue Service forms or instructions.

(iii) *Signatory.* The provisional foreign tax credit agreement must be signed under penalties of perjury by a person authorized to sign the return of the taxpayer.

(iv) *Annual notice.* For each taxable year following the year in which an election pursuant to paragraph (d)(4) of this section is made up to and including the taxable year in which the contest is resolved, the taxpayer must include with its timely-filed return the information described in paragraphs (d)(4)(iii)(A) through (C) of this section on Form 1116 or Form 1118 or in such other form or manner prescribed by the Commissioner of Internal Revenue in Internal Revenue Service forms or instructions.

(A) A description of the contested foreign income tax liability, including the name (or other identifier) of the foreign tax or taxes, the name of the country imposing the tax, the name and identifying number of the payor of the contested tax, the amount of the contested tax, and a description of the status of the contest.

(B) With the return for the taxable year in which the contest is resolved, notification that the contest has been resolved. Such notification must include the date of final resolution and the amount of the finally determined foreign income tax liability.

(C) Any additional information, which may include a copy of the final judgment, order, settlement, or other documentation of the contest resolution, as may be prescribed by the Commissioner of Internal Revenue in Internal Revenue Service forms or instructions.

(5) *Correction of improper accruals*—(i) *In general.* The accrual of a foreign income tax expense generally involves the determination of the proper timing for recognizing the expense for Federal income tax purposes. Thus, foreign income tax expense is a material item within the meaning of section 446. See § 1.446–1(e)(2)(ii). As a material item, a change in the timing of accruing a foreign income tax expense is generally a change in method of accounting. See section 446(e). A change from an improper method of accruing foreign income taxes to the proper method of accrual described in this paragraph (d) is treated as a change in a method of accounting, regardless of whether the taxpayer (or a partner or beneficiary taking into account a distributive share

of foreign income taxes paid by a partnership or other pass-through entity) chooses to claim a deduction or a credit for such taxes in any taxable year. For purposes of this paragraph (d)(5), an improper method of accruing foreign income taxes includes a method under which foreign income tax is accrued in a taxable year other than the taxable year in which the requirements of the all events test in §§ 1.446–1(c)(1)(ii)(A) and 1.461–4(g)(6)(iii)(B) are met, or which fails to apply the relation-back rule in paragraph (d)(1) of this section that applies for purposes of the foreign tax credit, but does not include corrections to estimated accruals or errors in computing the amount of foreign income tax that is allowed as a deduction or credit in any taxable year. Taxpayers must file a Form 3115, Application for Change in Accounting Method, in accordance with Revenue Procedure 2015–13 (or any successor administrative procedure prescribed by the Commissioner) to obtain the Commissioner's permission to change from an improper method of accruing foreign income taxes to the proper method described in this paragraph (d). In order to prevent a duplication or omission of a benefit for foreign income taxes that accrue in any taxable year (whether through the double allowance or double disallowance of either a deduction or a credit, the allowance of both a deduction and a credit, or the disallowance of either a deduction or a credit, for the same amount of foreign income tax), the rules in paragraphs (d)(5)(ii) through (iv) of this section, describing a modified cut-off approach, apply if the Commissioner grants permission for the taxpayer to change to the proper method of accrual. Under the modified cut-off approach, a section 481(a) adjustment is neither required nor permitted with respect to the amounts of foreign income tax that were improperly accrued (or improperly not accrued) under the taxpayer's improper method in taxable years before the taxable year of change.

(ii) *Adjustments required to implement a change in method of accounting for accruing foreign income taxes.* A change from an improper method of accruing foreign income taxes to the proper method described in this paragraph (d) is made under the modified cut-off approach described in this paragraph (d)(5)(ii). Under the modified cut-off approach, the amount of foreign income tax in a statutory or residual grouping (such as a separate category as defined in § 1.904–5(a)(4)) that properly accrues in the taxable year of change (accounted for in the currency in which the foreign tax liability is denominated) is first adjusted upward by the amount of foreign income tax in the same grouping that properly accrued in a taxable year before the taxable year of change but which, under the taxpayer's improper method of accounting, the taxpayer failed to accrue and claim as either a credit or a deduction in any taxable year before the taxable year of change, and next, adjusted downward (but not below zero) by the amount of foreign income tax in the same grouping that the taxpayer improperly accrued in a taxable year before the year of change and for which the taxpayer claimed a credit or a deduction in such prior taxable year, but only if the improperly-accrued amount of foreign income tax did not properly accrue in a taxable year before the taxable year of change. The modified cut-off approach is applied separately with respect to amounts of foreign income tax for which the foreign tax credit is disallowed and to which section 275 does not apply. See, for example, section 901(m)(6). For purposes of the foreign tax credit, the adjusted amounts of accrued foreign income taxes, including any upward adjustment, are translated into U.S. dollars under § 1.986(a)–1 as if those amounts properly accrued in the taxable year of change. To the extent that the downward adjustment in any grouping required under this modified cut-off approach exceeds the amount of foreign income tax properly accruing in that grouping in the year of change, as increased by the upward adjustment, if any, such excess will carry forward to each subsequent taxable year and reduce properly-accrued amounts of foreign income tax in the same grouping to the extent of those properly-accrued amounts, until all improperly-accrued amounts included in the downward adjustment are accounted for. See § 1.861–20 for rules that apply to assign foreign income taxes to statutory and residual groupings. See paragraphs (d)(6)(v) through (d)(6)(ix) of this section for examples illustrating the application of the modified cut-off approach.

(iii) *Application of section 905(c)*—(A) *Two-year rule.* Except as otherwise provided in this paragraph (d)(5)(iii), if the taxpayer claimed a credit for improperly-accrued amounts in a taxable year before the taxable year of change, no adjustment is required under section 905(c)(2) and § 1.905–3(a) solely by reason of the improper accrual. For purposes of applying section 905(c)(2) and § 1.905–3(a) to improperly-accrued amounts of foreign income tax that were claimed as a credit in any taxable year before the taxable year of change, the 24-month period runs from the close of the U.S. taxable year(s) in which those amounts were accrued under the taxpayer's improper method and claimed as a credit. To the extent any improperly-accrued amounts remain unpaid as of the date 24 months after the close of the taxable year in which the amounts were improperly accrued and claimed as a credit, an adjustment is required under section 905(c)(2) and § 1.905–3(a) as if the improperly-accrued amounts were refunded as of the date 24 months after the close of such taxable year. See § 1.986(a)–1(c) (a refund or other downward adjustment to foreign income taxes paid or accrued on more than one date reduces the foreign income taxes paid or accrued on a last-in, first-out basis, starting with the amounts most recently paid or accrued).

(B) *Application of payments.* Amounts of foreign income tax that a taxpayer accrued and claimed as a credit or a deduction in a taxable year before the taxable year of change under the taxpayer's improper method, but that had properly accrued either in the taxable year the credit or deduction was claimed or in a different taxable year before the taxable year of change, are not included in the downward adjustment required by paragraph (d)(5)(ii) of this section. Remittances to the foreign country of such amounts (accounted for in the currency in which the foreign tax liability is denominated) are treated first as payments of the amounts of tax that had properly accrued in the taxable year claimed as a credit or deduction to the extent thereof, and then as payments of the amounts of tax that were improperly accrued in a different taxable year, on a last-in, first-out basis, starting with the most recent improperly-accrued amounts. Remittances to the foreign country of amounts of foreign income tax that properly accrue in or after the taxable year of change (accounted for in the foreign currency in which the foreign tax liability is denominated) but that are offset by the amounts included in the downward adjustment required by paragraph (d)(5)(ii) of this section are treated as payments of the amounts of tax that were improperly accrued before the taxable year of change and included in the downward adjustment on a last-in, first-out basis, starting with the most recent improperly-accrued amounts. Additional amounts of foreign income tax that first accrue in or after the taxable year of change but that relate to a taxable year before the taxable year of change are taken into account in the earlier of the taxable year of change or

the taxable year or years in which they would have been considered to accrue based upon the taxpayer's improper method. Additional amounts of foreign income tax that first accrue in or after the taxable year of change and that relate to the taxable year of change or a taxable year after the year of change are taken into account in the proper relation-back year, but may then be subject to the downward adjustment required by paragraph (d)(5)(ii) of this section.

