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Presidential Documents

Title 3—

The President

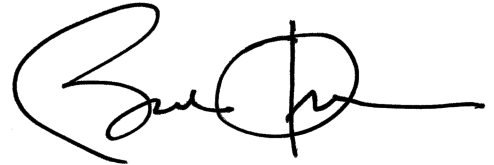
Memorandum of September 28, 2016

Delegation of Authority Under Section 404(c) of the Child Soldiers Prevention Act of 2008

Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, I hereby delegate to the Secretary of State the authority under section 404 (c)(1) of the Child Soldiers Prevention Act of 2008, as amended (CSPA)(22 U.S.C. 2370c–1), to waive the application of the prohibition in section 404(a) of the CSPA, as it applies to Yemen, and to make the determinations necessary for such waiver. I hereby also delegate to the Secretary of State the authority under section 404(c)(2) of the CSPA to notify the appropriate congressional committees of such waiver and the accompanying Memorandum of Justification for granting such waiver, and to publish the determination in the *Federal Register*.

You are hereby authorized and directed to publish memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, September 28, 2016

[FR Doc. 2016–25682
Filed 10–20–16; 8:45 am]
Billing code 4710–10–P

Presidential Documents

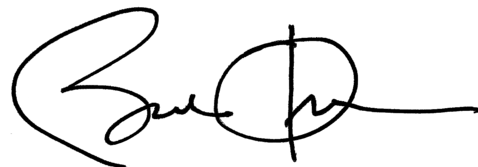
Presidential Determination No. 2016–14 of September 28, 2016

Presidential Determinations With Respect to the Child Soldiers Prevention Act of 2008

Memorandum for the Secretary of State

Pursuant to section 404(c) of the Child Soldiers Prevention Act of 2008, as amended (CSPA) (22 U.S.C. 2370c–1), I hereby determine that it is in the national interest of the United States to waive the application of the prohibition in section 404(a) of the CSPA with respect to Burma, Iraq, and Nigeria; and to waive in part the application of the prohibition in section 404(a) of the CSPA with respect to the Democratic Republic of the Congo (DRC) to allow for provision of International Military Education and Training (IMET) and Peacekeeping Operations (PKO) assistance to build the DRC military's capacity to respond to critical atrocity prevention priorities in the region such as countering the Lord's Resistance Army and other armed groups, to the extent such assistance or support would be restricted by the CSPA; to waive in part the application of the prohibition in section 404(a) of the CSPA with respect to Rwanda to allow for the provision of IMET, PKO assistance, and non-lethal Excess Defense Articles for humanitarian and peacekeeping purposes, to the extent such assistance or support would be restricted by the CSPA; to waive in part the application of the prohibition in section 404(a) with respect to Somalia to allow for the provision of IMET, PKO assistance, and support provided pursuant to 10 U.S.C. 2282, to the extent such assistance or support would be restricted by the CSPA; and to waive in part the application of the prohibition in section 404(a) with respect to South Sudan to allow for the provision of IMET, PKO assistance, and support provided pursuant to section 1208 of the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113–66), to the extent such assistance or support would be restricted by the CSPA. I hereby waive such provisions accordingly.

You are hereby authorized and directed to submit this determination to the Congress along with the accompanying Memorandum of Justification, and to publish the determination in the *Federal Register*.



THE WHITE HOUSE,
Washington, September 28, 2016

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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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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 870

RIN 3206–AM98

Federal Employees' Group Life Insurance Program: Excepted Service and Pathways Programs

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: This action amends the rule to reflect that excepted service employees hired under the internship program known as the Pathways Programs may elect to enroll in Federal Employee's Group Life Insurance (FEGLI), if applicable Federal requirements are met. This action is necessary due to the omission of technical changes to OPMs final rule, *Excepted Service, Career and Career-Conditional Employment, and Pathways Programs,* issued on May 11, 2012, which concerns the excepted service internship programs. The effect of this action is to remove a barrier to recruiting students and recent graduates to help the Federal Government better compete with all employers when it comes to hiring qualified applicants for entry-level positions.

DATES: This rule is effective on October 21, 2016.

FOR FURTHER INFORMATION CONTACT: Ronald Brown, Policy Analyst, (202) 606–0004, or by email to *Ronald.Brown@opm.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On December 27, 2010, Executive Order (E.O.) 13562 was signed and established the Internship Program and the Recent Graduates Program, which, along with the Presidential Management Fellows Program, as modified therein, became the Pathways Programs. As directed by the President, the Pathways Programs provides clear paths to Federal internships and potential careers in Government for students and recent graduates. The E.O. also created the Schedule D authority that supports the Pathways Programs by authorizing exceptions to the competitive hiring rules. Under the Schedule D authority, agencies are able, under OPM's guidance, to use excepted service hiring to fill positions from among a particular class of eligible individuals—students and recent graduates.

II. Discussion of Final Rule

This final rule updates the FEGLI regulation to change the name of the internship programs under FEGLI rules and provides that employees hired under the Pathways Programs authority may elect to enroll for coverage in FEGLI, if applicable Federal requirements are met. This change was omitted in the OPM final rule (77 FR 28194) issued in 2012 concerning the excepted service internship programs. However, this final rule does not establish new enrollment eligibility for any Pathways Programs interns.

Agencies should continue to refer to the supplementary information published in the aforementioned final rule and the guidance that is on the OPM Web site at: *http://www.opm.gov/policy-data-oversight/hiring-authorities/students-recent-graduates/.*

Analysis of and Responses to Public Comments

We received one comment on the interim final rule relating to agency guidance materials. The sole commenter asked if OPM will issue new guidance to Federal agencies concerning the changed scheduling authority for Pathways Programs participants. In response to the comment, OPM will not issue guidance to Federal agencies based on the changed scheduling authority. The OPM amends this rule to reflect technical changes concerning Pathways Program interns to conform with the final Pathways rule published on May 11, 2012 (77 FR 28194). The technical changes are necessary to reflect that the schedule appointment authority for Pathways Programs interns changed to Schedule D. Lastly, the intern programs were renamed and we needed to change the name in the regulation. See § 870.302(b)(2).

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' The RFA covers a widerange of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation only affects life insurance benefits of Federal employees and retirees.

Executive Order 12866, Regulatory Review

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

Federalism

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

List of Subjects in 5 CFR Parts 870

Administrative practice and procedure, Government employees, Life insurance, Retirement.

U.S. Office of Personnel Management.

Beth F. Cobert,

Acting Director.

Accordingly, OPM is amending 5 CFR part 870 as follows:

PART 870—FEDERAL EMPLOYEES' GROUP LIFE INSURANCE PROGRAM

■ 1. The authority citation for part 870 is revised to read as follows:

Authority: 5 U.S.C. 8716; Subpart J also issued under section 599C of Pub. L. 101–513, 104 Stat. 2064, as amended; Sec. 870.302(a)(3)(ii) also issued under section 153 of Pub. L. 104–134, 110 Stat. 1321; Sec. 870.302(a)(3) also issued under sections 11202(f), 11232(e), and 11246(b) and (c) of Pub. L. 105–33, 111 Stat. 251, and section 7(e) of Pub. L. 105–274, 112 Stat. 2419; Sec. 870.302(a)(3) also issued under section 145 of Pub. L. 106–522, 114 Stat. 2472; Secs. 870.302(b)(8), 870.601(a), and 870.602(b) also issued under Pub. L. 110–279, 122 Stat. 2604. Subpart E also issued under 5 U.S.C. 8702(c); Sec. 870.601(d)(3) also issued under 5 U.S.C. 8706(d); Sec. 870.703(e)(1) also issued under section 502 of Pub. L. 110–177, 121 Stat. 2542; Sec. 870.705 also issued under 5 U.S.C. 8714b(c) and 8714c(c); Public Law 104–106, 110 Stat. 521.

Subpart C—Eligibility

■ 2. Revise § 870.302(b)(2) to read as follows:

§ 870.302 Exclusions.

* * * * *

(b) * * *

(2) An employee who is employed for an uncertain or purely temporary period, who is employed for brief periods at intervals, or who is expected to work less than 6 months in each year. Exception: An employee who receives an appointment of at least 1 year's duration as an Intern under § 213.3402 of this chapter, entitled ''*Entire executive civil service; Pathways Programs,*'' and who is expected to be in a pay status for at least one-third of the total period of time from the date of the first appointment to the completion of the work-study program.

* * * * *

[FR Doc. 2016–25507 Filed 10–20–16; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Parts 761 and 762

RIN 0560–AI34

EZ Guarantee Program and Micro Lender Program (MLP) Status

AGENCY: Farm Service Agency, USDA.

ACTION: Final rule.

SUMMARY: The Farm Service Agency (FSA) is amending the guaranteed Farm Loan Programs (FLP) regulations to implement an EZ Guarantee Program and establish an additional lender status. The EZ Guarantee Program will help lenders reduce costs of underwriting and servicing loans to help meet the unique financing needs of small farm operations. The intended effects of the rule are to make guaranteed loan programs more widely available and attractive to small farm operations and the lenders who work with those farm operations through a more flexible underwriting analysis process, reduced application requirements, and faster FSA approval. In addition, FSA is amending the regulations to make a technical correction related to chattel appraisal appeals related to both guaranteed and direct loans.

DATES:

Effective Date: October 21, 2016.

Comment Dates: We will consider comments on the Paperwork Reduction Act that we receive by: December 20, 2016.

We will consider comments on the regulatory changes that we receive by: January 19, 2017.

ADDRESSES: We invite you to submit comments on this rule. In your comment, specify RIN 0560–AI34, and include the volume, date, and page number of this issue of the **Federal Register**. You may submit comments by either of the following methods:

- *Federal Rulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Director, Loan Making Division, FLP, FSA, US Department of Agriculture, 1400 Independence Avenue SW., Stop 0522, Washington, DC 20250–0522.

Comments will be available for viewing online at *http://www.regulations.gov.* In addition, comments will be available for public inspection at the above address during business hours from 8 a.m. to 5 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Randi Sheffer; telephone: (202) 205–0682. Persons with disabilities or who require alternative means for communications should contact the USDA Target Center at (202) 720–2600 (voice).

SUPPLEMENTARY INFORMATION:

Background

FSA makes and services a variety of direct and guaranteed loans to the nation's farmers and ranchers who are unable to obtain private commercial credit at reasonable rates and terms. FSA also provides direct loan customers with credit counseling and supervision to enhance their opportunity for success. FSA direct and guaranteed loan applicants are often beginning farmers and socially disadvantaged farmers who do not qualify for conventional loans because of insufficient net worth or established farmers who have suffered financial setbacks due to natural disasters or economic downturns. FSA tailors direct and guaranteed loans to a customer's needs and may be used to buy farmland and to finance agricultural production.

The Consolidated Farm and Rural Development Act of 1972 (CONACT, Pub. L. 92–419), as amended, authorizes FSA's Guaranteed Farm Loan Programs.

EZ Guarantee Program

FSA is amending its FLP regulations to add an EZ Guarantee Program to further assist the financing needs of small farm operations. Section 333A(g)(1)(A) of the CONACT states that FSA will provide lenders with a short, simplified application for loans which are $125,000 or less (see 7 U.S.C. 1983a(g)(1)(A)). The EZ Guarantee Program process will be the same as the Guaranteed Loan Program, except there is a new, self-contained application specifically formatted for EZ Guarantee loans. FSA may request additional information for the application when necessary to clarify a response on the application before making an approval decision.

FSA is adding a definition of an EZ Guarantee loan in 7 CFR 761.2. The EZ Guarantee Program will provide alternatives for application and financial underwriting process for Operating Loan (OL) and Farm Ownership loan (FO) purposes. All other FLP rules will remain unchanged and the funding sources for these EZ Guarantee loans will continue to be through FSA's guaranteed OL and FO annual appropriations.

All lenders who meet FSA eligibility criteria (see 7 CFR 762.105, 762.106, and 762.107) will be eligible to originate EZ Guarantee loans. As discussed below, the rule adds MLP Status in addition to Standard Eligible Lender (SEL), Certified Lender Program (CLP), and Preferred Lender Program (PLP) status. SELs, CLPs, and PLPs may originate EZ Guarantee loans up to $100,000. Because of their limited experience in making agricultural loans, MLPs will be limited to loans up to $50,000. The streamlined application and new underwriting process will reduce the burden for all of the FSA lender types. Beyond that, we expect that this new EZ Guarantee Program may be of particular interest to and used primarily by small commercial lenders

desiring to build their agriculture portfolio and by nontraditional lenders who typically work with small farm operations.

EZ Guarantee loans will be subject to the same eligibility, security, and environmental requirements, as any other guaranteed OL or FO. Loan purposes, interest rate requirements, loan terms, appraisal requirements, and percent guarantee, and guarantee fees will also remain the same. Therefore, §§ 762.120 through 762.124 and 762.126 through 762.127 are not being revised.

Because small loans present less credit risk, and lenders are less inclined to finance small loans, FSA is revising § 762.110 to reflect a new, all-inclusive application form to be used only for EZ Guarantee loans. Unlike other guaranteed applications, lenders will not need to submit supporting information to FSA; therefore, the approval process will require significantly less time. In addition, the application format is different from the application forms now being used by FSA guaranteed lenders. The EZ Guarantee application will include a series of questions that pertain to eligibility, loan repayment prospects, collateral, and environmental review, which if appropriate, will allow for an accelerated FSA approval. An application not qualifying for the accelerated FSA approval will not necessarily be rejected, but instead will require additional information. This rule also makes additional changes to § 762.110 for clarity, but the rules for regular guaranteed applications remain the same.