(iv) *Foreign income tax expense improperly accrued by a foreign corporation, partnership, or other pass-through entity.* Foreign income tax expense of a foreign corporation reduces both the corporation's taxable income and its earnings and profits, and may give rise to an amount of foreign taxes deemed paid under section 960 that may be claimed as a credit by a United States shareholder that is a domestic corporation or that is a person that makes an election under section 962. If the Commissioner grants permission for a foreign corporation to change its method of accounting for foreign income tax expense, the duplication or omission of those expenses (accounted for in the functional currency of the foreign corporation) and the associated foreign income taxes (translated into dollars in accordance with § 1.986(a)-1) are accounted for by applying the rules in paragraph (d)(5)(ii) of this section as if the foreign corporation were itself eligible to, and did, claim a credit under section 901 for such amounts. In the case of a partnership or other pass-through entity that is granted permission to change its method of accounting for accruing foreign income taxes to a proper method as described in this paragraph (d), such partnership or other pass-through entity must provide its partners or other owners with the information needed for the partners or other owners to properly account for the improperly-accrued or unaccrued amounts under the rules in paragraph (d)(5)(ii) of this section as if their proportionate shares of foreign income tax expense were directly paid or accrued by them.

(6) *Examples.* The following examples illustrate the application of paragraph (d) of this section. Unless otherwise stated, the local currency of Country X and Country Y, and the functional currency of any foreign branch, is the Euro (€), and at all relevant times the exchange rate is $1:€1.

(i) *Example 1: Accrual of foreign income tax*—(A) *Facts.* A, a U.S. citizen, resides and works in Country X. A uses the calendar year as the U.S. taxable year and has made an election under paragraph (e) of this section to claim foreign tax credits on an accrual basis. Country X has a tax year that begins on April 1 and ends on March 31. A's wages are subject to net income tax, at graduated rates, under Country X tax law and are subject to withholding on a monthly basis by A's employer in Country X. In the period between April 1, Year 1, and March 31, Year 2, A earns $50,000x in Country X wages, from which A's employer withholds $10,000x in tax. On December 1, Year 1, A receives a dividend distribution from a Country Y corporation, from which the corporation withheld $500x of tax. Country Y imposes withholding tax on dividends paid to nonresidents solely based on the gross amount of the dividend payment; A is not required to file a tax return in Country Y.

(B) *Analysis.* Under paragraph (d)(1) of this section, A's liability for Country X net income tax accrues on March 31, Year 2, the last day of the Country X taxable year. The Country X net income tax withheld by A's employer from A's wages is a reasonable approximation of, and represents an advance payment of, A's final net income tax liability for the year, which becomes fixed and determinable only at the close of the Country X taxable year. Thus, A cannot claim a credit for any portion of the Country X net income tax on A's Federal income tax return for Year 1, and may claim a credit for the entire Country X net income tax that accrues on March 31, Year 2, on A's Federal income tax return for Year 2. A may claim a credit for the Country Y withholding tax on A's Federal income tax return for Year 1, because the withholding tax accrued on December 1, Year 1.

(ii) *Example 2: 52–53 week taxable year*—(A) *Facts.* U.S.C., an accrual method taxpayer, is a domestic corporation that operates in branch form in Country X. U.S.C. uses the calendar year for Country X tax purposes. For Federal income tax purposes, U.S.C. elects pursuant to § 1.441–2(a) to use a 52–53 week taxable year that ends on the last Friday of December. In Year 1, U.S.C.'s U.S. taxable year ends on Friday, December 25; in Year 2, U.S.C.'s U.S. taxable year ends Friday, December 31. For its foreign taxable year ending December 31, Year 1, U.S.C. earns $10,000x of foreign source income through its Country X branch and incurs Country X foreign income tax of $500x; for Year 2, U.S.C. earns $12,000x and incurs Country X foreign income tax of $600x.

(B) *Analysis.* Under paragraph (d)(1) of this section, the $500x of Country X foreign income tax becomes fixed and determinable at the close of U.S.C.'s foreign taxable year, on December 31, Year 1, which is after the close of its U.S. taxable year (December 25, Year 1). The $600x of Country X foreign income tax becomes fixed and determinable on December 31, Year 2. Thus, both the Year 1 and Year 2 Country X foreign income taxes accrue in U.S.C.'s U.S. taxable year ending December 31, Year 2. However, pursuant to paragraph (d)(2) of this section, for purposes of determining the amount of foreign income taxes accrued in each taxable year for foreign tax credit purposes, U.S.C.'s U.S. taxable year is deemed to end on December 31, the end of U.S.C.'s Country X taxable year. U.S.C. may therefore claim a foreign tax credit for $500x of Country X foreign income tax on its Federal income tax return for Year 1 and a credit for $600x of Country X foreign income tax on its Federal income tax return for Year 2.

(iii) *Example 3: Contested tax*—(A) *Facts.* U.S.C. is a domestic corporation that operates in branch form in Country X. U.S.C. uses an accrual method of accounting and uses the calendar year as its U.S. and Country X taxable year. In Year 1, when the average exchange rate described in § 1.986(a)–1(a)(1) is $1:€1, U.S.C. earns €20,000x = $20,000x through its Country X branch for U.S. and Country X tax purposes and accrues Country X foreign income taxes of €500x = $500x, which U.S.C. claims as a credit on its Federal income tax return for Year 1. In Year 3, when the average exchange rate is $1:€1.2, Country X asserts that U.S.C. owes additional foreign income taxes of €100x with respect to U.S.C.'s Year 1 income. U.S.C. contests the liability but remits €40x to Country X with respect to the contested liability in Year 3. U.S.C. does not make an election under paragraph (d)(4) of this section to claim a provisional credit with respect to the €40x. In Year 6, after exhausting all effective and practical remedies, it is finally determined that U.S.C. is liable for €50x of additional Country X foreign income taxes with respect to its Year 1 income. U.S.C. pays an additional €10x to Country X on September 15, Year 6, when the spot rate described in § 1.986(a)–1(a)(2)(i) is $1:€2.

(B) *Analysis.* Pursuant to paragraph (d)(3) of this section, the additional liability asserted by Country X with respect to U.S.C.'s Year 1 income does not accrue until the contest is resolved in Year 6. U.S.C.'s remittance of €40x of contested tax in Year 3 is not a payment of accrued tax, and so is not a foreign tax redetermination. Both the €40x of Country X taxes paid in Year 3 and the €10x of Country X taxes paid in Year 6

accrue in Year 6, when the contest is resolved. Once accrued and paid, the €50x relates back for foreign tax credit purposes to Year 1, and can be claimed as a credit by U.S.C. on a timely-filed amended return for Year 1. Under § 1.986(a)–1(a), for foreign tax credit purposes the €40x paid in Year 3 is translated into dollars at the average exchange rate for Year 1 (€40x × $1/€1 = $40x), and the €10x paid in Year 6 is translated into dollars at the spot rate on the date paid (€10x × $1/€2 = $5x). Accordingly, after the €50x of Country X income tax is paid in Year 6 U.S.C. may claim an additional foreign tax credit of $45x for Year 1.

(iv) *Example 4: Provisional credit for contested tax*—(A) *Facts.* The facts are the same as those in paragraph (d)(6)(iii)(A) of this section (the facts in *Example 3*), except that U.S.C. pays the entire contested tax liability of €100x to Country X in Year 3 and elects under paragraph (d)(4) of this section to claim a provisional foreign tax credit on an amended return for Year 1. In Year 6, upon resolution of the contest, U.S.C. receives a refund of €50x from Country X.

(B) *Analysis.* In Year 3, U.S.C. may claim a provisional foreign tax credit for $100x (€100x translated at the average exchange rate for Year 1) of contested foreign tax paid to Country X by filing an amended return for Year 1, with Form 1118 attached, and a provisional foreign tax credit agreement described in paragraph (d)(4)(ii) of this section. In each year for Years 4 through 6, U.S.C. must attach the certification described in paragraph (d)(4)(iii) of this section to its timely-filed Federal income tax return. In Year 6, as a result of the €50x refund, U.S.C. must redetermine its U.S. tax liability for Year 1 and for any other affected year pursuant to § 1.905–3, reducing the Year 1 foreign tax credit by $50x (from $600x to $550x), and comply with the notification requirements in § 1.905–4. See § 1.986(a)–1(c) (refunds of foreign income tax translated into U.S. dollars at the rate used to claim the credit).

(v) *Example 5: Improperly accelerated accrual*—(A) *Facts*—(*1*) *Foreign income tax accrued and paid.* U.S.C. is a domestic corporation that operates a foreign branch in Country X. All of U.S.C.'s gross and taxable income is foreign source foreign branch category income, and all of its foreign income taxes are properly allocated and apportioned under § 1.861–20 to the foreign branch category. U.S.C. uses the accrual method of accounting and uses the calendar year as its U.S. taxable year. For Country X tax purposes, U.S.C. uses a fiscal year that ends on March 31. U.S.C. accrued €200x of Country X net income tax (as defined in § 1.901–2(a)(3)) for its foreign taxable year ending March 31, Year 2, for which the average exchange rate was $1:€1. It timely filed its Country X tax return and paid the €200x on January 15, Year 3. U.S.C. accrued and paid with its timely filed Country X tax returns €280x and €240x of Country X net income tax for its foreign taxable years ending on March 31 of Year 3 and Year 4, respectively, on January 15 of Year 4 and Year 5, respectively.

(*2*) *Improper accrual.* On its Federal income tax return for Year 1, U.S.C. improperly pro-rated and accelerated the accrual of Country X net income tax and claimed a credit for $150x, equal to three-fourths of the Country X net income tax of $200x that relates to U.S.C.'s foreign taxable year ending March 31, Year 2. Continuing with this improper method of accruing foreign income taxes, U.S.C. claimed a foreign tax credit of $260x on its U.S. tax return for Year 2, comprising $50x (one-fourth of the $200x of net income tax relating to its foreign taxable year ending March 31, Year 2) plus $210x (three-fourths of the $280x of net income tax relating to its foreign taxable year ending March 31, Year 3). Similarly, U.S.C. improperly accrued and claimed a foreign tax credit on its U.S. tax return for Year 3 for $250x of Country X net income tax, comprising $70x (one-fourth of the $280x that properly accrued in Year 3) plus $180x (three-fourths of the $240x that properly accrued in Year 4). In Year 4, U.S.C. realizes its mistake and, as provided in paragraph (d)(5)(i) of this section, files Form 3115 with the IRS to seek permission to change from an improper method to a proper method of accruing foreign income taxes.

TABLE 1 TO PARAGRAPH (d)(6)(v)(A)(*2*)

Country X taxable year ending in U.S. calendar taxable year	Net income tax properly accrued ($1 = €1))	Net income tax accrued under improper method ($1 = €1))
3/31/Y1 ends in Year 1	0	¾ (200x) = 150x.
3/31/Y2 ends in Year 2	200x	¼ (200x) + ¾ (280x) = 260x.
3/31/Y3 ends in Year 3	280x	¼ (280x) + ¾ (240x) = 250x.
3/31/Y4 ends in Year 4	240x	[year of change].

(B) *Analysis*—(*1*) *Downward adjustment.* Under paragraph (d)(5)(ii) of this section, in Year 4, the year of change, U.S.C. must reduce (but not below zero) the amount (in Euros) of Country X net income tax in the foreign branch category that properly accrues in Year 4, €240x, by the amount of foreign income tax that was accrued and claimed as either a deduction or a credit in a year before the year of change, and that had not properly accrued in either the year in which the tax was accrued under U.S.C.'s improper method or in any other taxable year before the taxable year of change. For all taxable years before the taxable year of change, under its improper method U.S.C. had accrued and claimed as a credit a total of €660x = $660x of foreign income tax, of which only €480x = $480x had properly accrued. Therefore, the downward adjustment required by paragraph (d)(5)(ii) of this section is €180x (€660x − €480x = €180x). In Year 4, U.S.C.'s foreign tax credit in the foreign branch category is reduced by $180x (€180x downward adjustment translated into dollars at $1:€1, the average exchange rate for Year 4), from $240x to $60x.

(*2*) *Application of section 905(c)*—(*i*) *Year 1.* Under paragraph (d)(5)(iii) of this section, the €200x U.S.C. paid on January 15, Year 3, that relates to its Country X taxable year ending on March 31, Year 2, is first treated as a payment of the €50x of that Country X net income tax liability that properly accrued and was claimed as a credit by U.S.C. in Year 2, and next as a payment of the €150x of that Country X net income tax liability that U.S.C. improperly accrued and claimed as a credit in Year 1. Because all €150x of the Country X net income tax that was improperly accrued and claimed as a credit in Year 1 was paid within 24 months of December 31, Year 1, no foreign tax redetermination occurs, and

no redetermination of U.S. tax liability is required, for Year 1.

(*ii*) *Year 2.* Under paragraph (d)(5)(iii) of this section, the €280x U.S.C. paid on January 15, Year 4, that relates to its Country X taxable year ending on March 31, Year 3, is first treated as a payment of the €70x = $70x of that Country X net income tax liability that properly accrued and was claimed as a credit by U.S.C. in Year 3, and next as a payment of the €210x = $210x of that Country X net income tax liability that U.S.C. improperly accrued and claimed as a credit in Year 2. Together with the €50x = $50x of U.S.C.'s Country X net income tax liability that properly accrued and was claimed as a credit in Year 2, all €260x of the Country X net income tax that was accrued and claimed as a credit in Year 2 under U.S.C.'s improper method was paid within 24 months of December 31, Year 2. Accordingly, no foreign tax redetermination occurs, and no redetermination of U.S. tax liability is required, for Year 2.

(*iii*) *Year 3.* Under paragraph (d)(5)(iii) of this section, the €240x U.S.C. paid on January 15, Year 5, that relates to its Country X taxable year ending on March 31, Year 4, is first treated as a payment of the €60x = $60x of that Country X net income tax liability that properly accrued and was claimed as a credit by U.S.C. in Year 4, and next as a payment of the €180x = $180x of that Country X net income tax liability that U.S.C. improperly accrued and claimed as a credit in Year 3. Together with the €70x = $70x of U.S.C.'s Country X net income tax liability that properly accrued and was claimed as a credit by U.S.C. in Year 3, all €250x of the Country X net income tax that was accrued and claimed as a credit in Year 3 under U.S.C.'s improper method was paid within 24 months of December 31, Year 3. Accordingly, no foreign tax redetermination occurs, and no redetermination of U.S. tax liability is required, for Year 3.

(*iv*) *Year 4.* Under paragraph (d)(5)(iii) of this section, €60x = $60x of U.S.C.'s January 15, Year 5 payment of €240x with respect to its Country X net income tax liability for Year 4 is treated as a payment of €60x = $60x of Country X net income tax that, after application of the downward adjustment required by paragraph (d)(5)(ii) of this section, was accrued and claimed as a credit in Year 4, the year of change.

(vi) *Example 6: Failure to pay improperly-accrued tax within 24 months*—(A) *Facts.* The facts are the same as those in paragraph (d)(6)(v) of this section (the facts in *Example 5*), except that U.S.C. does not pay its €240x tax liability for its Country X taxable year ending on March 31, Year 4, until January 15 of Year 6, when the spot rate described in § 1.986(a)–1(a)(2)(i) is $1:€1.5.

(B) *Analysis.* The results are the same as in paragraphs (d)(6)(v)(B)(*2*)(*i*) and (*ii*) of this section (the analysis in *Example 5* for Year 1 and Year 2). With respect to Year 3, because the €180x = $180x of Year 4 foreign income tax that was improperly accrued and credited in Year 3 was not paid within 24 months of the end of Year 3, under section 905(c)(2) and § 1.905–3(a) that €180x = $180x is treated as refunded on December 31, Year 5, requiring a redetermination of U.S.C.'s Federal income tax liability for Year 3 (to reverse out the credit claimed). In Year 6, when U.S.C. pays the €240x of Country X income tax liability for Year 4, under paragraph (d)(5)(iii) of this section that payment is first treated as a payment of the €60x = $60x that was properly accrued and claimed as a credit in Year 4, and then as a payment of the €180x that was improperly accrued and claimed as a credit in Year 3 and that was treated as refunded in Year 5. Under section 905(c)(2)(B) and § 1.905–3(a), that Year 6 payment of accrued but unpaid tax is a second foreign tax redetermination for Year 3 that also requires a redetermination of U.S.C.'s U.S. tax liability. Under § 1.986(a)–1(a)(2), the €180x of redetermined tax for Year 3 is translated into dollars at the spot rate on January 15, Year 6, when the tax is paid (€180x × $1/€1.5 = $120x). Under § 1.905–4(b)(1)(iv), U.S.C. may file one amended return accounting for both foreign tax redeterminations (which occur in two consecutive taxable years) with respect to Year 3, which taken together result in a reduction in U.S.C.'s foreign tax credit for Year 3 from $250x to $190x ($250x originally accrued − $180x unpaid after 24 months + $120x paid in Year 6).

(vii) *Example 7: Additional payment of improperly-accrued tax*—(A) *Facts.* The facts are the same as those in paragraph (d)(6)(v)(A) of this section (the facts in *Example 5*), except that in Year 6, Country X assessed additional net income tax of €100x with respect to U.S.C.'s Country X taxable year ending March 31, Year 3, and after exhausting all effective and practical remedies to reduce its liability for Country X income tax, U.S.C. pays the additional assessed tax on September 15, Year 7, when the spot rate described in § 1.986(a)–1(a)(2)(i) is $1:€0.5.