As part of streamlining the application process, FSA is revising § 762.125 to use a more streamlined underwriting process for EZ Guarantee loans. Because of the limited income derived from a small loan, commercial lenders typically perform very limited financial analysis at loan origination. With the EZ Guarantee Program, the lender may analyze the loan in the same manner they would analyze a nonguaranteed loan of the same size and type, saving them time and money. Many lenders are now using historical averages, industry standards, or scorecard lending rather than projecting cash flow budgets to determine feasibility. Scorecard lending is an underwriting method where lenders use a variety of financial ratios and other information to predict the level of credit risk a particular applicant presents. Lenders will be required to analyze an EZ Guarantee application and determine that the applicant demonstrated reasonable prospects for repayment using normal, industry accepted methods and criteria. As part of the lender's information added to the application, the lender will describe the method and standards used on the EZ Guarantee application.

The lender's standards need to meet the following requirements:

1. The lender must perform the same financial analysis and apply the same underwriting standards for an EZ Guarantee loan as they would for a nonguaranteed loan of the same size and type.

2. The lender must determine that the EZ Guarantee applicant demonstrates reasonable prospects to repay the requested loan. This determination must be arrived at using the lender's typical underwriting criteria and methods, such as a cash flow projection, a scorecard underwriting model, historical income and expenses, or other repayment capacity indicator.

3. The lender will describe the methods and criteria used to determine the applicant's prospects for repayment on the EZ Guarantee application form.

FSA anticipates changes in accepted lending practices, portfolio performance, and economic conditions will create a need to update the EZ Guarantee underwriting criteria; therefore, § 762.125(d) specifies that the standards will be updated for future changes through an FSA announcement posted on the FSA Web site (*www.fsa.usda.gov*). That will allow for timely updating of the standards as needs change.

Since lenders will continue to analyze and document EZ Guarantee loans using the same methods and standards they use for nonguaranteed loans, FSA anticipates little to no change in default rates resulting from the limited underwriting analysis.

FSA will service EZ Guarantee loans as it currently services guaranteed OLs and FOs with exceptions for term loans performing according to the promissory notes and loan agreements. The lender will be responsible for servicing the entire loan in a reasonable and prudent manner, protecting and accounting for collateral; and the lender will also remain as the mortgagee or secured party of record. The lender will be responsible for servicing its guaranteed loans as it services any other loan in its portfolio and complying with all FLP requirements in 7 CFR 762.140 through 762.149. The reporting requirements will be the current reporting requirements in 7 CFR 761.141 including semi-annual status and default status reporting.

FSA is revising 7 CFR 762.140 for more limited analysis of borrowers with EZ Guarantee loans. If the loan is performing as intended, an annual analysis may not be required. All delinquent servicing lender responsibilities in 7 CFR 762.143 will remain the same.

Guaranteed MLP

FSA will administer MLP to increase collaboration with nontraditional lenders and assist small farm operations typically in underserved areas. The additional MLP Status will also enable nontraditional lenders to participate in the EZ Guarantee Program. Also, establishing a stronger working relationship with nontraditional lenders will be beneficial because they share a common goal with FSA to assist producers in underserved areas, including credit deserts such as Indian Country.

Minor reference changes in the rules are being made in §§ 761.2, 762.101, and 762.128. In § 761.2, an abbreviation of ''Micro Lender Program'' is being added. In § 762.101, ''Micro Lender'' is being added to the lender classification. In § 762.128, ''MLP'' is being added to the list of lenders who must comply with the environmental requirements.

Also, this rule adds § 762.107 to implement MLP including the creation of an additional MLP Status for nontraditional lenders and commercial lenders who are not eligible for or do not want Standard Eligible Lender (SEL), Certified Lender Program (CLP), or Preferred Lender Program (PLP) status. To request MLP Status, a lender will submit an application form to any FSA office. The application form will collect information from the lender, such as loan portfolio characteristics (delinquency and default rates), source(s) of loan funding, and certifications by the lender.

FSA will evaluate the MLP Status application using the criteria in 7 CFR 762.107(b).

FSA regulations require guaranteed lenders to be subject to credit examination and supervision by an acceptable State or Federal regulatory agency (see 7 CFR 762.105(b)). This requirement has prevented many nontraditional lenders from qualifying to receive FSA Guarantees on loans made to their customers. MLP Status will allow nontraditional lenders to participate in FSA's EZ Guarantee Program by permitting this examination and supervision to be performed by other types of regulatory agencies. In the new § 762.107(b)(3), FSA requires lenders to be subject to appropriate oversight to participate in the FSA Guaranteed Program as micro lenders. Nontraditional lenders such as Community Development Financial

Institutions (CDFIs) are supervised and regulated, but not to the same degree that agencies like the Office of the Comptroller of the Currency or other banking authorities regulate commercial banks. The following types of organizations have currently been determined to meet these standards:

1. A lender meeting the examination and supervision requirement in § 762.105(b).
2. CDFI. CDFIs that have been awarded funds and are under the supervision of the CDFIs Program described in 12 CFR part 1805.
3. Rural Rehabilitation Corporation (RRC). RRCs that have entered into an agreement establishing an ongoing reporting and credit supervision relationship with FSA.

Traditional lenders, such as banks or credit unions, that are currently not eligible to obtain SEL, CLP or PLP status, would be eligible to apply for MLP status. Additionally nontraditional lenders that are certified by the U.S. Department of the Treasury—such as CDFIs—or that are subject to credit examination and supervision by FSA's Deputy Administrator for FLP (DAFLP)—such as RRCs—would be eligible to apply for MLP Status because:

1. FSA has experience in working with CDFIs and RRCs. In addition, CDFIs and RRCs typically make loans to small farms and underserved farmers, and are expected to be one of the primary users of the new EZ Guarantee Program; and
2. At this time, FSA does not have sufficient knowledge or expertise regarding other types of nontraditional lenders. Further research, including the potential need for guarantees by other types of nontraditional lenders is required before allowing these lenders to participate in the EZ Guarantee Program.

FSA expects to allow future expansion of the MLP Status to include other types of nontraditional lenders once further research is conducted; therefore, § 762.107(b)(3) specifies that FSA will announce future modifications to acceptable oversight on the FSA Web site. This will allow FSA to include other lenders as our experience with MLP Status grows.

In addition to the oversight and portfolio performance criteria, FSA also will require the lender to demonstrate experience in making the types of loans they will be requesting FSA to guarantee and the resources to properly make and service these loans, which is very similar to what FSA requires of its other lenders. MLPs lending capabilities may be demonstrated by their experience making and servicing other loans rather than just agricultural loans, as with other FSA guaranteed lenders.

As an objective measure of the capability to make and service loans, FSA is establishing minimum volume and maximum loss rates. These rates will be based on the lender's entire portfolio. In 7 CFR 762.107(b)(3), FSA requires lenders to demonstrate significant positive experience in making and servicing loans. The experience must be that:

1. The lender has originated 20 or more business loans of $50,000 or less; and
2. The lender's losses on all business loans of $50,000 or less made over the past 7 years do not exceed 3 percent.

Again, to allow for timely modification of these rates as circumstances change, FSA may modify these rates by posting rates on the FSA Web site.

Once approved, MLP Status will be valid for 5 years unless revoked by FSA. This is consistent with the timeframe of FSA's CLP and PLP lender status. FSA will also reconsider MLP Status in the event a lender's ownership changes, as is currently done with CLP and PLP lenders.

An MLP Status lender will be bound by all existing terms specified in FSA's Lender's Agreement. It will have the same reporting requirements and be subject to periodic lender review. Unlike FSA's other guaranteed lenders, however, MLP lenders typically have limited experience with agricultural loans and therefore will only be able to underwrite loans up to $50,000 under the EZ Guarantee Program.

Technical Correction for Chattel Appraisal Appeals

FSA is amending the regulations in 7 CFR 761.7(e)(2) to make a technical correction related to chattel appraisal appeals in connection with both guaranteed and direct loans. In the FSA final rule published on November 28, 2013, (78 FR 65523–65541), changes made relative to chattel appraisal appeals specified that the borrower needs to provide an independent appraisal. However, it was the intent of FSA that the borrower provide an independent appraisal review by a person that possesses sufficient experience or training to establish market value of chattel property based on public sales of the same or similar property in the market area, rather than an entirely new appraisal. Therefore, this rule is correcting that error in 7 CFR 761.7(e)(2).

Notice and Comment

In general, the Administrative Procedure Act (5 U.S.C. 553) requires that a notice of proposed rulemaking be published in the **Federal Register** and interested persons be given an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation, except that when the rule involves a matter relating to public property, loans, grants, benefits, or contracts section 553 does not apply. This rule involved matters relating to loans and is therefore being published as a final rule without the prior opportunity for comments. Although FSA is not required to provide the opportunity for comments on this rule, we are requesting public comments for 90 days to request public input on the changes.

Effective Date

The Administrative Procedure Act (APA, 5 U.S.C. 553) provides generally that before rules are issued by Government agencies, the rule is required to be published in the **Federal Register**, and the required publication of a substantive rule is to be not less than 30 days before its effective date. However, as noted above, one of the exceptions is that section 553 does not apply to rulemaking that involves a matter relating to loans. Therefore, because this rule relates to loans, the 30-day effective period requirement in section 553 does not apply. This final rule is effective when published in the **Federal Register**. Most FLP guaranteed loans are established at the beginning of the calendar year; therefore, implementing this rule quickly will benefit beginning and small farms starting in 2016, instead of having to wait for 2017.

Executive Order 12866 and 13563

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

The Office of Management and Budget (OMB) designated this rule as not

significant under Executive Order 12866 and, therefore, OMB was not required to review this final rule.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally requires an agency to prepare a regulatory flexibility analysis of any rule whenever an agency is required by APA or any other law to publish a proposed rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule is not subject to the Regulatory Flexibility Act because it is exempt from notice and comment rulemaking requirements of the APA and no other law requires that a proposed rule be published for this rulemaking initiative.

Environmental Review

The environmental impacts of this rule have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and the FSA regulations for compliance with NEPA (7 CFR part 799). Through this rule, FSA is establishing the EZ Guarantee Program to provide a guarantee for OLs and FOs up to $100,000, which are expected to be most used by beginning farmers and farmers with small farms (farms with annual gross agricultural products sales from $1,000 to $99,999) with less traditional farm operations who are not typically FSA Guaranteed loan customers. FSA is implementing the MLP Status to allow nontraditional lenders to participate in the EZ Guarantee Program, which is an administrative change. FSA is revising the existing FLP regulations to make those changes, but it is not changing the environmental review requirements that apply. The environmental responsibilities for each prospective applicant will not change from the current process followed for all FLP actions (7 CFR 799). Each EZ Guarantee Program action will be reviewed under the existing process to ensure it will not have a significant impact on the quality of the human environment either individually or cumulatively. Therefore, FSA will not prepare a programmatic environmental assessment or environmental impact statement on this rule.

Executive Order 12372

Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' requires consultation with State and local officials that would be directly affected by proposed Federal financial assistance. The objectives of the Executive Order are to foster an intergovernmental partnership and a strengthened Federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal Financial assistance and direct Federal development. For reasons specified in the final rule related notice regarding 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), the programs and activities within this rule are excluded from the scope of Executive Order 12372.

Executive Order 12988

This rule has been reviewed in accordance with Executive Order 12988, ''Civil Justice Reform.'' This rule will not preempt State or local laws, regulations, or policies unless they represent an irreconcilable conflict with this rule. The rule does not have retroactive effect. Before any judicial action may be brought regarding the provisions of this rule, the administrative appeal provisions of 7 CFR parts 11 and 780 are to be exhausted.

Executive Order 13132

This rule has been reviewed under Executive Order 13132, ''Federalism.'' The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the Federal government and the States, or the distribution of power and responsibilities among the various levels of government, except as required by law. Nor will this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes or on the distribution of power and responsibilities between the Federal government and Indian tribes.

FSA has assessed the impact of this rule on Indian tribes and determined that this rule does not, to our knowledge, have tribal implications that require tribal consultation under Executive Order 13175. If a Tribe requests consultation, FSA will work with the USDA Office of Tribal Relations to ensure meaningful consultation is provided.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Pub. L. 104–4) requires Federal agencies to assess the effects of their regulatory actions on State, local, or Tribal governments or the private sector. Agencies generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures of $100 million or more in any 1 year for State, local, or Tribal governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates, as defined in Title II of UMRA, for State, local, or Tribal governments, or private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, the following new information collection request that supports the EZ Guarantee Program was submitted to OMB for emergency approval and is also being submitted to OMB for the 3-year approval. FSA is requesting comments from interested individuals and organizations on the information collection activities related to the EZ Guarantee application process as described in this rule. FSA is currently modifying the loan application process in order to provide loans to eligible borrowers through the EZ Guarantee process.

After OMB approval of the information collection request, FSA will merge this new information collection request with FSA's approved information collection of the OMB control number 0560–0155.

Title: EZ Guarantee Program.

OMB Control Number: 0560—New.

Type of Request: New Collection.

Abstract: This information collection is required to support the regulation in 7 CFR part 762, ''Guaranteed Farm

Loans,'' which establishes the requirements for most of FSA's guaranteed loan programs and the changes in the rule that add the EZ Guarantee application process, as well as the application for lenders to receive MLP Status. The information collection established in this rule is necessary for FSA to evaluate the applicant's request and determine if eligibility, loan repayment, and security requirements can be met. The application includes information from the borrower and the lender; in general, the lender submits the application to FSA electronically. In addition, the information collection from lenders seeking MLP Status is necessary to ensure they meet the necessary regulatory standards to make and service agricultural loans.