(B) *Analysis.* Under paragraph (d)(3) of this section, the additional €100x of Country X income tax U.S.C. paid in Year 7 with respect to its foreign taxable year that ended March 31, Year 3, relates back and is considered to accrue in Year 3. However, under its improper method of accounting U.S.C. had accrued and claimed foreign tax credits for Country X net income tax that related to Year 3 on its Federal income tax returns for both Year 2 and Year 3. Accordingly, under paragraph (d)(5)(iii)(B) of this section U.S.C. must redetermine its U.S. tax liability for both Year 2 and Year 3 (and any other affected years) to account for the additional €100x of Country X net income tax liability, using the improper method it used to accrue foreign income taxes before the year of change. Therefore, three-fourths of the €100x of additional tax, or €75x, is treated as if it accrued in Year 2, and one-fourth of the additional tax, or €25x, is treated as if it accrued in Year 3. Pursuant to § 1.986(a)–1(a)(2)(i), the €75x of tax treated as if it accrued in Year 2 and the €25x of tax treated as if it accrued in Year 3 are converted into dollars using the September 15, Year 7, spot rate of $1:€0.5, to $150x and $50x, respectively. Under § 1.905–4(b)(1)(iii), U.S.C. may claim a refund for any resulting overpayment of U.S. tax for Year 2 or Year 3 or any other affected year by filing an amended return within the period provided in section 6511.

(viii) *Example 8: Tax improperly accrued before year of change exceeds tax properly accrued in year of change*—(A) *Facts.* U.S.C. owns all of the stock in CFC, a controlled foreign corporation organized in Country X. Country X imposes net income tax on Country X corporations at a rate of 10% only in the year its earnings are distributed to its shareholders, rather than in the year the income is earned. Both U.S.C. and CFC use the calendar year as their taxable year for both Federal and Country X income tax purposes and CFC uses the Euro as its functional currency. In each of Years 1–3, CFC earns €1,000x for both Federal and Country X income tax purposes of general category foreign base company sales income (before reduction for foreign income taxes). CFC improperly accrues €100x of Country X net income tax with respect to €1,000x of income at the end of each of Years 1 and 2, even though no distribution is made in those years. In Year 1, for which the average exchange rate is $1:€1, U.S.C. computes and includes in income with respect to CFC $900x of subpart F income, claims a deemed paid foreign tax credit of $100x under section 960(a), and has a section 78 dividend of $100x. In Year 2, for which the average exchange rate is $1:€0.5, U.S.C. computes and includes in income with respect to CFC $1,800x

of subpart F income, claims a deemed paid foreign tax credit of $200x under section 960(a), and has a section 78 dividend of $200x. In Year 2, CFC makes a distribution to U.S.C. of €400x of earnings and pays €40x of net income tax to Country X. In Year 3, for which the average exchange rate is $1:€1, CFC makes another distribution to U.S.C. of €500x of earnings and pays €50x in net income tax to Country X. In Year 3, U.S.C. realizes its mistake and seeks permission from the IRS for CFC to change to a proper method of accruing foreign income taxes. In Year 4, for which the average exchange rate is $1:€2, CFC makes a distribution of €700x of earnings and pays €70x of net income tax to Country X.

TABLE 2 TO PARAGRAPH (d)(6)(viii)(A)

Taxable year ending	Foreign income tax properly accrued	Foreign income tax accrued under improper method
12/31/Y1 ($1:€1)	0	€100x = $100x.
12/31/Y2 ($1:€0.5)	€40x = $80x	€100x = $200x.
12/31/Y3 ($1:€1)	€50x = $50x	[year of change].
12/31/Y4 ($1:€2)	€70x = $35x	

(B) *Analysis*—(*1*) *Downward adjustment.* Under paragraph (d)(5)(iv) of this section, CFC applies the rules of paragraph (d)(5) of this section as if it claimed a foreign tax credit under section 901 for Country X taxes. Under paragraph (d)(5)(ii) of this section, in Year 3, the year of change, CFC must reduce (but not below zero) the amount (in Euros) of Country X net income tax allocated and apportioned to its general category foreign base company sales income group that properly accrues in Year 3, €50x, by the amount of foreign income tax (in Euros) that was improperly accrued in that statutory grouping in a year before the year of change, and that had not properly accrued in either the year accrued or in another taxable year before the year of change. For all taxable years before the year of change, under its improper method CFC had accrued a total of €200x of foreign income tax with respect to its general category foreign base company sales income group, of which only €40x had properly accrued. Therefore, the downward adjustment required by paragraph (d)(5)(ii) of this section is €160x (€200x—€40x = €160x). In Year 3, CFC's €50x of eligible foreign income taxes in the general category foreign base company sales income group is reduced by €50x to zero. The €110x balance of the downward adjustment carries forward to Year 4, and reduces CFC's €70x of eligible foreign income taxes in the general category foreign base company sales income group by €70x to zero. The remaining €40x balance of the downward adjustment carries forward to later years and will reduce CFC's eligible foreign income taxes in the general category foreign base company sales income group until all improperly-accrued amounts are accounted for.

(*2*) *Application of section 905(c)*—(*i*) *Year 2.* Under paragraph (d)(5)(iii) of this section, CFC's payment in Year 2 of the €40x of Country X net income tax that properly accrued in Year 2, before the year of change, is treated as a payment of €40x of foreign income tax that CFC properly accrued in Year 2. The €60x of foreign income tax that CFC improperly accrued in Year 2 that remains unpaid at the end of Year 2 is not adjusted in Year 2. Under paragraph (d)(5)(iii) of this section, CFC's payment in Year 3 of €50x of Country X net income tax that properly accrued but was offset by the downward adjustment in Year 3 is treated as a payment of €50x of the remaining €60x of Country X net income tax that CFC improperly accrued in Year 2, the most recent improper accrual. In addition, CFC's payment in Year 4 of €70x of Country X net income tax that properly accrued but was offset by the downward adjustment in Year 4 is treated first as a payment of the remaining €10x of Country X net income tax that CFC improperly accrued in Year 2. Because all €100x of foreign income tax accrued in Year 2 under CFC's improper method of accounting is treated as paid within 24 months of December 31, Year 2, no foreign tax redetermination occurs, and no redetermination of CFC's foreign base company sales income, earnings and profits, and eligible foreign income taxes or of U.S.C.'s $1,800x subpart F inclusion, $200x deemed paid credit, $200x section 78 dividend and U.S. tax liability is required, for Year 2.

(*ii*) *Year 1.* Because all €100x of the tax CFC improperly accrued in Year 1 remained unpaid as of December 31, Year 3, the date 24 months after the end of Year 1, under section 905(c)(2) and § 1.905–3(a) that €100x is treated as refunded on December 31, Year 3. Under § 1.905–3(b)(2)(ii), U.S.C. must redetermine its Federal income tax liability for Year 1 to account for the foreign tax redetermination, increasing CFC's foreign base company sales income and earnings and profits by €100x, and decreasing its eligible foreign income taxes by $100x. However, under paragraph (d)(5)(iii)(B) of this section €60x of CFC's payment in Year 4 of €70x of Country X net income tax that properly accrued but was offset by the downward adjustment in Year 4 is treated as a payment of €60x of the €100x of Country X net income tax that was improperly accrued in Year 1 and treated as refunded in Year 3. Under § 1.905–4(b)(1)(iv), U.S.C. may account for the two foreign tax redeterminations that occurred in Years 3 and 4 on a single amended Federal income tax return for Year 1. CFC's foreign base company sales income (taking into account the reduction for foreign income taxes) and earnings and profits for Year 1 are recomputed as €1,000x of foreign base company sales income—€100x foreign income tax improperly accrued in Year 1 + €100x improperly accrued foreign income tax treated as refunded on December 31, Year 3—€60x improperly accrued foreign income tax treated as paid in Year 4 = €940x. CFC's eligible foreign income taxes for Year 1 are translated into dollars at the applicable exchange rate and recomputed as $100x foreign income tax improperly accrued in Year 1—$100x improperly accrued foreign income tax treated as refunded on December 31, Year 3 + $30x improperly accrued foreign income tax treated as paid in Year 4 = $30x. U.S.C.'s subpart F inclusion with respect to CFC for Year 1 (translated at the average exchange rate for Year 1 of $1:€1) is increased from $900x to $940x (€940x x $1/€1), and the amount of foreign taxes deemed paid under section 960(a) and the

amount of the section 78 dividend are reduced from $100x to $30x.

(*iii*) *Summary.* As of the end of Year 4, CFC and U.S.C. have been allowed a $30x foreign tax credit for Year 1, and a $200x foreign tax credit for Year 2. If in a later taxable year CFC distributes additional earnings to U.S.C. and accrues €40x of additional Country X net income tax that is offset by the balance of the €40x downward adjustment, CFC's payment of that €40x Country X net income tax liability will be treated as a payment of the remaining €40x of Country X net income tax that was improperly accrued in Year 1 and treated as refunded as of the end of Year 3.

(ix) *Example 9: Improperly deferred accrual*—(A) *Facts*—(*1*) *Foreign income tax accrued and paid.* U.S.C. is a domestic corporation that operates a foreign branch in Country X. All of U.S.C.'s gross and taxable income is foreign source foreign branch category income, and all of its foreign income taxes are properly allocated and apportioned under § 1.861–20 to the foreign branch category. U.S.C. uses the accrual method of accounting and uses the calendar year as its taxable year for both Federal and Country X income tax purposes. U.S.C. accrued €160x of Country X net income tax (as defined in § 1.901–2(a)(3)) with respect to Year 1. U.S.C. filed its Country X tax return and paid the €160x on June 30, Year 2. U.S.C. accrued €180x, €240x, and €150x of Country X tax for Years 2, 3, and 4, respectively, and paid with its timely filed Country X tax returns these tax liabilities on June 30 of Years 3, 4, and 5, respectively. The average exchange rate described in § 1.986(a)–1(a)(1) is $1:€0.5 in Year 1, $1:€1 in Year 2, $1:€1.25 in Year 3, and $1:€1.5 in Year 4.

(*2*) *Improper accrual.* On its Federal income tax return for Year 1, U.S.C. claimed no foreign tax credit. On its Federal income tax return for Year 2, U.S.C. improperly accrued and claimed a credit for $160x (€160x of Country X tax for Year 1 that it paid in Year 2, translated into dollars at the average exchange rate for Year 2). Continuing with this improper method of accounting, U.S.C. improperly accrued and claimed a credit in Year 3 for $144x (€180x of Country X tax for Year 2 that it paid in Year 3, translated into dollars at the average exchange rate for Year 3). In Year 4, U.S.C. realizes its mistake and seeks permission from the IRS to change to a proper method of accruing foreign income taxes.

TABLE 3 TO PARAGRAPH (d)(6)(ix)(A)(2)

Taxable year ending	Foreign income tax properly accrued	Foreign income tax accrued under improper method
12/31/Y1 ($1:€0.5)	€160x = $320x	0.
12/31/Y2 ($1:€1)	€180x = $180x	€160x = $160x.
12/31/Y3 ($1:€1.25)	€240x = $192x	€180x = $144x.
12/31/Y4 ($1:€1.5)	€150x = $100x	[year of change].

(B) *Analysis*—(*1*) *Upward adjustment.* Under paragraph (d)(5)(ii) of this section, in Year 4, the year of change, U.S.C. increases the amount of Country X net income tax allocated and apportioned to its foreign branch category that properly accrues in Year 4, €150x, by the amount of foreign income tax in that same grouping that properly accrued in a taxable year before the taxable year of change, but which, under its improper method of accounting, U.S.C. failed to accrue and claim as either a credit or deduction before the taxable year of change. For all taxable years before the taxable year of change, under a proper method, U.S.C. would have accrued a total of €580x of foreign income tax, of which it accrued and claimed a credit for only €340x under its improper method. Thus, in Year 4, U.S.C. increases its €150x of properly accrued foreign income taxes in the foreign branch category by €240x (€580x − €340x), and may claim a credit in that year for the total, €390x, or $260x (translated into dollars at the average exchange rate for Year 4, as if the total amount properly accrued in Year 4).

(*2*) *Application of section 905(c).* Under paragraph (d)(5)(iii) of this section, U.S.C.'s payment in Year 2 of €160x of Country X net income tax that properly accrued in Year 1 but that U.S.C. accrued and claimed as a credit in Year 2 under its improper method of accounting is first treated as a payment of the amount of the Year 1 tax liability that properly accrued in Year 2. Since none of the €160x properly accrued in Year 2, the €160x is treated as a payment of the Year 1 tax liability that U.S.C. improperly accrued and claimed as a credit in Year 2, €160x. Because all €160x of the Country X net income tax that was improperly accrued and claimed as a credit in Year 2 was paid within 24 months of the end of Year 2, no foreign tax redetermination occurs, and no redetermination of U.S.C.'s $160x foreign tax credit and U.S. tax liability is required, for Year 2. Similarly, because all €180x of the Year 2 Country X net income tax that was improperly accrued and claimed as a credit in Year 3 was paid within 24 months of the end of Year 3, no foreign tax redetermination occurs, and no redetermination of U.S.C.'s $144x foreign tax credit and U.S. tax liability is required, for Year 3.

(e) *Election by cash method taxpayer to take credit on the accrual basis*—(1) *In general.* A taxpayer who uses the cash method of accounting for income may elect to take the foreign tax credit in the taxable year in which the taxes accrue in accordance with the rules in paragraph (d) of this section. Except as provided in paragraph (e)(2) of this section, an election pursuant to this paragraph (e)(1) must be made on a timely-filed original return, by checking the appropriate box on Form 1116 (Foreign Tax Credit (Individual, Estate, or Trust)) or Form 1118 (Foreign Tax Credit—Corporations) indicating the cash method taxpayer's choice to claim the foreign tax credit in the year the foreign income taxes accrue. Once made, the election is irrevocable and must be followed for purposes of claiming a foreign tax credit for all subsequent years. See section 905(a).

(2) *Exception for cash method taxpayers claiming a foreign tax credit for the first time.* If the year with respect to which an election pursuant to paragraph (e)(1) of this section to claim the foreign tax credit on an accrual basis is made (the ''election year'') is the first year for which a taxpayer has ever claimed a foreign tax credit, the election to claim the foreign tax credit on an accrual basis can also be made on an amended return filed within the period permitted under § 1.901–1(d)(1). The election is binding in the election year

and all subsequent taxable years in which the taxpayer claims a foreign tax credit.

(3) *Treatment of taxes that accrued in a prior year.* In the election year and subsequent taxable years, a cash method taxpayer that claimed foreign tax credits on the cash basis in a prior taxable year may claim a foreign tax credit not only for foreign income taxes that accrue in the election year, but also for foreign income taxes that accrued (or are considered to accrue) in a taxable year preceding the election year but that are paid in the election year or a subsequent taxable year, as applicable. Under paragraph (c) of this section, foreign income taxes paid with respect to a taxable year that precedes the election year may be claimed as a credit only in the year the taxes are paid and do not require a redetermination under section 905(c) or § 1.905–3 of U.S. tax liability in any prior year.

(4) *Examples.* The following examples illustrate the application of paragraph (e) of this section.

(i) *Example 1*—(A) *Facts.* A, a U.S. citizen who is a resident of Country X, is a cash method taxpayer who uses the calendar year as the taxable year for both U.S. and Country X tax purposes. In Year 1 through Year 5, A claims foreign tax credits for Country X foreign income taxes on the cash method, in the year the taxes are paid. For Year 6, A makes a timely election to claim foreign tax credits on the accrual basis. In Year 6, A accrues $100x of Country X foreign income taxes with respect to Year 6. Also in Year 6, A pays $80x in foreign income taxes that had accrued in Year 5.

(B) *Analysis.* Pursuant to paragraph (e)(3) of this section, A can claim a foreign tax credit in Year 6 for the $100x of Country X taxes that accrued in Year 6 and for the $80x of Country X taxes that accrued in Year 5 but that are paid in Year 6.

(ii) *Example 2*—(A) *Facts.* The facts are the same as those in paragraph (e)(4)(i)(A) of this section (the facts in *Example 1*), except that in Year 7, A is assessed an additional $10x of foreign income tax by Country X with respect to A's income in Year 3. After exhausting all effective and practical remedies, A pays the additional $10x to Country X in Year 8.

(B) *Analysis.* Pursuant to paragraph (e)(3) of this section, A can claim a foreign tax credit in Year 8 for the additional $10x of foreign income tax paid to Country X in Year 8 with respect to Year 3.