The formulas used to calculate the total burden hours is estimated average time per response hours times total annual burden hours.

The estimated Public Burden for the EZ Guarantee and MLP Status are:

Estimate of Burden: Public reporting for this collection of information is estimated to average 0.46899 hours. The travel time, which is included in the total annual burden, is estimated to be 1 hour per respondent.

Type of Respondents: Individuals or households, businesses or other for profit, and farms.

Estimated Number of Respondents: 6,280.

Estimated Average Number of Responses per Respondent: 1.3.

Estimated Total Annual Number of Responses: 8,160.

Estimated Total Annual Burden on Respondents: 3,827 hours.

We are requesting comments on all aspects of this information collection and to help us:

1. Evaluate whether the collection of information is necessary for the proper performance of the FSA functions, including whether the information will have practical utility;

2. Evaluate the accuracy of FSA's estimate of burden including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this document, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission for OMB approval.

E-Government Act Compliance

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

Federal Assistance Programs

The title and number of the Federal assistance programs, as found in the Catalog of Federal Domestic Assistance, to which this interim rule would apply are:

10.406 Farm Operating Loans;
10.407 Farm Ownership Loans.

List of Subjects

7 CFR Part 761

Accounting, Loan programs-agriculture, Rural areas.

7 CFR Part 762

Agriculture, Banks, Banking, Credit, Loan Programs—agriculture.

For the reasons discussed above, FSA amends 7 CFR parts 761 and 762 as follows:

PART 761—FARM LOAN PROGRAM; GENERAL PROGRAM ADMINISTRATION

■ 1. The authority citation for part 761 continues to read as follows:

Authority: 5 U.S.C. 301 and 7 U.S.C. 1989.

Subpart A—General Provisions

■ 2. Amend § 761.2 as follows:
■ a. In paragraph (a), add the abbreviation for ''MLP'' in alphabetical order; and
■ b. In paragraph (b), add the definition of ''EZ Guarantee'' in alphabetical order.

The addition and revision read as follows:

§ 761.2 Abbreviations and definitions.

* * * * *

(a) * * *

* * * * *

MLP Micro Lender Program.

* * * * *

(b) * * *

* * * * *

EZ Guarantee means a type of OL or FO of $100,000 or less made using a simplified loan application. As part of the simplified application process, EZ Guarantees are processed using a streamlined underwriting method to determine financial feasibility.

* * * * *

§ 761.7 [Amended]

■ 3. Amend § 761.7(e)(2) by removing the words ''independent appraisal'' in both places and add the words ''independent appraisal review'' in their place.

PART 762—GUARANTEED FARM LOANS

■ 4. The authority citation for part 762 continues to read as follows:

Authority: 5 U.S.C. 301 and 7 U.S.C. 1989.

■ 5. Amend § 762.101(c) as follows:
■ a. In paragraph (c)(2), remove the punctuation and word '', or'' and add a semicolon in their place;
■ b. In paragraph (c)(3), remove the period and add the punctuation and word ''; or'' in its place; and
■ c. Add paragraph (c)(4).

The addition reads as follows:

§ 762.101 Introduction.

* * * * *

(c) * * *

(4) Micro Lender under § 762.107.

* * * * *

§ 762.105 [Amended]

■ 6. In § 762.105(d)(2) remove ''CLP or PLP'' and add ''CLP, PLP, or MLP'' in its place.

■ 7. Add § 762.107 to read as follows:

§ 762.107 Micro Lender Program.

(a) *General.* The lenders must submit the following items:

(1) To request MLP Status, a lender must submit an application form to any local FSA office.

(2) The lender must provide any additional information requested by the Agency to process an MLP request, if the lender continues with the approval process.

(3) MLP lender authorities are limited to originating and servicing EZ Guarantee loans.

(b) *MLP criteria.* An MLP lender must satisfy the following requirements to obtain MLP Status:

(1) Have experience in making and servicing business loans.

(2) Have the staff and resources to properly and efficiently discharge its loan making and loan servicing responsibilities that may include use of Agency approved agents.

(3) Be subject to oversight as established and announced by the Agency on the FSA Web site (*www.fsa.usda.gov*).

(4) Have a loss rate not in excess of the maximum MLP loss rate established and announced by the Agency on the FSA Web site (*www.fsa.usda.gov*).

(5) Have made the minimum number of loans as established and announced

by the Agency on the FSA Web site (*www.fsa.usda.gov*).

(6) Not be debarred or suspended from participation in Government contracts or programs or be delinquent on a Government debt. This includes the lender's officers and agents.

(c) *Renewal of MLP Status.* MLP Status will expire within a period not to exceed 5 years from the date the lender's agreement is executed, unless a new lender's agreement is executed.

(1) Renewal of MLP Status is not automatic. A lender must submit a new application for renewal.

(2) MLP Status will be renewed if the applicable eligibility criteria under this section are met, and no cause exists for denying renewal under paragraph (d)(1) of this section.

(d) *Revocation of MLP Status.* The Agency may revoke the lender's MLP Status at any time during the 5 year term for cause as specified in paragraph (d)(1) of this section.

(1) Any of the following instances constitutes cause for revoking or not renewing MLP Status:

(i) Violation of the terms of the lender's agreement;

(ii) Failure to maintain MLP eligibility criteria;

(iii) Knowingly submitting false or misleading information to the Agency;

(iv) Deficiencies that indicate an inability to process or service Agency guaranteed farm loan programs loans in accordance with this subpart;

(v) Failure to correct cited deficiencies in loan documents upon notification by the Agency;

(vi) Failure to submit status reports in a timely manner; or

(vii) Failure to comply with the reimbursement requirements of § 762.144(c)(7) and (c)(8).

(2) A lender that has lost MLP Status may reapply for MLP Status once the problem that caused the MLP Status to be revoked has been resolved.

■ 8. Amend § 762.110 as follows:

■ a. Redesignate paragraphs (a) through (h) as paragraphs (c) through (j);

■ b. Add new paragraphs (a) and (b);

■ c. Revise newly redesignated paragraphs (c), (d) introductory text, and (f);

■ d. In newly redesignated paragraph (e) introductory text, remove the references ''(a)'' and (b)'' and add the references ''(c)'' and (d)'' in their place;

■ e. Remove newly redesignated paragraphs (e)(3) and (4);

■ f. Further redesignate newly redesignated paragraph (e)(5) as paragraph (e)(3).

■ g. In newly redesignated paragraph (g)(1), remove the last sentence; and

■ h. In newly redesignated paragraph (g)(4), remove ''CLP and PLP'' and add the word ''All'' in their place.

The additions and revisions read follows:

§ 762.110 Loan application.

(a) *General.* This paragraph (a) specifies the general requirements for guaranteed loan applications:

(1) Lenders must perform at least the same level of evaluation and documentation for a guaranteed loan that the lender typically performs for non-guaranteed loans of a similar type and amount.

(2) The application thresholds in this section apply to any single loan, or package of loans submitted for consideration at any one time. A lender must not split a loan into two or more parts in order to fall below the threshold in order to avoid additional documentation.

(3) The Agency may require lenders with a lender loss rate in excess of the rate for CLP lenders to assemble additional documentation specified in paragraph (d) of this section.

(b) *EZ Guarantee loans.* MLP lenders may submit an EZ Guarantee application for loans up to $50,000. All other lenders may submit EZ Guarantee applications for loans up to $100,000. Lenders must submit:

(1) An EZ Guarantee application form.

(2) If the loan fails to pass the underwriting criteria for EZ Guarantee approval in § 762.125(d), or the responses in the application are insufficient for the Agency to make a loan decision, the lender must provide additional information as requested by the Agency.

(c) *Loans up to $125,000.* Lenders must submit the following items for loans up to $125,000 (other than EZ Guarantees):

(1) The application form;

(2) Loan narrative, including a plan for servicing the loan;

(3) Balance sheet;

(4) Cash flow budget; and

(5) Credit report.

(d) *Loans over $125,000.* A complete application for loans over $125,000 will require items specified in paragraph (c) of this section, plus the following items:

*   *   *   *   *

(f) *CL Guarantees.* In addition to the other requirements in this section, the following items apply when a lender is requesting a CL guarantee:

(1) Lenders must submit a copy of the conservation plan or Forest Stewardship Management Plan;

(2) Lenders must submit plans to transition to organic or sustainable agriculture when the funds requested will be used to facilitate the transition and the lender is requesting consideration for priority funding;

(3) When CL guarantee applicants meet all the following criteria, the cash flow budget requirement in this section will be waived:

(i) Be current on all payments to all creditors including the Agency (if currently an Agency borrower);

(ii) Debt to asset ratio is 40 percent or less;

(iii) Balance sheet indicates a net worth of 3 times the requested loan amount or greater; and

(iv) FICO credit score is at least 700; for entity applicants, the FICO credit score of the majority of the individual members of the entity must be at least 700.

*   *   *   *   *

■ 9. Amend § 762.125 as follows:

■ a. Revise paragraphs (a) introductory text and (b) introductory text; and

■ b. Add paragraph (d).

The revisions and addition read as follows:

§ 762.125 Financial feasibility.

(a) *General.* Except for streamlined CL guarantees (see § 762.110(f)), the following requirements must be met:

*   *   *   *   *

(b) *Estimating production.* Except for streamlined CL guarantees (see § 762.110(f)), the following requirements must be met:

*   *   *   *   *

(d) *EZ Guarantee feasibility.* Notwithstanding any other provision of this section:

(1) The Agency will evaluate EZ Guarantee application financial feasibility using criteria determined and announced by the Agency on the FSA Web site (*www.fsa.usda.gov*).

(2) *EZ Guarantee* applications that satisfy the criteria will be determined to meet the financial feasibility standards in this section.

(3) *EZ Guarantee* applications that do not satisfy the criteria will require further documentation as determined by the Agency and announced on the FSA Web site (*www.fsa.usda.gov*).

§ 762.128 [Amended]

■ 10. Amend § 762.128(a) by removing ''CLP and PLP'' and adding ''CLP, PLP, and MLP'' in its place.

■ 11. Amend § 762.140 by revising the introductory text of paragraph (b)(5) and adding paragraph (b)(5)(v) to read as follows:

§ 762.140 General servicing responsibilities.

*   *   *   *   *

(b) * * *

(5) Performing an annual analysis of the borrower's financial condition to determine the borrower's progress for all term loans with aggregate balances greater than $100,000 and all line of credit loans. The annual analysis will include:

* * * * *

(v) For borrowers with an outstanding loan balance for existing term loans of $100,000 or less, the need for an annual analysis will be determined by the Agency for SEL, CLP, and MLP lenders. The annual analysis for PLP lenders will be in accordance with requirements in lender's credit management system (CMS).

* * * * *

Val Dolcini,

Administrator, Farm Service Agency.

[FR Doc. 2016–25492 Filed 10–20–16; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Part 165

[USCBP–2016–0053; CBP Dec. 16–11]

RIN 1515–AE10

Investigation of Claims of Evasion of Antidumping and Countervailing Duties

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Interim final regulations; extension of comment period.

SUMMARY: This document provides an additional 60 days for interested parties to submit comments on the interim final rule that amended the U.S. Customs and Border Protection (CBP) regulations setting forth procedures for CBP to investigate claims of evasion of antidumping and countervailing duty orders in accordance with section 421 of the Trade Facilitation and Trade Enforcement Act of 2015. The interim final rule was published in the **Federal Register** on August 22, 2016, with comments due on or before October 21, 2016. To have as much public participation as possible in the formulation of the final rule, CBP is extending the comment period to December 20, 2016.

DATES: The comment period for the interim final rule published August 22, 2016, at 81 FR 56477, effective August 22, 2016, is extended. Comments must be received on or before December 20, 2016.

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

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments via docket number USCBP–2016–0053.
- *Mail:* Trade and Commercial Regulations Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street NE., 10th Floor, Washington, DC 20229–1177.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Submitted comments may also be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Trade and Commercial Regulations Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street NE., 10th Floor, Washington, DC Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: Kevin M. McCann, Chief, Analytical Communications Branch, Office of Trade, U.S. Customs and Border Protection, 202–863–6078.

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the interim rule. U.S. Customs and Border Protection (CBP) also invites comments that relate to the economic, environmental, or federalism effects that might result from this interim rule. Comments that will provide the most assistance to CBP in developing these regulations will reference a specific portion of the interim rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change. *See* **ADDRESSES** above for information on how to submit comments.

Background

On August 22, 2016, U.S. Customs and Border Protection (CBP) published in the **Federal Register** (81 FR 56477) an Interim Final Rule (CBP Dec. 16–11) that amended the CBP regulations setting forth procedures for CBP to investigate claims of evasion of antidumping and countervailing duty orders in accordance with section 421 of the Trade Facilitation and Trade Enforcement Act of 2015. The document solicited public comments in the interim rule, and requested that submitted comments be received by CBP on or before October 21, 2016.

Extension of Comment Period

With the goal of establishing the most effective and transparent procedures as possible for CBP to employ to investigate claims of evasion of antidumping and countervailing duty orders, CBP believes that it is very important to have as much public participation as possible in the formulation of the final rule that establishes those procedures for CBP. Therefore, CBP has decided to allow additional time for the public to submit comments on the final rule. Accordingly, the comment period is extended to December 20, 2016.

Dated: October 18, 2016.

Alice A. Kipel,

Executive Director, Regulations and Rulings Office of Trade, U.S. Customs and Border Protection.