(f) *Rules for creditable foreign tax expenditures of partners, shareholders, or beneficiaries of a pass-through entity*—(1) *Effect of pass-through entity's method of accounting on when foreign tax credit or deduction can be claimed.* Each partner that elects to claim the foreign tax credit for a particular taxable year may treat its distributive share of the creditable foreign tax expenditures (as defined in § 1.704–1(b)(4)(viii)(*b*)) of the partnership that are paid or accrued by the partnership, under the partnership's method of accounting, during the partnership's taxable year ending with or within the partner's taxable year, as foreign income taxes paid or accrued (as the case may be, according to the partner's method of accounting for such taxes) by the partner in that particular taxable year. See §§ 1.702–1(a)(6) and 1.703–1(b)(2). Under §§ 1.905–3(a) and 1.905–4(b)(2), additional creditable foreign tax expenditures of the partnership that result from a change in the partnership's foreign tax liability for a prior taxable year, including additional taxes paid when a contest with a foreign tax authority is resolved, must be identified by the partnership as a prior year creditable foreign tax expenditure in the information reported to its partners for its taxable year in which the additional tax is actually paid. Subject to the rules in paragraphs (c) and (e) of this section, a partner using the cash method of accounting for foreign income taxes may claim a credit (or a deduction) for its distributive share of such additional taxes in the partner's taxable year with or within which the partnership's taxable year ends. Subject to the rules in paragraph (d) of this section, a partner using the accrual method of accounting for foreign income taxes may claim a credit for the partner's distributive share of such additional taxes in the relation-back year, or may claim a deduction in its taxable year with or within which the partnership's taxable year ends. The principles of this paragraph (f)(1) apply to determine the year in which a shareholder of a S corporation, or the grantor or beneficiary of an estate or trust, may claim a foreign tax credit (or a deduction) for its proportionate share of foreign income taxes paid or accrued by the S corporation, estate or trust. See sections 642(a), 671, 901(b)(5), and 1373(a) and §§ 1.1363–1(c)(2)(iii) and 1.1366–1(a)(2)(iv). See §§ 1.905–3 and 1.905–4 for notifications and adjustments of U.S. tax liability that are required if creditable foreign tax expenditures of a partnership or S corporation, or foreign income taxes paid or accrued by a trust or estate, are refunded or otherwise reduced.

(2) *Provisional credit for contested taxes.* Under paragraph (d)(3) of this section, a contested foreign tax liability does not accrue until the contest is resolved and the amount of the liability has been finally determined. In addition, under section 905(c)(2), a foreign income tax that is not paid within 24 months of the close of the taxable year to which the tax relates may not be claimed as a credit until the tax is actually paid. Thus, a partnership or other pass-through entity cannot take the contested tax into account as a creditable foreign tax expenditure until both the contest is resolved and the tax is actually paid. However, to the extent that a partnership or other pass-through entity remits a contested foreign tax liability to a foreign country, a partner or other owner of such pass-through entity that claims foreign tax credits may, by complying with the rules in paragraph (c)(3) or (d)(4) of this section, as applicable, elect to claim a provisional credit for its distributive share of such contested tax liability in the year the pass-through entity remits the tax (for owners claiming foreign tax credits on the cash basis) or in the relation-back year (for owners claiming foreign tax credits on the accrual basis).

(3) *Example.* The following example illustrates the application of paragraph (f) of this section.

(i) *Facts.* ABC is a U.S. partnership that is engaged in a trade or business in Country X. ABC has two U.S. partners, A and B. For Federal income tax purposes, ABC and partner A both use the accrual method of accounting and utilize a taxable year ending on September 30. ABC uses a taxable year ending on September 30 for Country X tax purposes. B is a calendar year taxpayer that uses the cash method of accounting. For its taxable year ending September 30, Year 1, ABC accrues $500x in foreign income tax to Country X; each partner's distributive share of the foreign income tax is $250x. In its taxable year ending September 30, Year 5, ABC settles a contest with Country X with respect to its Year 1 tax liability and, as a result of such settlement, accrues an additional $100x in foreign income tax for Year 1. ABC remits the additional tax to Country X in January of Year 6. A and B both elect to claim foreign tax credits for their respective taxable Years 1 through 6.

(ii) *Analysis.* For its taxable year ending September 30, Year 1, A can claim a credit for its $250x distributive share of foreign income taxes paid by ABC with respect to ABC's taxable year ending September 30, Year 1. Pursuant to paragraph (f)(1) of this section, B can claim its distributive share of $250x of

foreign income tax for its taxable year ending December 31, Year 1, even if ABC does not remit the Year 1 taxes to Country X until Year 2. Although the additional $100x of Country X foreign income tax owed by ABC with respect to Year 1 accrued in its taxable year ending September 30, Year 5, upon conclusion of the contest, because ABC uses the accrual method of accounting, it does not take the additional tax into account until the tax is actually paid, in its taxable year ending September 30, Year 6. See section 905(c)(2)(B) and paragraph (f)(1) of this section. Pursuant to § 1.905–4(b)(2), ABC is required to notify the IRS and its partners of the foreign tax redetermination. A's distributive share of the additional tax relates back, is considered to accrue, and may be claimed as a credit for Year 1; however, A cannot claim a credit for the additional tax until Year 6, when ABC remits the tax to Country X. See § 1.905–3(a). B's distributive share of the additional tax does not relate back to Year 1 and is creditable in B's taxable year ending December 31, Year 6.

(g) *Blocked income.* If, under the provisions of the regulations under section 461, an amount otherwise constituting gross income for the taxable year from sources without the United States is, owing to monetary, exchange, or other restrictions imposed by a foreign country, not includible in gross income of the taxpayer for such year, the credit for foreign income taxes imposed by such foreign country with respect to such amount shall be taken proportionately in any subsequent taxable year in which such amount or portion thereof is includible in gross income.

(h) *Applicability dates.* This section applies to foreign income taxes paid or accrued in taxable years beginning on or after December 28, 2021. In addition, the election described in paragraphs (c)(3) and (d)(4) of this section may be made (including by a partner or other owner of a pass-through entity described in paragraph (f)(2) of this section) with respect to amounts of contested tax that are remitted in taxable years beginning on or after December 28, 2021 and that relate to a taxable year beginning before December 28, 2021.

■ **Par. 29.** Section 1.905–3 is amended:

■ 1. In paragraph (a), by revising the first two sentences.

■ 2. In paragraph (b)(1)(ii)(B)(*1*), by removing the language ''U.S.C. Effective'' and adding the language ''U.S.C.. Effective'' in its place.

■ 3. By adding paragraph (b)(4).

■ 4. By revising paragraph (d).

The revisions and addition read as follows:

§ 1.905–3 Adjustments to U.S. tax liability and to current earnings and profits as a result of a foreign tax redetermination.

(a) * * * For purposes of this section and § 1.905–4, the term *foreign tax redetermination* means a change in the liability for foreign income taxes (as defined in § 1.901–2(a)) or certain other changes described in this paragraph (a) that may affect a taxpayer's U.S. tax liability, including by reason of a change in the amount of its foreign tax credit, a change to claim a foreign tax credit for foreign income taxes that it previously deducted, a change to claim a deduction for foreign income taxes that it previously credited, a change in the amount of its distributions or inclusions under sections 951, 951A, or 1293, a change in the application of the high-tax exception described in section 954(b)(4) (including for purposes of determining amounts excluded from gross tested income under section 951A(c)(2)(A)(i)(III) and § 1.951A–2(c)(1)(iii)), or a change in the amount of tax determined under sections 1291(c)(2) and 1291(g)(1)(C)(ii). In the case of a taxpayer that claims the credit in the year the taxes are paid, a foreign tax redetermination occurs if any portion of the tax paid is subsequently refunded, or if the taxpayer's liability is subsequently determined to be less than the amount paid and claimed as a credit. * * *

(b) * * *

(4) *Change in election to claim a foreign tax credit.* A redetermination of U.S. tax liability is required to account for the effect of a timely change by the taxpayer to claim a foreign tax credit or a deduction for foreign income taxes paid or accrued in any taxable year as permitted under § 1.901–1(d).

* * * * *

(d) *Applicability dates.* Except as provided in this paragraph (d), this section applies to foreign tax redeterminations occurring in taxable years ending on or after December 16, 2019, and to foreign tax redeterminations of foreign corporations occurring in taxable years that end with or within a taxable year of a United States shareholder ending on or after December 16, 2019 and that relate to taxable years of foreign corporations beginning after December 31, 2017. The first two sentences of paragraph (a) of this section, and paragraph (b)(4) of this section, apply to foreign tax redeterminations occurring in taxable years beginning on or after December 28, 2021.

■ **Par. 30.** Section 1.951A–2 is amended:

■ 1. In paragraph (c)(7)(iii)(A), by adding the language ''and the rules of § 1.861–20'' at the end of the first sentence.

■ 2. By removing paragraph (c)(7)(iii)(B).

■ 3. By redesignating paragraph (c)(7)(iii)(C) as paragraph (c)(7)(iii)(B).

■ 4. In newly redesignated paragraph (c)(7)(iii)(B), by removing the language ''(c)(7)(iii)(C)'' from the first sentence and adding the language ''(c)(7)(iii)(B)'' in its place.

■ 5. By adding paragraph (c)(8)(ii)(M).

■ 6. By revising paragraph (c)(8)(iii)(A)(*2*)(*ii*).

■ 7. By removing and reserving paragraph (c)(8)(iii)(B).

■ 8. In paragraph (c)(8)(iii)(C)(*2*)(*iii*):

■ i. By removing the language ''the principles of §§ 1.960–1(d)(3)(ii) and 1.904–6(a)(1)'' from the first and second sentences and adding the language ''§ 1.861–20'' in its place.

■ ii. By removing the language ''Under these principles, the'' from the third sentence and adding the language ''Under § 1.861–20,'' in its place.

The additions and revisions read as follows:

§ 1.951A–2 Tested income and tested loss.

* * * * *

(c) * * *

(8) * * *

(ii) * * *

(M) The same amounts of regarded items of income and deduction that are accrued under federal income tax law are also accrued under foreign law.

(iii) * * *

(A) * * *

(2) * * *

(ii) * * * Under paragraph (c)(7)(iii)(A) of this section, CFC1X's tentative tested income items are computed by treating the CFC1X tentative gross tested income item and the FDE1Y tentative gross tested income item each as income in a separate tested income group (the ''CFC1X income group'' and the ''FDE1Y income group'') and by allocating and apportioning CFC1X's deductions for current year taxes under § 1.861–20 (CFC1X has no other deductions to allocate and apportion). Under paragraph (c)(7)(iii)(A) of this section and § 1.861–20(d)(3)(v), the €20x deduction for Country Y income taxes is allocated and apportioned solely to the FDE1Y income group (the ''FDE1Y group tax'') and none of the Country Y taxes are allocated and apportioned to the CFC1X income group.

* * * * *

■ **Par. 31.** Section 1.951A–7(b) is amended:

■ 1. By removing the language ''Section'' from the first sentence and adding the language ''Except as otherwise provided in this paragraph (b), section,'' in its place.
■ 2. Adding three sentences after the second sentence.

The addition reads as follows:

§ 1.951A–7 Applicability dates.

* * * * *

(b) * * * Section 1.951A–2(c)(7)(iii)(B), (c)(8)(ii), (c)(8)(iii)(A)(*2*)(*ii*), and (c)(8)(iii)(B) apply to taxable years of foreign corporations beginning on or after December 28, 2021, and to taxable years of United States shareholders in which or with which such taxable years of the foreign corporations end. In addition, taxpayers may choose to apply the rules in § 1.951A–2(c)(7)(iii)(B), (c)(8)(iii)(A)(*2*)(*ii*), and (c)(8)(iii)(B)(*2*)(*iii*) to taxable years of foreign corporations that begin after December 31, 2019, and before December 28, 2021, and to taxable years of U.S. shareholders in which or with which such taxable years of the foreign corporations end. For taxable years of foreign corporations beginning before December 28, 2021, see § 1.951A–2(c)(7)(iii)(B), (c)(8)(iii)(A)(*2*)(*ii*), and (c)(8)(iii)(B)(*2*)(*iii*) as contained in 26 CFR part 1 revised as of April 1, 2021.

■ **Par. 32.** Section 1.960–1 is amended:
■ 1. By revising paragraph (b)(4).
■ 2. By redesignating paragraphs (b)(5) through (37) as paragraphs (b)(6) through (38), respectively.
■ 3. By adding a new paragraph (b)(5).
■ 4. By revising newly redesignated paragraphs (b)(6) and (c)(1)(ii).
■ 5. By redesignating paragraphs (c)(1)(iii) through (vi) as paragraphs (c)(1)(iv) through (vii).
■ 6. By adding a new paragraph (c)(1)(iii).
■ 7. In newly redesignated paragraph (c)(1)(iv), by removing the language ''Third, current year taxes'' in the first sentence and adding the language ''Fourth, eligible current year taxes'' in its place.
■ 8. In newly redesignated paragraph (c)(1)(v), by removing the language ''Fourth,'' from the first sentence and adding the language ''Fifth,'' in its place.
■ 9. In newly redesignated paragraph (c)(1)(vi), by removing the language ''Fifth,'' from the first sentence and adding the language ''Sixth,'' in its place.
■ 10. In newly redesignated paragraph (c)(1)(vii), by removing the language ''Sixth,'' from the first sentence and adding the language ''Seventh,'' in its place.
■ 11. In paragraph (d)(1), by removing the language ''the U.S. dollar amount of current year taxes'' from the first sentence and adding the language ''the U.S. dollar amount of eligible current year taxes'' in its place.
■ 12. In paragraph (d)(3)(i) introductory text, by removing the language ''current year taxes'' from the second sentence and adding the language ''eligible current year taxes'' in its place.
■ 13. In paragraph (d)(3)(ii)(A), by revising the last sentence.
■ 14. In paragraph (d)(3)(ii)(B), by removing the language ''a current year tax'' from the first sentence and adding the language ''an eligible current year tax'' in its place.
■ 15. In paragraph (f)(1)(ii), by removing the language ''tax'' from the fifth sentence and adding the language ''eligible current year tax'' in its place.
■ 16. In paragraph (f)(2)(i):
■ i. By removing the language ''paragraphs (c)(1)(i) through (iv)'' from the third sentence and adding the language ''paragraphs (c)(1)(i) through (v)'' in its place.
■ ii. By removing the language ''Under paragraph (c)(1)(v) of this section, the rules in paragraph (c)(1)(i) through (iv)'' from the fourth sentence and adding the language ''Under paragraph (c)(1)(vi) of this section, the rules in paragraph (c)(1)(i) through (v)'' in its place.
■ 17. In paragraph (f)(2)(ii)(B)(*1*), by removing the language ''current year taxes'' from the last sentence and adding the language ''eligible current year taxes'' in its place.
■ 18. In paragraph (f)(2)(ii)(B)(*2*):
■ i. By removing the language ''current year taxes'' from the fifth sentence and adding the language ''eligible current year taxes'' in its place.
■ ii. By removing the last two sentences.
■ 19. By redesignating paragraphs (f)(2)(ii)(C) through (F) as paragraphs (f)(2)(ii)(D) through (G), respectively.
■ 20. By adding a new paragraph (f)(2)(ii)(C).
■ 21. In newly-redesignated paragraph (f)(2)(ii)(D):
■ i. By removing the language ''*Step 3*. Under paragraph (c)(1)(iii)'' from the first sentence and adding the language ''*Step 4*. Under paragraph (c)(1)(iv)'' in its place.
■ ii. By removing the language ''paragraph (c)(1)(iii)'' from the fifth sentence and adding the language ''paragraph (c)(1)(iv)'' in its place.
■ 21. In newly-redesignated paragraph (f)(2)(ii)(E), by removing the language ''*Step 4*. Under paragraph (c)(1)(iv)'' from the first sentence and adding the language ''*Step 5*. Under paragraph (c)(1)(v)'' in its place.
■ 22. In newly-redesignated paragraph (f)(2)(ii)(F), by removing the language ''*Step 5*. Paragraph (c)(1)(v)'' and adding the language ''*Step 6*. Paragraph (c)(1)(vi)'' in its place.
■ 23. In newly-redesignated paragraph (f)(2)(ii)(G), by removing the language ''*Step 6*. Paragraph (c)(1)(vi)'' and adding the language ''*Step 7*. Paragraph (c)(1)(vii)'' in its place.

The additions and revisions read as follows:

§ 1.960–1 Overview, definitions, and computational rules for determining foreign income taxes deemed paid under section 960(a), (b), and (d).

* * * * *

(b) * * *

(4) *Current year tax.* The term *current year tax* means a foreign income tax that is paid or accrued by a controlled foreign corporation in a current taxable year (taking into account any adjustments resulting from a foreign tax redetermination (as defined in § 1.905–3(a)). See § 1.905–1 for rules on when foreign income taxes are considered paid or accrued for foreign tax credit purposes; see also § 1.367(b)-7(g) for rules relating to foreign income taxes associated with foreign section 381 transactions and hovering deficits.