[FR Doc. 2016–25489 Filed 10–20–16; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 0

[OAG Docket No. 152; A.G. Order No. 3754–2016]

Conforming Justice Department Regulations to the Federal Vacancies Reform Act of 1998

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This final rule amends the Department of Justice (DOJ) organizational regulations to remove authority from United States Attorneys (USAs) to designate any Assistant United States Attorney as Acting United States Attorney. The Federal Vacancies

Reform Act of 1998 governs designations of Acting USAs. The removal of authority from USAs is designed to bring DOJ's organizational regulations in compliance with the Act.

DATES: This rule is effective October 21, 2016.

FOR FURTHER INFORMATION CONTACT: Jay Macklin, General Counsel, Executive Office for United States Attorneys, 600 E Street NW., Suite 5100, Washington, DC 20530; Telephone: (202) 252–1600; Fax: (202) 252–1650.

SUPPLEMENTARY INFORMATION: The Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345–3349d, provides that, when a Senate-confirmed officer in an Executive agency ''dies, resigns, or is otherwise unable to perform the functions and duties of the office,'' the First Assistant to that office automatically becomes the acting officer, unless the President designates someone else to perform the functions and duties of the office under 5 U.S.C. 3345(a)(2) or (a)(3). 5 U.S.C. 3345(a)(1). Only individuals performing the functions and duties of a vacant office pursuant to 5 U.S.C. 3345 may use the acting title, because the Act, with exceptions not relevant here, is ''the exclusive means for temporarily authorizing an acting official to perform the functions and duties'' of an office covered by the Act. 5 U.S.C. 3347. Currently, 28 CFR 0.136, which governs the designation of Acting USAs, is inconsistent with the Act, insofar as it authorizes each USA to designate any AUSA in the office to perform the functions and duties of the USA office and use the title of Acting USA.

The Department's regulations already account for potential USA vacancies under 28 CFR 0.137(b), which provides that each Department office ''to which appointment is required to be made by the President with the advice and consent of the Senate (PAS office) shall have a First Assistant within the meaning of the Federal Vacancies Reform Act of 1998,'' and ''[w]here there is a position of Principal Deputy to the PAS office, the Principal Deputy shall be the First Assistant.'' *Id.* The offices of USAs each have a First Assistant United States Attorney who is considered the Principal Deputy for purposes of § 0.137(b) and, by operation of the Act, automatically becomes the Acting USA when the USA leaves office or is otherwise unable to perform the office's functions or duties, unless the President designates another individual to serve as Acting USA.

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

This rule is limited to agency organization, management, or personnel matters, and accordingly it is not subject to review under Executive Order 12866, § 3(d) (Sept. 30, 1993).

Executive Order 13132 (Federalism)

This rule 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. Therefore, in accordance with Executive Order 13132 (Aug. 4, 1999), the Department has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996).

Administrative Procedure Act

This rule is exempt from the rulemaking provisions of 5 U.S.C. 553 because this action pertains to rules of agency organization, procedure, and practice. 5 U.S.C. 553(b)(3)(A). Accordingly, it is not necessary to issue this rule using the notice and public procedure set forth in 5 U.S.C. 553(b), and the requirement of a delayed effective date in 5 U.S.C. 553(d) does not apply.

Unfunded Mandates Reform Act of 1995

This 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 one 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, 2 U.S.C. 1501 *et seq.*

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this rule and, by approving it, certifies that it will not have a significant economic impact on a substantial number of small entities. The rule removes authority that was inconsistent with the Federal Vacancies Reform Act of 1998.

Congressional Review Act

This action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of non-agency parties. Accordingly, it is not a ''rule'' for purposes of the reporting requirement of 5 U.S.C. 801. *See* 5 U.S.C. 804(3). Therefore, the reports to Congress and the General Accounting Office are not required.

List of Subjects in 28 CFR Part 0

Authority delegations (Government agencies), Government employees, Organization and functions (Government agencies), Privacy, Reporting and recordkeeping requirements, Whistleblowing.

Accordingly, by virtue of the authority vested in me as Attorney General, including 5 U.S.C. 301 and 28 U.S.C. 509 and 510, Chapter I of Title 28 of the Code of Federal Regulations is amended as follows:

PART 0—ORGANIZATION OF THE DEPARTMENT OF JUSTICE

■ 1. The authority citation for part 0 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515–519.

§ 0.136 [Removed and Reserved]

■ 2. Remove and reserve § 0.136.

Dated: October 14, 2016.

Loretta E. Lynch,

Attorney General.

[FR Doc. 2016–25464 Filed 10–20–16; 8:45 am]

BILLING CODE 4410–07–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2016–0941]

Drawbridge Operation Regulation; Sacramento River, Sacramento, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulation.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the Tower Drawbridge across the Sacramento River, mile 59.0, at Sacramento, CA. The deviation is necessary to allow the community to participate in the Golden Arches Run event. This deviation allows the bridge to remain in the closed-to-

navigation position during the deviation period.

DATES: This deviation is effective from 7:30 a.m. to 11 a.m. on October 23, 2016.

ADDRESSES: The docket for this deviation, [USCG–2016–0941], is available at *http://www.regulations.gov.* Type the docket number in the ''SEARCH'' box and click ''SEARCH''. Click on Open Docket Folder on the line associated with this deviation.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email David H. Sulouff, Chief, Bridge Section, Eleventh Coast Guard District; telephone 510–437–3516, email *David.H.Sulouff@uscg.mil.*

SUPPLEMENTARY INFORMATION: California Department of Transportation has requested a temporary change to the operation of the Tower Drawbridge, mile 59.0, over Sacramento River, at Sacramento, CA. The vertical lift bridge navigation span provides a vertical clearance of 30 feet above Mean High Water in the closed-to-navigation position. The draw operates as required by 33 CFR 117.189(a). Navigation on the waterway is commercial and recreational.

The drawspan will be secured in the closed-to-navigation position from 7:30 a.m. to 11 a.m. on October 23, 2016, to allow the community to participate in the Golden Arches Run event. This temporary deviation has been coordinated with the waterway users. No objections to the proposed temporary deviation were raised.

Vessels able to pass through the bridge in the closed position may do so at anytime. The bridge will not be able to open for emergencies and there is no immediate alternate route for vessels to pass. The Coast Guard will also inform the users of the waterway through our Local and Broadcast Notices to Mariners of the change in operating schedule for the bridge so that vessel operators can arrange their transits to minimize any impact caused by the temporary deviation.

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

Dated: October 17, 2016.

D.H. Sulouff,

District Bridge Chief, Eleventh Coast Guard District.

[FR Doc. 2016–25479 Filed 10–20–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 2 and 7

[Docket No. PTO–T–2016–0005]

RIN 0651–AD08

Trademark Fee Adjustment

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: The United States Patent and Trademark Office (Office or USPTO) is amending its rules to set or increase certain trademark fees, as authorized by the Leahy-Smith America Invents Act (AIA). The fees will allow the Office to further USPTO strategic objectives by: Better aligning fees with the full cost of the relevant products and services; protecting the integrity of the register by incentivizing more timely filing or examination of applications and other filings and more efficient resolution of appeals and trials; and promoting the efficiency of the process, in large part through lower-cost electronic filing options. The changes will also continue to recover the aggregate estimated cost of Trademark and Trademark Trial and Appeal Board (TTAB) operations and USPTO administrative services that support Trademark operations.

DATES: This rule is effective on January 14, 2017.

FOR FURTHER INFORMATION CONTACT: Jennifer Chicoski, Office of the Deputy Commissioner for Trademark Examination Policy, by email at *TMPolicy@uspto.gov,* or by telephone at (571) 272–8943.

SUPPLEMENTARY INFORMATION:

Purpose: Section 10 of the AIA (Section 10) authorizes the Director of the USPTO (Director) to set or adjust by rule any fee established, authorized, or charged under the Trademark Act of 1946, 15 U.S.C. 1051 *et seq.,* as amended (the Trademark Act or the Act) for any services performed by, or materials furnished by, the Office. *See* Section 10 of the AIA, Public Law 112–29, 125 Stat. 284, 316–17. Section 10 prescribes that fees may be set or adjusted only to recover the aggregate estimated costs to the Office for processing, activities, services, and materials relating to trademarks, including administrative costs to the Office with respect to such Trademark and TTAB operations. The Director may set individual fees at, below, or above their respective cost. Section 10 authority includes flexibility to set individual fees in a way that furthers key policy considerations, while taking into account the cost of the respective services. Section 10 also establishes certain procedural requirements for setting or adjusting fee regulations, such as public hearings and input from the Trademark Public Advisory Committee (TPAC) and oversight by Congress. Accordingly, on October 14, 2015, the Director notified the TPAC of the Office's intent to set or adjust trademark fees and submitted a preliminary trademark fee proposal with supporting materials.

The TPAC held a public hearing in Alexandria, Virginia on November 3, 2015 and released its report regarding the preliminary proposed fees on November 30, 2015. The Office considered the comments, advice, and recommendations received from the TPAC and the public in proposing the fees set forth in the notice of proposed rulemaking published in the **Federal Register** on May 27, 2016, at 81 FR 33619. The proposed rule included links to the preliminary trademark fee proposal and associated materials and to the TPAC report. The Office considered all public comments received during the comment period in the development of this final rule.

The USPTO protects consumers and provides benefits to businesses by effectively and efficiently carrying out the trademark laws of the United States. The final rule will advance key policy considerations, while taking into account the cost of individual services. For example, the increased fees for paper filings aim to better align the required fees with the cost of processing paper filings and incentivize electronic filings to promote efficiency of the registration process. Other trademark fees are increased to encourage timely filings and notices to further promote the efficiency of the process.

The fee schedule implemented in this rulemaking will also continue to recover the aggregate estimated costs to the Office to achieve strategic and operational goals, such as maintaining an operating reserve, implementing measures to maintain trademark pendency and high quality, modernizing the trademark information technology (IT) systems, continuing programs for stakeholder and public outreach, and enhancing operations of the TTAB.

Summary of Major Provisions: The Office herein sets or adjusts 42 trademark processing and service fees. The fee structure increases the per-class fee for an initial application filed on paper by $225 to $600, and increases the fees for 31 other paper filings by between $75 and $200 (per class, where

applicable). The per-class fee for an initial application filed using the regular Trademark Electronic Application System (TEAS) option is increased by $75 to $400. This increase also applies to requests for extension of protection and subsequent designations filed under the Madrid Protocol. 15 U.S.C. 1141e; Madrid Protocol Article 8(7)(a). As discussed below, in response to comments regarding requests for extensions of time to file a statement of use filed electronically, the USPTO is reducing the fee for such extensions. In addition, 10 TTAB-related fees are established or revised, six of which differentiate the fees for initiating a proceeding, as filed electronically or on paper, and increase these as compared to the prior undifferentiated fees; and four that establish electronic and paper filing fees for requests to extend time to file a notice of opposition in certain circumstances. A link to a full list of current and final rule fees, including the unit cost by fee from fiscal years 2013, 2014, and 2015, is available at: *http://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting.*

Rulemaking Goals and Strategies: This final rule will allow the Office to achieve the dual goals of furthering key policy considerations while continuing to recover prospective aggregate costs of operation. One of the overall objectives of this rulemaking is to set individual fees to further key IP-protection policy considerations while taking into account the cost of the particular service. The Office seeks to enhance trademark protection for IP rights holders by offering application filing options and promoting the Administration's innovation strategies.

This final rule is based on furthering three key policy considerations: (1) To better align fees with full costs; (2) to protect the integrity of the register; and (3) to promote the efficiency of the trademark process.

Better Align Fees with Full Costs: The first fee-setting objective is to set and adjust trademark fees to better align those fees with the full costs of providing the relevant services to achieve aggregate cost recovery. In determining which fees to set or adjust, the Office targeted changes to fees where the gap between the cost of the service and the current fee rate was the greatest. Paper filings are generally more expensive to process than electronic filings. Currently, however, most fees for paper filings are not set at full cost; instead they are subsidized by electronic filers. Because of this, across-the-board increases in fees for paper filings are implemented herein to bring the respective fees closer to the actual cost of processing paper filings and incentivize lower-cost electronic options. Additionally, adjustments to TTAB fees, which have not been adjusted, depending on the fee, for 15–25 years, will bring the fees closer to current processing costs, and new fees for extensions of time to file a notice of opposition will allow recovery of some of the cost of processing these filings.

Protect the Integrity of the Trademark Register: The second fee-setting objective is to set or adjust fees to further the policy objective of protecting the accuracy of the trademark register by incentivizing timely filings and examination, as well as efficient trial and appeal resolutions. These fees are used to encourage actions that help to facilitate efficient processing and encourage the prompt conclusion of application prosecution. An accurate register allows the public to rely on the register to determine potential trademark rights. Filings that may result in a less-accurate register are among those filings targeted under this objective.

Promote the Efficiency of the Trademark Process: The third fee-setting objective pertains to furthering key policy objectives and meeting stakeholder expectations by improving the efficiency of the trademark registration process, and related appeals and trial cases, primarily by incentivizing electronic filings. To reach this objective, the Office targets changes to fees that could administratively improve application processing by encouraging more electronic filing. Electronic filing expedites processing, shortens pendency, minimizes manual processing and the potential for data-entry errors, and is more efficient for both the filer and the USPTO. The Office believes that the increase in fees for paper filings, in conjunction with such prior rulemakings as the TEAS Reduced Fee (TEAS RF) rulemaking that took effect in January 2015 (79 FR 74633 (Dec. 16, 2014)) and increased electronic-filing options at lower rates, will continue to result in a greater percentage of electronic filings, in turn improving the efficiency of the trademark process.