(5) *Eligible current year tax.* The term *eligible current year tax* means a current year tax, other than a current year tax for which a credit is disallowed or suspended at the level of the controlled foreign corporation. See, for example, section 245A(e)(3) and § 1.245A(d)-1(a)(2) and sections 901(k)(1), (l), and (m), 909, and 6038(c)(1)(B). An eligible current year tax, however, includes a current year tax that may be deemed paid but for which a credit is reduced or disallowed at the level of the United States shareholder. See, for example, sections 901(e), 901(j), 901(k)(2), 908, 965(g), and 6038(c)(1)(A).

(6) *Foreign income tax.* The term *foreign income tax* has the meaning provided in § 1.901–2(a).

* * * * *

(c) * * *

(1) * * *

(ii) Second, deductions (other than for current year taxes) of the controlled foreign corporation for the current taxable year are allocated and apportioned to reduce gross income in the section 904 categories and the income groups within a section 904 category. See paragraph (d)(3)(i) of this section. Deductions for current year taxes (other than eligible current year taxes) of the controlled foreign corporation for the current taxable year are allocated and apportioned to reduce gross income in the section 904 categories and the income groups within a section 904 category. Additionally, the

functional currency amounts of eligible current year taxes are allocated and apportioned to reduce gross income in the section 904 categories and the income groups within a section 904 category, and to reduce earnings and profits in the PTEP groups that were increased as provided in paragraph (c)(1)(i) of this section. No deductions other than eligible current year taxes are allocated and apportioned to PTEP groups. See paragraph (d)(3)(ii) of this section.

(iii) Third, for purposes of computing foreign taxes deemed paid, eligible current year taxes that were allocated and apportioned to income groups and PTEP groups in the section 904 categories are translated into U.S. dollars in accordance with section 986(a).

* * * * *

(d) * * *

(3) * * *

(ii) * * *

(A) * * * For purposes of determining foreign income taxes deemed paid under the rules in §§ 1.960–2 and 1.960–3, the U.S. dollar amount of eligible current year taxes is assigned to the section 904 categories, income groups, and PTEP groups (to the extent provided in paragraph (d)(3)(ii)(B) of this section) to which the eligible current year taxes are allocated and apportioned.

* * * * *

(f) * * *

(2) * * *

(ii) * * *

(C) *Step 3.* Under paragraph (c)(1)(iii) of this section, for purposes of computing foreign taxes deemed paid under section 960, CFC1 has $600,000x of foreign income taxes in the PTEP group within the general category and $300,000x of current year taxes in the residual income group within the general category. Under paragraph (e) of this section, the United States shareholders of CFC1 cannot claim a credit with respect to the $300,000x of taxes on CFC1's income in the residual income group.

* * * * *

■ **Par. 33.** Section 1.960–2 is amended:

■ 1. In paragraph (b)(2), by removing the language ''current year taxes'' and adding the language ''eligible current year taxes'' in its place.

■ 2. In paragraph (b)(3)(i), by removing the language ''current year taxes'' each place it appears and adding the language ''eligible current year taxes'' in its place.

■ 3. In paragraph (b)(5)(i), by revising the seventh sentence.

■ 4. In paragraph (b)(5)(ii)(A), by revising the first and second sentences.

■ 5. In paragraph (b)(5)(ii)(B), by revising the first and second sentences.

■ 6. In paragraph (c)(4), by removing the language ''current year taxes'' and adding the language ''eligible current year taxes'' in its place.

■ 7. In paragraph (c)(5), by removing the language ''current year taxes'' each place it appears and adding the language ''eligible current year taxes'' in its place.

■ 8. In paragraph (c)(7)(i)(A), by revising the fifth sentence.

■ 9. In paragraph (c)(7)(i)(B), by revising the first and second sentences.

■ 10. In paragraph (c)(7)(ii)(A)(*1*), by revising the ninth and eleventh sentences.

■ 11. In paragraph (c)(7)(ii)(B)(*1*)(*i*), by revising the first and second sentences.

■ 12. In paragraph (c)(7)(ii)(B)(*1*)(*ii*), by removing the language ''foreign income taxes'' in the first sentence and adding the language ''eligible current year taxes'' in its place.

The additions and revisions read as follows:

§ 1.960–2 Foreign income taxes deemed paid under sections 960(a) and (d).

* * * * *

(b) * * *

(5) * * *

(i) * * * CFC has current year taxes, all of which are eligible current year taxes, translated into U.S. dollars, of $740,000x that are allocated and apportioned as follows: $50,000x to subpart F income group 1; $240,000x to subpart F income group 2; and $450,000x to subpart F income group 3. * * *

(ii) * * *

(A) * * * Under paragraphs (b)(2) and (3) of this section, the amount of CFC's foreign income taxes that are properly attributable to items of income in subpart F income group 1 to which a subpart F inclusion is attributable equals USP's proportionate share of the eligible current year taxes that are allocated and apportioned under § 1.960–1(d)(3)(ii) to subpart F income group 1, which is $40,000x ($50,000x × 800,000u/1,000,000u). Under paragraphs (b)(2) and (3) of this section, the amount of CFC's foreign income taxes that are properly attributable to items of income in subpart F income group 2 to which a subpart F inclusion is attributable equals USP's proportionate share of the eligible current year taxes that are allocated and apportioned under § 1.960–1(d)(3)(ii) to subpart F income group 2, which is $192,000x ($240,000x × 1,920,000u/2,400,000u). * * *

(B) * * * Under paragraphs (b)(2) and (3) of this section, the amount of CFC's foreign income taxes that are properly attributable to items of income in subpart F income group 3 to which a subpart F inclusion is attributable equals USP's proportionate share of the eligible current year taxes that are allocated and apportioned under § 1.960–1(d)(3)(ii) to subpart F income group 3, which is $360,000x ($450,000x × 1,440,000u/1,800,000u). CFC has no other subpart F income groups within the general category. * * *

(c) * * *

(7) * * *

(i) * * *

(A) * * * CFC1 has current year taxes, all of which are eligible current year taxes, translated into U.S. dollars, of $400x that are all allocated and apportioned to the tested income group. * * *

(B) * * * Under paragraph (c)(5) of this section, USP's proportionate share of the eligible current year taxes that are allocated and apportioned under § 1.960–1(d)(3)(ii) to CFC1's tested income group is $400x ($400x × 2,000u/2,000u). Therefore, under paragraph (c)(4) of this section, the amount of foreign income taxes that are properly attributable to tested income taxes taken into account by USP under section 951A(a) and § 1.951A–1(b) is $400x. * * *

(ii) * * *

(A) * * *

(*1*) * * * CFC1 has current year taxes, all of which are eligible current year taxes, translated into U.S. dollars, of $100x that are all allocated and apportioned to CFC1's tested income group. * * * CFC2 has current year taxes, all of which are eligible current year taxes, translated into U.S. dollars, of $20x that are allocated and apportioned to CFC2's tested income group.

* * * * *

(B) * * *

(*1*) * * *

(*i*) * * * Under paragraphs (c)(5) and (6) of this section, US1's proportionate share of the eligible current year taxes that are allocated and apportioned under § 1.960–1(d)(3)(ii) to CFC1's tested income group is $95x ($100x × 285u/300u). Therefore, under paragraph (c)(4) of this section, the amount of the foreign income taxes that are properly attributable to tested income taxes taken into account by US1 under section 951A(a) and § 1.951A–1(b) is $95x. * * *

* * * * *

■ **Par. 34.** Section 1.960–7 is amended by revising paragraph (b) to read as follows:

§ 1.960–7 Applicability dates.

* * * * *

(b) Section 1.960–1(c)(2) and (d)(3)(ii) apply to taxable years of a foreign corporation beginning after December 31, 2019, and to each taxable year of a domestic corporation that is a United States shareholder of the foreign corporation in which or with which such taxable year of such foreign corporation ends. For taxable years of a foreign corporation that end on or after December 4, 2018, and also begin before January 1, 2020, see § 1.960–1(c)(2) and (d)(3)(ii) as in effect on December 17, 2019. Paragraphs (b)(4), (5), and (6), (c)(1)(ii), (iii), and (iv), and (d)(3)(ii)(A) and (B) of § 1.960–1, and paragraphs (b)(2), (b)(3)(i), (b)(5)(i), (b)(5)(iv)(A), and (c)(4), (5), and (7) of § 1.960–2, apply to taxable years of foreign corporations beginning on or after December 28, 2021, and to each taxable year of a domestic corporation that is a United States shareholder of the foreign corporation in which or with which such taxable year of such foreign corporation ends. For taxable years of foreign corporations beginning before December 28, 2021, with respect to the paragraphs described in the preceding sentence, see §§ 1.960–1 and 1.960–2 as in effect on November 12, 2020.

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

Approved: December 9, 2021

Lily Batchelder,

Assistant Secretary of the Treasury (Tax Policy).

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