Consistent with the Office's goals and obligations under the AIA, another overall objective of this rulemaking is to ensure the fee schedule continues to generate sufficient revenue to recover the prospective aggregate costs of Trademark and TTAB operations and the associated administrative costs. Fees must be set at levels projected to cover future aggregate costs, which include budgetary requirements and an operating reserve. A record number of over 500,000 classes were filed in fiscal year (FY) 2015, the seventh consecutive year of increased filings, and the Office projects this trend of increased filings to continue for the foreseeable future. Additionally, to maintain trademark pendency and quality goals with the increased filings, the Office must ensure it continues to have adequate resources and IT systems to support future processing and examination requirements. The Office is in the midst of a multi-year IT systems and infrastructure upgrade, which is critical to the future of the U.S. trademark registration system and long sought after by stakeholders.

Maintaining the current fee schedule is unlikely to meet budgetary requirements, including: Full costs associated with the projected increases in filings; the full costs necessary to support Trademark and TTAB operations; and necessary investments in IT systems, intellectual property (IP) policy, and USPTO programs. The USPTO FY 2017 President's Budget was the basis for the initial fee proposal. It includes two revenue estimates based on the projected demand for trademark products and services and fee rates: (1) The current fee schedule; and (2) the initial fee proposal as submitted to the TPAC and discussed in its public hearing and report. It also includes information on estimated aggregate cost that may be found in the USPTO FY 2017 President's Budget (Figure #4, page 23) at *http://www.uspto.gov/sites/default/files/documents/fy17pbr.pdf.*

The Office notes that because the FY 2017 President's Budget was submitted prior to the USPTO making final decisions on the fee adjustments, and given that the Office reduced several fees from the initial proposal in response to comments from the TPAC and the public, and further reduced fees in response to comments submitted regarding the proposed rule, as discussed herein, the aggregate revenue projected for FY 2017–FY 2021 is higher in that document than the projections for this final rule. Under the fee schedule in this final rule, assuming the same level of budgetary requirements, optimal operating reserves are projected by FY 2021. The USPTO would use its existing authority going forward to adjust fees to cover budgetary requirements and to maintain the optimal operating reserve balance. If the actual operating reserve exceeds the estimated optimal level by 15 percent for two consecutive years, the USPTO would consider lowering fees.

Aggregate costs are estimated through the USPTO budget-formulation process

with the annual preparation of a five-year performance-based budget request.

These fee-schedule goals are consistent with strategic goals and objectives detailed in the USPTO 2014–2018 Strategic Plan (Strategic Plan) that is available at: *http://www.uspto.gov/sites/default/files/documents/USPTO_2014-2018_Strategic_Plan.pdf.* The Strategic Plan defines the USPTO's mission and long-term goals and presents the actions the Office will take to realize those goals. The significant actions the Office describes in the Strategic Plan that are specifically related to the goals of this rulemaking are: Ensuring optimal IT service to all users, maintaining trademark pendency and high quality, continuing and enhancing stakeholder and public outreach, and enhancing operations of the TTAB.

The trademark fee schedule implemented herein will achieve the goals of furthering the key policy considerations of better aligning fees with full costs, protecting the integrity of the register, and promoting the efficiency of the trademark process in FY 2017 and beyond while recovering prospective aggregate costs of operation. It will also create a better and fairer cost-recovery system that balances subsidizing costs to encourage broader usage of IP rights-protection mechanisms and participation by more trademark owners.

The following table shows the current and final fee amounts implemented by this rulemaking for paper-filed applications and documents.

FEES FOR PAPER FILINGS

37 CFR	Fee code	Description	Current fee	Final rule fee	Change
2.6(a)(1)(i)	6001	Filing an Application on Paper, per Class	$375	$600	$225
2.6(a)(19)(i)	6006	Request to Divide an Application Filed on Paper, per New Application Created.	100	200	100
2.6(a)(1)(v)	6008	Additional Processing Fee under § 2.22(c) or § 2.23(c), per Class.	50	125	75
2.6(a)(5)(i)	6201	Filing an Application for Renewal of a Registration on Paper, per Class.	400	500	100
2.6(a)(6)(i)	6203	Additional Fee for Filing a Renewal Application During the Grace Period on Paper, per Class.	100	200	100
2.6(a)(21)(i)	6204	Correcting a Deficiency in a Renewal Application via Paper Filing.	100	200	100
2.6(a)(12)(i)	6205	Filing an Affidavit under § 8 of the Act on Paper, per Class.	100	225	125
2.6(a)(14)(i)	6206	Additional Fee for Filing a § 8 Affidavit During the Grace Period on Paper, per Class.	100	200	100
2.6(a)(20)(i)	6207	Correcting a Deficiency in a § 8 Affidavit via Paper Filing.	100	200	100
2.6(a)(13)(i)	6208	Filing an Affidavit under § 15 of the Act on Paper, per Class.	200	300	100
2.6(a)(7)(i)	6210	Filing to Publish a Mark under § 12(c) on Paper, per Class.	100	200	100
2.6(a)(8)(i)	6211	Issuing New Certificate of Registration upon Request of Registrant, Request Filed on Paper.	100	200	100
2.6(a)(9)(i)	6212	Certificate of Correction of Registrant's Error, Request Filed on Paper.	100	200	100
2.6(a)(10)(i)	6213	Filing a Disclaimer to a Registration, on Paper	100	200	100
2.6(a)(11)(i)	6214	Filing an Amendment to a Registration, on Paper.	100	200	100
2.6(a)(2)(i)	6002	Filing an Amendment to Allege Use under § 1(c) of the Act on Paper, per Class.	100	200	100
2.6(a)(3)(i)	6003	Filing a Statement of Use under § 1(d)(1) of the Act on Paper, per Class.	100	200	100
2.6(a)(4)(i)	6004	Filing a Request under § 1(d)(2) of the Act for a Six-Month Extension of Time for Filing a Statement of Use under § 1(d)(1) of the Act on Paper, per Class.	150	225	75
7.6(a)(1)(i)	6901	Certifying an International Application Based on a Single Application or Registration, Filed on Paper, per Class.	100	200	100
7.6(a)(2)(i)	6902	Certifying an International Application Based on More Than One Basic Application or Registration Filed on Paper, per Class.	150	250	100
7.6(a)(4)(i)	6903	Transmitting a Request to Record an Assignment or Restriction, or Release of a Restriction, under § 7.23 or § 7.24 Filed on Paper.	100	200	100
7.6(a)(5)(i)	6904	Filing a Notice of Replacement under § 7.28 on Paper, per Class.	100	200	100
7.6(a)(6)(i)	6905	Filing an Affidavit under § 71 of the Act on Paper, per Class.	100	225	125
7.6(a)(7)(i)	6906	Surcharge for Filing an Affidavit under § 71 of the Act During Grace Period on Paper, per Class.	100	200	100
7.6(a)(3)(i)	6907	Transmitting a Subsequent Designation under § 7.21, Filed on Paper.	100	200	100

FEES FOR PAPER FILINGS—Continued

37 CFR	Fee code	Description	Current fee	Final rule fee	Change
7.6(a)(8)(i)	6908	Correcting a Deficiency in a § 71 Affidavit Filed on Paper.	100	200	100
2.6(a)(16)(i)	6401	Filing a Petition to Cancel on Paper, per Class	300	500	200
2.6(a)(17)(i)	6402	Filing a Notice of Opposition on Paper, per Class.	300	500	200
2.6(a)(18)(i)	6403	Ex Parte Appeal to the Trademark Trial and Appeal Board Filed on Paper, per Class.	100	300	200
2.6(a)(22)(i)	New	Filing a Request for an Extension of Time to File a Notice of Opposition under § 2.102(c)(3) on Paper.		200	n/a
2.6(a)(23)(i)	New	Filing a Request for an Extension of Time to File a Notice of Opposition under § 2.102(c)(1)(ii) or (c)(2) on Paper.		300	n/a
2.6(a)(15)(i)	6005	Petitions to the Director Filed on Paper	100	200	100

Comments and Responses

The USPTO published a proposed rule on May 27, 2016 soliciting comments on the proposed fee schedule. In response, the USPTO received comments from four intellectual property organizations and seven individual commenters representing law firms, corporations, and individuals. These comments are posted on the USPTO's Web site at *http://www.uspto.gov/trademark/trademark-updates-and-announcements/comments-proposed-rulemaking-relating-trademark-fee.*

The Office received comments both generally supporting and objecting to the fee increases. Three commenters objected to any increase in fees, as they believed such increases placed hardships on individual filers and small-business owners. Two of these commenters suggested that fees be maintained at their current levels for these groups and one suggested that the Office consider lowering the fees for individual entrepreneurs, artisans, and crafts people. Alternatively, one commenter expressed support of the Office's goal of incentivizing use of electronic filings, the proposed fee increases on certain paper filings, and the increase of the application fee for the regular TEAS application.

The USPTO appreciates the commenter's support of the objective of incentivizing electronic filing, but it also appreciates the concerns of the commenters regarding the impact of the increased fees on individuals and small-business owners. After review of the comments to the fee proposal, the USPTO is reducing the current fee for electronically filed requests for extensions of time to file a statement of use and the proposed increases for affidavits under sections 8 and 71. Furthermore, the majority of the fee increases are for paper filings. The less-expensive electronic filing method can be used by all types of filers, including small companies and individuals focused on minimizing costs, and the Office's experience is that small companies and individual filers have proven particularly adept at finding and choosing lower-cost filing options.

The USPTO also received public comments expressing concerns with several individual fees. In the interest of providing context to those comments, they are summarized and responded to in the general discussion of the individual fee rationale below.

Individual Fee Rationale: The Office projects the aggregate revenue generated from trademark fees will recover the prospective aggregate cost, including the attainment and maintenance of an adequate operating reserve for its Trademark and TTAB operations. In addition, as described above, some of the fees are set to balance several key policy factors, and executing these policy factors in the trademark fee schedule is consistent with the goals and objectives outlined in the Strategic Plan. Once the key policy factors are considered, fees are set at, above, or below individual cost-recovery levels for the service provided. For more information regarding the cost methodologies used to derive the historical fee unit expenses, please refer to USPTO Fee Setting—Activity Based Information and Trademark Fee Unit Expense Methodology available at: *http://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting.*

Fees for Paper Filings: The final rule increases the fees for paper filings in order to meet two objectives: Better align fees with costs and improve the efficiency of the trademark process. The fee for filing a trademark application for registration on paper is increased by $225, from $375 per International Class to $600 per International Class. Additionally, all trademark processing fees for paper filings are increased by $75 to $200 more than current fees (per class, when applicable).

The costs of processing paper filings are generally higher than electronic filings and higher than current fee schedules. A full list of current and new fees including the unit cost by fee from fiscal years 2013, 2014, and 2015 is available in the Table of Trademark Fees—Current, Final Rule and Unit Cost at: *http://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting.* An increase in the fees for these filings will help to offset the higher processing costs and come closer to recovering the total processing costs. Furthermore, setting a higher fee for paper filings incentivizes electronic filings, which are more cost efficient for the Office to process and which reduce the possibility of data-entry errors. As a result, adjustments of 5–10% in the estimated number of paper filings have been made in projecting filings and estimating revenue considering the impact of the fee increase on the behavior of applicants and parties to TTAB proceedings and the resulting revenues. The rationale behind this fee increase is consistent with prior fee reductions for electronic filings.

At present, the vast majority of filings are electronic. For example, in FY 2015, only 0.4% of initial applications for registration were filed on paper, increasing the unit costs as filings decrease. Additionally, more than 95% of all fee-paid requests were filed electronically in FY 2015. Thus, the increase in all paper filing fees will have virtually no impact on the vast majority of applicants and registrants who file documents electronically.

Three commenters objected to the amounts of the proposed fee increases

for paper filings. The USPTO understands the concerns to keep costs low for all filers. The objections to these fees have been carefully considered. However, some of the amended fees are set to balance several key policy factors, and executing these policy factors in the trademark fee schedule is consistent with the goals and objectives outlined in the Strategic Plan. In addition, given the costs to process paper filings, the USPTO has determined that a fee increase is necessary at this time in order to bring the fees charged closer to the costs of processing the filings. The USPTO encourages the use of electronic filing as a preferred filing method because it is less expensive, with lower processing fees and costs. It is also more efficient, because electronic filing expedites processing by eliminating the need for individual data entry as well as decreasing the potential for data-entry errors. The USPTO provides guidance on using TEAS electronic filing forms on its Web site at *http://www.uspto.gov/trademarks-getting-started/trademark-basics/teas-nuts-and-bolts-videos.*

Two commenters suggested a waiver of any higher fee for paper filing in situations where electronic filing is unavailable, whether due a system outage or to TEAS limitations regarding the submission of evidence or specimens in video format. One of the commenters also suggested that the difference in fees in such situations be waived by some mechanism other than a petition to the Director.

The USPTO notes that it is currently possible to submit electronic files containing sound or multimedia specimens or evidence directly through TEAS in all initial application forms as well as response forms, allegation-of-use forms, petitions forms, and post-registration maintenance forms. The complete list of forms is available on the USPTO Web site at *http://www.uspto.gov/trademarks-application-process/filing-online/trademark-electronic-application-system-teas-1#164074.* The USPTO is also enhancing additional forms to permit direct submission of sound or multimedia files on an ongoing basis, with the next enhancement planned for October 2016. Therefore, there are few situations in which a party would be unable to attach an electronic file to a TEAS form. Until such time as all forms accept such attachments, the USPTO has provided a workaround approach for submitting such files via email.

The USPTO makes every effort to have TEAS and the Electronic System for Trademark Trials and Appeals (ESTTA) for trademark and TTAB filings, respectively, available 24 hours a day, 7 days a week. Sometimes, TEAS or ESTTA may be unavailable because of routine maintenance or are unexpectedly inaccessible. In such cases, the USPTO provides information about the outage on its Web site and makes every attempt to restore service as soon as possible. The USPTO also provides information regarding filing documents during an outage at *http://www.uspto.gov/trademarks-application-process/filing-online/filing-documents-during-outage.* Requests to waive a fee because a document had to be filed on paper due to a system outage or other circumstance are considered on a case-by-case basis. In order to properly assess the circumstances and evidence regarding each request for a fee waiver, the appropriate mechanism is to file a petition to the Director under 37 CFR 2.146.

Other Trademark-Processing Fees: The Office also increases certain other trademark-processing fees in order to further key policy considerations, and reduces one fee. The rule increases the per-class fee for an initial application filed through TEAS from $325 to $400. This fee increase applies to both U.S. and foreign filers as well as to applications submitted under the Madrid Protocol as requests for extension of protection and subsequent designation. The rule also increases the processing fee for failure to meet the requirements for a TEAS Plus or TEAS RF filing from $50 to $125 per International Class to better align the resulting total charge with the fee for filing a regular TEAS application. In addition, the final rule increases the fees for affidavits under sections 8 and 71 of the Act in the amount of $25 per class for electronic filings and $125 per class for paper filings. However, as a result of public comments, the rule reduces the current fee for electronically filing a request for an extension of time to file a statement of use from $150 to $125 per class and reduces the increase for filing such a request on paper to $225, rather than the proposed increase to $250.

Initial Application Filed Through TEAS: The final rule increases the fee for an initial application filed through TEAS as a regular TEAS application in order to better align the fee with the costs and to incentivize subsequent electronic filing and communications. The fee is increased from $325 to $400 to bring the fee closer to the full processing cost of the service. Unlike the TEAS Plus and TEAS RF application options, the regular TEAS application does not require the applicant to commit to communicating electronically with the Office throughout the course of prosecution of the application. Increasing the fee for this application option will encourage applicants to commit to complete electronic processing using one of the lower-cost application options. Corresponding increases to the individual fee for requests for protection of an International Registration through the Madrid Protocol are also affected by invoking the relevant provisions under the Protocol and its Common Regulations to adjust fees at the request of a contracting party.

One commenter stated that the proposed increase of ''from $75 a class to $400 a class'' for regular TEAS applications is extremely burdensome on small companies and individuals, and suggested reducing the fee to no more than $150 per class. The USPTO appreciates the commenter's concerns regarding the increased price for the regular TEAS application and assumes that the commenter is referring to the $75 increase from the current fee of $325 per class to $400 per class. The USPTO notes that all filers, including small companies and individuals, have less-expensive filing options. Filers seeking lower-cost alternatives may select between the TEAS Plus application, at $225 per class, and the TEAS RF option, which has fewer filing requirements than the TEAS Plus option, at $275 per class. The USPTO has no plans to introduce a lower-cost filing option at this time as these fees are set based on the reasons mentioned above.

OTHER TRADEMARK-PROCESSING FEES

[Initial application filed through TEAS]

37 CFR	Fee code	Description	Current fee	Final rule fee	Change
2.6(a)(1)(ii)	7001	Filing and Application through TEAS, per Class	$325	$400	$75

(1) Processing Fee for Failure to Meet Requirements for TEAS Plus or TEAS RF: The final rule increases the fee for failure to meet TEAS Plus or TEAS RF filing requirements in order to promote the efficiency of the trademark application process by incentivizing electronic filings and communication. Both TEAS Plus and TEAS RF feature reduced filing fees in exchange for meeting certain requirements, including a requirement to file certain documents electronically. Applicants who fail to meet the requirements are charged a per-class processing fee. This fee is increased from $50 to $125 to address the difference between the filing fees for these applications and the filing fee for a regular TEAS application, and to further encourage applicants to maintain the discounted application status by meeting all TEAS Plus and TEAS RF requirements to avoid being assessed the additional processing fee. Thus, the Office will continue to promote use of electronic filings, which are more efficient and cost-effective to review.

OTHER TRADEMARK-PROCESSING FEES

[Processing fee for failure to meet requirements for TEAS plus or TEAS RF]

37 CFR	Fee code	Description	Current fee	Final rule fee	Change
2.6(a)(1)(v)	6008	Additional Processing Fee under § 2.22(c) or § 2.23(c), per Class (paper).	$50	$125	$75
2.6(a)(1)(v)	7008	Additional Processing Fee under § 2.22(c) or § 2.23(c), per Class (electronic).	50	125	75

(2) Affidavits under sections 8 and 71 of the Act: In addition to aligning the fees with full costs, the increase in fees for submitting affidavits under sections 8 and 71 will help to ensure the accuracy and integrity of the trademark register. Costs are set to increase for these filings as a result of the need for increased legal examination. In 2012, the USPTO began the Post Registration Proof of Use Pilot Program, during which 500 registrations (for which section 8 or 71 affidavits were filed) were reviewed to assess the accuracy and integrity of the trademark register as to the actual use of the mark with the goods and/or services identified in the registration. The findings of the pilot program demonstrated a need for ongoing measures for additional review of these filings on a permanent basis. Such additional measures, which are currently under development in a separate rulemaking (*see* ''Changes in Requirements for Affidavits or Declarations of Use, Continued Use, or Excusable Nonuse in Trademark Cases'' (81 FR 40589; June 22, 2016)), will help identify and remove registrations with insufficient maintenance filings, thereby reducing the number of invalid registrations, and resulting in a more accurate trademark register. Increased fees are required to recover the costs associated with the additional review.

The USPTO has reassessed its aggregate cost and determined that a reduction in the proposed increase for affidavits under sections 8 and 71 that are filed on paper is appropriate. The fee for such affidavits filed using TEAS is increased by $25, rather than the proposed increase of $50. The fee for such affidavits filed on paper is increased by $125, rather than the proposed increase of $150.

OTHER TRADEMARK-PROCESSING FEES

[Affidavits under § 8 and § 71 of the Act]

37 CFR	Fee code	Description	Current fee	Final rule fee	Change
2.6(a)(12)(i)	6205	Filing an Affidavit under § 8 of the Act on Paper, per Class.	$100	$225	$125
2.6(a)(12)(ii)	7205	Filing an Affidavit under § 8 of the Act through TEAS, per Class.	100	125	25
7.6(a)(6)(i)	6905	Filing an Affidavit under § 71 of the Act on Paper, per Class.	100	225	125
7.6(a)(6)(ii)	7905	Filing an Affidavit under § 71 of the Act through TEAS, per Class.	100	125	25

(3) Extension of Time to File a Statement of Use: Two commenters encouraged the USPTO to reduce the fee for extensions of time to file a statement of use filed through TEAS, given the disparity between the cost to process such extensions and the TEAS fee. The comment is well-taken, and the USPTO will reduce the fee for electronically filed extensions of time to file a statement of use from $150 to $125 per class. Although reduced, the fee will still serve to incentivize electronic filing, a more efficient process than paper filing.

OTHER TRADEMARK-PROCESSING FEES

[Extension of time to file a statement of use]

37 CFR	Fee code	Description	Current fee	Final rule fee	Change
2.6(a)(4)(i)	6004	Filing a Request under § 1(d)(2) of the Act for a Six-Month Extension of Time for Filing a Statement of Use under § 1(d)(1) of the Act on Paper, per Class.	$150	$225	$75
2.6(a)(4)(i)	7004	Filing a Request under § 1(d)(2) of the Act for a Six-Month Extension of Time for Filing a Statement of Use under § 1(d)(1) of the Act through TEAS, per Class.	150	125	(25)

Trademark Service Fees: The final rule discontinues two trademark service fees and replaces two ''at-cost'' service fees with a set fee. The deposit account set-up fee is discontinued because the process will be handled electronically, thus reducing the cost to process. The self-service copy fee is discontinued because the service will be provided by a third-party vendor. Additionally, the USPTO is not moving forward with the proposed hourly fee for using X-Search. The Office revaluated the proposed fee change and determined to continue to charge no fee for this service. Finally, the unspecified labor fees are replaced with a set fee of $160 for expedited service and $40 for overnight delivery. The fees are based on an average hourly cost of $40 per hour and the additional time estimated to fulfill the type of request.

TRADEMARK SERVICE FEES

37 CFR	Fee code	Description	Current fee	Final rule fee	Change
	8524	Unspecified Other Services, Excluding Labor	At cost	n/a	n/a.
	9201	Establish Deposit Account	$10	n/a	n/a.
	8902	Self-Service Copy Charge, per Page Copishare Card.	$0.25	n/a	n/a.
	8523	Labor Charges for Services, per Hour or Fraction Thereof.	$40	n/a	n/a.
2.6(b)(9)	New	Additional Fee for Expedited Service		$160	n/a.
2.6(b)(8)	New	Additional Fee for Overnight Delivery		$40	n/a.

Existing Fees at the TTAB: This final rule also increases ex parte (*i.e.,* appeal) fees, which have not been adjusted in more than 25 years, and inter partes (*i.e.,* trial) fees, which have not been adjusted in 15 years. With this rule, the TTAB differentiates paper and electronic filing fees. The rule includes a $100 per-class increase in fees for electronic filings for petitions for cancellation, notices of opposition, and ex parte appeals. A $200 increase, per class, is enacted for paper filings for the same requests. Currently, the cost of TTAB operations is heavily subsidized by revenue from other trademark processing fees. The fee increases will not recover the full costs of TTAB operations, but will bring the fees closer to the full costs in order to better align costs and fees. Furthermore, the larger increased fees for paper filings will incentivize lower-cost electronic filing in order to improve the efficiency of processing and reduce total costs.

The Office interpreted one comment to raise concerns about the $200 increase per class to file a notice of appeal on paper. Another commenter pointed out that most notices of appeal are filed electronically, so the $100 per-class increase would affect more stakeholders than the $200 increase to the paper filing fee. Both comments explained that notices of appeal often are filed to ''buy time'' or ''preserve the right to appeal'' while a request for reconsideration of an examining attorney's final refusal is pending, and as an alternative to any increase in the fee for a notice of appeal, suggested adding a separate fee for only those applicants who file an appeal brief.

The Office recognizes that a significant percentage of notices of appeal are filed, in essence, to obtain an extension of time to continue discussions with an examining attorney regarding issues presented by a final refusal. The final rule retains the proposed increase in the appeal fee (and the differentiation between paper filings and electronic filings). The higher paper filing fee encourages electronic filing, and the increase in the appeal fee encourages efficiency by promoting earlier and more comprehensive communication between applicants and examining attorneys regarding issues raised in Office actions refusing registration. In reviewing appeals that do not result in the filing of appeal briefs, because requests for reconsideration are granted or lead to further discussion obviating the need to file an appeal brief, the Office has learned that many issues could have been resolved earlier in the examination process or through prompt filing of a request for reconsideration after receipt of a final refusal, rather than much later as a complement to the notice of appeal. For many applicants who receive a final refusal, but promptly file a request for reconsideration, filing a notice of appeal and the fee therefor can be avoided entirely. In addition, were the Office to implement the recommendation to add a fee for filing an appeal brief, the brief fee would have to be significantly higher than the proposed increase in the notice of appeal fee in order to raise revenue equivalent to that generated by the fee increase for the notice of appeal, which, as noted, is avoidable when used primarily as an extension of the examination process.

EXISTING FEES AT THE TTAB

37 CFR	Fee code	Description	Current fee	Final rule fee	Change
2.6(a)(16)(i)	6401	Filing a Petition to Cancel on Paper, per Class	$300	$500	$200
2.6(a)(16)(ii)	7401	Filing a Petition to Cancel through ESTTA, per Class.	300	400	100
2.6(a)(17)(i)	6402	Filing a Notice of Opposition on Paper, per Class.	300	500	200
2.6(a)(17)(ii)	7402	Filing a Notice of Opposition through ESTTA, per Class.	300	400	100
2.6(a)(18)(i)	6403	Ex Parte Appeal to the Trademark Trial and Appeal Board Filed on Paper, per Class.	100	300	200
2.6(a)(18)(ii)	7403	Ex Parte Appeal to the Trademark Trial and Appeal Board Filed through ESTTA, per Class.	100	200	100

Establish Fees for Extensions of Time at the TTAB: The final rule establishes new fees for requests for extensions of time to file a notice of opposition in order to better align the fees with the processing costs as well as to protect the integrity of the trademark register. The public has 30 days from the date of publication of an application to file a notice of opposition with the TTAB. However, prior to this rule, a potential opposer had available to it several types of extensions, at no fee, that allowed the opposer to delay an application or delay making a decision regarding whether to file an opposition. This rulemaking establishes a tiered fee structure for these filings. Under the new structure, potential opposers may request: (1) An initial 30-day extension for no fee; (2) a subsequent 60-day extension for a fee of $100 for electronic filings and $200 for paper filings, OR a single 90-day extension effectively combining the 30-day no-fee extension and the subsequent 60-day extension, at these fees; and (3) a final 60-day extension for a fee of $200 for electronic filings and $300 for paper filings. The ''subsequent 60-day'' extension or 90-day extension both require a showing of good cause, 37 CFR 2.102(c)(1) to (2), in addition to the appropriate fee. The ''final 60-day extension'' requires written consent of the applicant or its representative, or a showing of extraordinary circumstances warranting this final extension, *see* 37 CFR 2.102(c)(3), in addition to the appropriate fee.

Three commenters addressed the proposed new fees for extensions of time to oppose. None took issue with higher costs for paper filings. One comment addressed the perceived ''abrogation'' of the option to file for a 90-day initial extension of time to oppose and noted this would increase filing costs as parties would file for the no-cost 30-day extension and then separately for the subsequent 60-day good-cause extension. The Office does not intend to remove the option for filing an initial 90-day extension, as explained above. All three commenters suggested that the fees for extensions of time to oppose might actually encourage potential opposers to file more notices of opposition to avoid the extension fees. Two of the commenters suggested a fee only for the ''final'' 60-day extension of time to oppose. The final rule retains the proposed extension fees, which are noted to be ''per application'' fees and not ''per class'' fees, and therefore lower than total fees for filing an opposition to a multi-class application.

These fees will yield efficiencies by encouraging potential opposers to make decisions regarding filing an opposition sooner, thus reducing delays to applicants. Thousands of applications are delayed each year without any subsequent filing of a notice of opposition, and the Office has received complaints from applicants whose applications have been delayed, from the applicants' perspective, unjustly. Additionally, for those that file the notice of opposition, the fee will result in faster commencement and, therefore, conclusion of TTAB cases by encouraging earlier decisions to initiate proceedings. This should also help to protect the integrity of the trademark register by encouraging timely decisions and filings to ensure that the rights of other applicants and the public are not adversely affected.

NEW FEES FOR EXTENSIONS OF TIME AT THE TTAB

37 CFR	Fee code	Description	Current fee	Final rule fee	Change
2.6(a)(22)(i)	New	Filing a Request for an Extension of Time to File a Notice of Opposition under § 2.102(c)(3) on Paper.		$200	n/a.
2.6(a)(22)(ii)	New	Filing a Request for an Extension of Time to File a Notice of Opposition under § 2.102(c)(3) through ESTTA.	n/a	100	n/a.
2.6(a)(23)(i)	New	Filing a Request for an Extension of Time to File a Notice of Opposition under § 2.102(c)(1)(ii) or (c)(2) on Paper.	n/a	300	n/a.
2.6(a)(23)(ii)	New	Filing a Request for an Extension of Time to File a Notice of Opposition under § 2.102(c)(1)(ii) or (c)(2) through ESTTA.	n/a	200	n/a.

Given that the fee for the notice of opposition has been increased, the Office believes that the extension fees should encourage earlier calculated decisions based on all of the available information and fees. Furthermore, implementing a tiered-fee structure will reduce the number of potential opposers

that use the extensions merely to delay applications.

Finally, these fees will help offset the processing costs. In FY 2015, the Office received 17,000 requests for extensions of time to file a notice of opposition, but there has been no fee to cover the costs to process these filings. It is customary for requests that delay processing of records, such as extensions, to require a fee to contribute to the cost of processing the filing as well as the overall cost of processing of appeals and trials. These fees are necessary to help attain primary Office goals of furthering key policy considerations, such as encouraging efficient processing, along with recovering the aggregate cost of operations.

Costs and Benefits: This rulemaking is not considered to be economically significant under Executive Order 12866 (Sept. 30, 1993).

Discussion of Regulatory Changes

The USPTO amends §§ 2.6 and 7.6 to establish new or increase certain existing trademark fees, and to make other conforming changes, as described in the section-by-section analysis below.

The USPTO revises § 2.6(a)(1)(i) to increase the fee for an initial application filed on paper from $375 to $600 per class, and § 2.6(a)(1)(ii) to increase the fee for an initial application filed using the regular TEAS option from $325 to $400 per class. This increase also applies to requests for extension of protection filed under the Madrid Protocol.

The USPTO revises § 2.6(a)(1)(v) to increase the fee for failure to meet TEAS Plus or TEAS RF requirements from $50 to $125 per class.

The USPTO revises § 2.6(a)(2) to read ''Amendment to allege use'' and adds §§ 2.6(a)(2)(i) and (ii) to set out the fees for filing an amendment to allege use on paper and through TEAS, respectively. The paper filing fee is increased from $100 to $200 per class.

The USPTO revises § 2.6(a)(3) to read ''Statement of use'' and adds §§ 2.6(a)(3)(i) and (ii) to set out the fees for filing a statement of use on paper and through TEAS, respectively. The paper filing fee is increased from $100 to $200 per class.

The USPTO revises § 2.6(a)(4) to read ''Extension of time for filing statement of use'' and adds §§ 2.6(a)(4)(i) and (ii) to set out the fees for filing an extension of time to file a statement of use on paper and through TEAS, respectively. The paper filing fee is increased from $150 to $225 per class. The fee for filing through TEAS is reduced from $150 to $125 per class.

The USPTO revises § 2.6(a)(5)(i) to increase the fee for filing an application for renewal of a registration on paper from $400 to $500 per class.

The USPTO revises § 2.6(a)(6) to read ''Renewal during grace period'' and adds §§ 2.6(a)(6)(i) and (ii) to set out the fees for filing a renewal application during the grace period on paper and through TEAS, respectively. The paper filing fee is increased from $100 to $200 per class.

The USPTO revises § 2.6(a)(7) to read ''Publishing mark under section 12(c)'' and adds §§ 2.6(a)(7)(i) and (ii) to set out the fees for filing a request to publish a mark under section 12(c) on paper and through TEAS, respectively. The paper filing fee is increased from $100 to $200 per class.

The USPTO revises § 2.6(a)(8) to read ''New certificate of registration'' and adds §§ 2.6(a)(8)(i) and (ii) to set out the fees for a filing a request to issue a new certificate of registration on paper and through TEAS, respectively. The paper filing fee is increased from $100 to $200.

The USPTO revises § 2.6(a)(9) to read ''Certificate of correction of registrant's error'' and adds §§ 2.6(a)(9)(i) and (ii) to set out the fees for filing a request to issue a certification of correction of a registrant's error on paper and through TEAS, respectively. The paper filing fee is increased from $100 to $200.

The USPTO revises § 2.6(a)(10) to read ''Disclaimer to a registration'' and adds §§ 2.6(a)(10)(i) and (ii) to set out the fees for submitting a disclaimer to a registration on paper and through TEAS or the Electronic System for Trademark Trials and Appeals (ESTTA), respectively. The paper filing fee is increased from $100 to $200.

The USPTO revises § 2.6(a)(11) to read ''Amendment of registration'' and adds §§ 2.6(a)(11)(i) and (ii) to set out the fees for filing an amendment to a registration on paper and through TEAS or ESTTA, respectively. The paper filing fee is increased from $100 to $200.

The USPTO revises § 2.6(a)(12) to read ''Affidavit under section 8'' and adds §§ 2.6(a)(12)(i) and (ii) to set out the fees for filing an affidavit under section 8 of the Act on paper and through TEAS, respectively. The paper filing fee is increased from $100 to $225 per class and the electronic filing fee is increased from $100 to $125 per class.

The USPTO revises § 2.6(a)(13) to read ''Affidavit under section 15'' and adds §§ 2.6(a)(13)(i) and (ii) to set out the fees for filing an affidavit under section 15 of the Act on paper and through TEAS, respectively. The paper filing fee is increased from $200 to $300 per class.

The USPTO revises § 2.6(a)(14) to read ''Filing section 8 affidavit during grace period'' and adds §§ 2.6(a)(14)(i) and (ii) to set out the fees for filing an affidavit under section 8 of the Act during the grace period on paper and through TEAS, respectively. The paper filing fee is increased from $100 to $200 per class.

The USPTO revises § 2.6(a)(15) to read ''Petitions to the Director'' and adds §§ 2.6(a)(15)(i) and (ii) to set out the fees for filing a petition to the Director on paper and through TEAS. The paper filing fee is increased from $100 to $200.

The USPTO revises § 2.6(a)(16) to read ''Petition to cancel'' and adds §§ 2.6(a)(16)(i) and (ii) to set out the fees for filing a petition to cancel on paper and through ESTTA. The paper filing fee is increased from $300 to $500 per class and the electronic filing fee is increased from $300 to $400 per class.

The USPTO revises § 2.6(a)(17) to read ''Notice of opposition'' and adds §§ 2.6(a)(17)(i) and (ii) to set out the fees for filing a notice of opposition on paper and through ESTTA, respectively. The paper filing fee is increased from $300 to $500 per class and the electronic filing fee is increased from $300 to $400 per class.

The USPTO revises § 2.6(a)(18) to read ''Ex parte appeal'' and adds §§ 2.6(a)(18)(i) and (ii) to set out the fees for filing an ex parte appeal on paper and through ESTTA, respectively. The paper filing fee is increased from $100 to $300 per class and the electronic filing fee is increased from $100 to $200 per class.

The USPTO revises § 2.6(a)(19) to read ''Dividing an application'' and adds §§ 2.6(a)(19)(i) and (ii) to set out the fees for filing a request to divide an application on paper and through TEAS, respectively. The proposed paper filing fee is increased from $100 to $200 per new application created.

The USPTO revises § 2.6(a)(20) to read ''Correcting deficiency in section 8 affidavit'' and adds §§ 2.6(a)(20)(i) and (ii) to set out the fees for filing a correction in a section 8 affidavit on paper and through TEAS, respectively. The paper filing fee is increased from $100 to $200.

The USPTO revises § 2.6(a)(21) to read ''Correcting deficiency in renewal application'' and adds §§ 2.6(a)(21)(i) and (ii) to set out the fees for filing a correction in a renewal application on paper and through TEAS, respectively. The paper filing fee is increased from $100 to $200.

The USPTO adds § 2.6(a)(22) to read ''Extension of time for filing notice of opposition under § 2.102(c)(1)(ii) or

(c)(2)'' and §§ 2.6(a)(22)(i) and (ii) to set out the fees for filing a request for an extension of time to file a notice of opposition pursuant to § 2.102(c)(1)(ii) or (c)(2) on paper and through ESTTA, respectively. The paper filing fee is set at $200 and the electronic filing fee is set at $100.

The USPTO adds § 2.6(a)(23) to read ''Extension of time for filing notice of opposition under § 2.102(c)(3)'' and §§ 2.6(a)(23)(i) and (ii) to set out the fees for filing a request for an extension of time to file a notice of opposition pursuant to § 2.102(c)(3) on paper and through ESTTA, respectively. The paper filing fee is set at $300 and the electronic filing fee is set at $200.

The USPTO deletes the current § 2.6(b)(8).

The USPTO redesignates § 2.6(b)(9) as § 2.6(b)(8) and deletes the current fee for self-service copies and replaces it with a fee of $40 for overnight delivery.

The USPTO redesignates § 2.6(b)(10) as § 2.6(b)(9) and deletes the current fee for labor charges and replaces it with a fee of $160 for expedited service.

The USPTO deletes the current § 2.6(b)(11) and redesignates the current § 2.6(b)(12) as § 2.6(b)(10).

The USPTO deletes the current §§ 2.6(b)(13) and § 2.6(b)(13)(i), redesignates the current § 2.6(b)(13)(ii) as § 2.6(b)(11), and adds the wording ''Deposit account'' at the beginning of the paragraph.

The USPTO revises § 2.200(b) to delete the reference to the extra charge in § 2.6(b)(10), pursuant to the proposed change to § 2.6(b)(10) set forth above.

The USPTO revises § 2.208(a) to delete the reference to the fee for establishing a deposit account and amend the reference regarding the service charge to § 2.6(b)(11), pursuant to the proposed changes to §§ 2.6(b)(13)–(13)(ii) set forth above.

The USPTO revises § 7.6(a)(1) to read ''Certification of international application based on single application or registration'' and adds §§ 7.6(a)(1)(i) and (ii) to set out the fees for certifying an international application based on a single basic application or registration on paper and through TEAS, respectively. The paper filing fee is increased from $100 to $200, per class.

The USPTO revises § 7.6(a)(2) to read ''Certification of international application based on more than one application or registration'' and adds §§ 7.6(a)(2)(i) and (ii) to set out the fees for certifying an international application based on a more than one application or registration on paper and through TEAS, respectively. The paper filing fee is increased from $150 to $250 per class.

The USPTO revises § 7.6(a)(3) to read ''Transmission of subsequent designation'' and adds §§ 7.6(a)(3)(i) and (ii) to set out the fees for transmitting a subsequent designation under § 7.21 on paper and through TEAS, respectively. The paper filing fee is increased from $100 to $200.

The USPTO revises § 7.6(a)(4) to read ''Transmission of request to record an assignment or restriction'' and adds §§ 7.6(a)(4)(i) and (ii) to set out the fees for transmitting a request to record an assignment or restriction under § 7.23 or § 7.24 on paper and through TEAS, respectively. The paper filing fee is increased from $100 to $200.

The USPTO revises § 7.6(a)(5) to read ''Notice of replacement'' and adds §§ 7.6(a)(5)(i) and (ii) to set out the fees for filing a notice of replacement under § 7.28 on paper and through TEAS, respectively. The fee for filing a notice of replacement on paper is increased from $100 to $200 per class.

The USPTO revises § 7.6(a)(6) to read ''Affidavit under section 71'' and to add §§ 7.6(a)(6)(i) and (ii) to set out the fees for filing an affidavit under section 71 of the Act on paper and through TEAS, respectively. The paper filing fee is increased from $100 to $225 per class, and the electronic filing fee is increased from $100 to $125 per class.

The USPTO revises § 7.6(a)(7) to read ''Filing affidavit under section 71 during grace period'' and adds §§ 7.6(a)(7)(i) and (ii) to set out the surcharge for filing an affidavit under section 71 of the Act during the grace period on paper and through TEAS, respectively. The surcharge for filing an affidavit during the grace period on paper is increased from $100 to $200 per class.

The USPTO revises § 7.6(a)(8) to read ''Correcting deficiency in section 71 affidavit'' and adds §§ 7.6(a)(8)(i) and (ii) to set out the fees for correcting a deficiency in a section 71 affidavit on paper and through TEAS, respectively. The fee for filing the correction on paper is increased from $100 to $200.

Rulemaking Requirements

America Invents Act

This rulemaking sets and adjusts fees under Section 10(a) of the AIA. Section 10(a) of the AIA authorizes the Director to set or adjust by rule any trademark fee established, authorized, or charged under the Trademark Act for any services performed by, or materials furnished by the Office. *See* Section 10 of the AIA, Public Law 112–29, 125 Stat. 284, 316–17. Section 10(e) of the AIA sets forth the general requirements for rulemakings that set or adjust fees under this authority. In particular, Section 10(e)(1) requires the Director to publish in the **Federal Register** any proposed fee change under Section 10, and include in such publication the specific rationale and purpose for the proposal, including the possible expectations or benefits resulting from the proposed change. For such rulemakings, the AIA requires that the Office provide a public comment period of not less than 45 days.

The TPAC advises the Under Secretary of Commerce for Intellectual Property and Director of the USPTO on the management, policies, goals, performance, budget, and user fees of Trademark operations. When adopting fees under Section 10, the AIA requires the Director to provide the TPAC with the proposed fees at least 45 days prior to publishing the proposed fees in the **Federal Register**. The TPAC then has at least 30 days within which to deliberate, consider, and comment on the proposal, as well as hold public hearing(s) on the proposed fees. The TPAC must make a written report available to the public of the comments, advice, and recommendations of the committee regarding the proposed fees before the Office issues any final fees. The Office will consider and analyze any comments, advice, or recommendations received from the TPAC before finally setting or adjusting fees. Fees set or adjusted under Section 10 may not become effective before the end of the 45-day period beginning on the day after the date on which the final rule setting or adjusting the fees is published in the **Federal Register**.

Consistent with the requirements of the AIA, on October 14, 2015, the Director notified the TPAC of the Office's intent to set or adjust trademark fees and submitted a preliminary trademark fee proposal with supporting materials. The preliminary trademark fee proposal and associated materials are available at: *http://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting*. The revenue estimate for the fee proposal considered by the TPAC was included in the USPTO FY 2017 President's Budget request. The fee schedule associated with the original proposal is presented as Alternative 4—Original Proposal to TPAC.

The TPAC held a public hearing in Alexandria, Virginia on November 3, 2015. Transcripts of this hearing and comments submitted to the TPAC in writing are available for review at *http://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting*. The TPAC released its report regarding the preliminary proposed fees on November 30, 2015. The report can be found online at *http://www.uspto.gov/*

about-us/performance-and-planning/fee-setting-and-adjusting. The proposed rule was published in the **Federal Register** on May 27, 2016 and the public was provided with a 45-day comment period. After consideration of public comments, the USPTO publishes this final rule, which is effective on January 14, 2017.

Final Regulatory Flexibility Analysis

The USPTO publishes this Final Regulatory Flexibility Analysis (FRFA) as required by the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) to examine the impact of the Office's proposed changes to trademark fees on small entities. Under the RFA, whenever an agency is required by 5 U.S.C. 553 (or any other law) to publish a notice of proposed rulemaking (NPRM), the agency must prepare and make available for public comment a FRFA, unless the agency certifies under 5 U.S.C. 605(b) that the proposed rule, if implemented, will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 605. The USPTO published an Initial Flexibility Analysis (IRFA), along with the NPRM, on May 27, 2016 (81 FR 33619). The USPTO received no comments from the public directly applicable to the IFRA, as stated below in Item 2.

Items 1–6 below discuss the six items specified in 5 U.S.C. 604(a)(1)–(6) to be addressed in a FRFA. Item 6 below discusses alternatives considered by the Office.

1. Succinct statement of the need for, and objectives of, the rule:

The USPTO is setting and adjusting certain trademark fees as authorized by Section 10 of the AIA. The fee schedule implemented under Section 10 in this rulemaking will further key policy considerations to: (1) Better align fees with full costs; (2) protect the integrity of the register; and (3) promote the efficiency of the trademark process; and recover the aggregate estimated trademark costs of the Office to achieve strategic and operational goals, such as maintaining an operating reserve, implementing measures to maintain trademark pendency and high trademark quality, modernizing the trademark IT systems, continuing programs for stakeholder and public outreach, and enhancing operations of the TTAB. Aggregate costs are estimated through the USPTO budget-formulation process with the annual preparation of a five-year performance-based budget request. Revenues are estimated based on the projected demand for trademark products and services and fee rates.

As to the legal basis for the final rule, Section 10 of the AIA provides the authority for the Director to set or adjust by rule any fee established, authorized, or charged under the Trademark Act of 1946, 15 U.S.C. 1051 *et seq.,* as amended. *See also* Section 31 of the Trademark Act, 15 U.S.C. 1113.

2. A statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments:

The USPTO did not receive any public comments in response to the IRFA. However, the Office received comments about fees in general, as well as particular fees, and their impact on small entities, which are further discussed in the preamble.

3. The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments:

The USPTO did not receive any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule.

4. Description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available:

The USPTO does not collect or maintain statistics in trademark cases on small-versus large-entity applicants, and this information would be required in order to determine the number of small entities that would be affected by the final rule. The USPTO believes that the overall impact of the fee structure implemented herein on applicants and registrants will be positive, because it promotes the more cost-effective electronic filing system. There will be little or no impact for the majority of applicants and registrants that file electronically and communicate on a timely basis.

The final rule applies to any entity filing with USPTO. The USPTO estimates that during the first fiscal year under the rules, assuming an expected implementation date of January 2017, the USPTO would expect to collect approximately $9.5 million more in trademark processing, service, and TTAB fees. The USPTO would receive an additional $0.7 million in fees from paper-filed applications and $8.8 million more from electronically filed applications, including $3 million from TEAS applications for the registration of a mark, $3.2 million from requests for extension of protection and subsequent designations, $0.3 million for additional fees for applications failing to meet the TEAS Plus or TEAS RF requirements, $4 million for affidavits of use under sections 8 and 71, and $5 million less for extensions of time for filing a statement of use. Total TTAB filing fees would increase by $3.6 million; $2.1 million is expected from the newly established fees for filing extensions of time to file an opposition.

Trademark fee category	Estimated collections with current fees	Estimated collections with final rule fees	Change
Total Trademark Fees	$307,468,600	$316,957,100	$9,488,500
Paper-Filed Applications	1,752,750	2,418,550	665,800
Electronically Filed Applications	294,063,575	302,875,475	8,811,900
TEAS Applications for the Registration of a Mark	17,787,900	20,763,600	2,975,700
Request for Extension of Protection and Subsequent Designations	19,384,950	22,567,950	3,183,000
Failing to Meet the TEAS Plus or TEAS RF Requirements	320,800	663,200	342,400
Affidavit under § 8 and § 71 of the Act	21,654,300	25,604,400	3,950,100
Extension of Time to File a Statement of Use	37,705,400	32,741,300	(4,964,100)
Total TTAB Fees	4,742,000	8,310,700	3,568,700
New TTAB Fees	0	2,142,300	2,142,300
Trademark Service Fees	11,652,240	11,663,440	11,200

5. Description of the reporting, recordkeeping, and other compliance requirements of the final rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record:

The final rule imposes no new reporting or recordkeeping requirements.

The final rule sets and adjusts trademark fees. The USPTO does not anticipate that the final rule would have a disproportionate impact upon any particular class of small or large entities.

6. Description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected:

The USPTO considered a total of five alternatives for setting fee rates before enacting this rule. A full list of current and proposed fees for each of the alternatives is available in the FRFA Tables and the Trademark Fee Aggregate Revenue Tables at *http://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting.* The alternatives are explained here with additional information regarding how each proposal was developed and the aggregate revenue was estimated. A description of the Aggregate Revenue Estimating Methodologies is available at: *http://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting.*

The USPTO chose the alternative implemented herein because it will enable the Office to achieve its goals effectively and efficiently without unduly burdening small entities, erecting barriers to entry, or stifling incentives to innovate. This alternative furthers key policy considerations of better aligning fees with full costs, protecting the integrity of the register, and promoting the efficiency of the trademark process while continuing to secure the Office's required revenue to meet its aggregate costs. The increased efficiencies realized through the final rule will benefit all applicants and registrants by allowing registrations to be granted sooner and more efficiently removing unused marks from the register, thus allowing mark owners to more quickly and assuredly register their marks. The fee schedule for this alternative (labeled Final Rule) is available at: *http://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting.*

One alternative to setting and increasing the proposed fees would be to take no action at this time regarding trademark fees and to leave all trademark fees as currently set. This alternative was rejected because it will not assist in protecting the integrity of the register by incentivizing more timely filing of applications and other filings and more efficient resolution of appeals and trials, will not promote the efficiency of the process by, in part, increasing the affordability of electronic filing options relative to paper filings, and will not better align fees with the full cost of products and services. In addition, it does not sufficiently recover aggregate costs. The fee schedule for this alternative (labeled Alternative 1—No Change) is available at: *http://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting.*

Another alternative to setting and increasing the fees that was considered was to tie all trademark fees to the Consumer Price Index (CPI), applying a 9.956%, multi-year, across-the-board inflationary increase to all trademark fees. The 9.956% represents the estimated cumulative inflationary adjustment from FY 2017 through FY 2021. As estimated by the Congressional Budget Office, projected inflationary rates by fiscal year are: 2.17% in FY 2017, 2.39% in FY 2018, 2.38% in FY 2019, 2.42% in FY 2020, and 2.42% in FY 2021. This alternative was rejected because, unlike the fee structure implemented herein, fee increases would be in excess of aggregate costs and there would be no improvements in fee design to accomplish the stated objectives of protecting the integrity of the register by incentivizing more timely filing of applications and other filings and more efficient resolution of appeals and trials. In addition, it was determined that adjusting trademark fees in accordance with increases or decreases in the CPI would likely lead to user confusion as fees would be adjusted by what could be viewed as non-traditional or unpredictable increments. The fee schedule for this alternative (labeled Alternative 2—CPI Increase) is available at: *http://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting.*

Another alternative that was considered was full cost recovery per fee. This would require USPTO to set each trademark fee at 100% of unit cost to allow the USPTO to recover full cost per fee based on the most recent fee unit cost trends. The USPTO uses Activity Based Information to determine the historical costs of activities related to each fee. Additional information about the methodology is available at: *http://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting.*

It is common practice in the Federal Government to set a particular fee at a level to recover the cost of a given good or service. In OMB Circular A–25: *User Charges,* the OMB states that user charges (fees) should be sufficient to recover the full cost to the Federal Government of providing the particular service, resource, or good, when the government is acting in its capacity as sovereign. This alternative was rejected because it was determined that the costs for any given product or service can vary from year to year, such that a yearly review of all, and adjustment to many, trademark fees would be required, and could also lead to stakeholder confusion regarding what any given trademark fee was currently set at and what the relevant fee would be in the future. This alternative would have increased revenue by more than the final rule in part because workloads are expected to increase. In addition, it was determined that setting the trademark fees to recover 100% of all costs associated with each product or service would not properly promote the efficiency of the process. The fee schedule for this alternative (labeled Alternative 3—Individual Cost Recovery) is available at: *http://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting.*

For purposes of this discussion, the preliminary trademark fee proposal presented to the TPAC is identified as Alternative 4 in the Trademark Fee Aggregate Revenue Tables available at: *http://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting.* The revenue estimate for the preliminary proposal considered by the TPAC was included in the USPTO FY 2017 President's Budget request. That proposal, as addressed in the preamble, was modified based on the feedback from the TPAC report received November 30, 2015 and feedback received from public comments. The preliminary proposal included an increase in the fee to file a request for an extension of time to file a statement of use that would apply only to U.S.-based applicants that filed an application based on a future intention to use the mark. The final rule no longer includes an increase to that fee unless it is filed on paper, consistent with the increase in all paper-filed requests.

Instead, the final rule includes a reduction in the fee for electronically filing a request for an extension of time to file a statement of use and an increase in the fee for filing an affidavit under section 8 and 71, which apply to the continued maintenance of a registration. The final rule also increases the fee for filing a TEAS application. The fee schedule for this alternative (labeled Alternative 4—Original Proposal to TPAC (FY 17 PB)) is available at: *http://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting.*

Executive Order 12866 (Regulatory Planning and Review): This rule has been determined to be significant, but not economically significant, for purposes of Executive Order 12866 (Sept. 30, 1993).

Executive Order 13563 (Improving Regulation and Regulatory Review): The USPTO has complied with Executive Order 13563 (Jan. 18, 2011). Specifically, the USPTO has, to the extent feasible and applicable: (1) Made a reasoned determination that the benefits justify the costs of the rule; (2) tailored the rule to impose the least burden on society consistent with obtaining the regulatory objectives; (3) selected a regulatory approach that maximizes net benefits; (4) specified performance objectives; (5) identified and assessed available alternatives; (6) provided the public with a meaningful opportunity to participate in the regulatory process, including soliciting the views of those likely affected prior to issuing a notice of proposed rulemaking, and provided online access to the rulemaking docket; (7) attempted to promote coordination, simplification, and harmonization across government agencies and identified goals designed to promote innovation; (8) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and (9) ensured the objectivity of scientific and technological information and processes, to the extent applicable.

Executive Order 13132 (Federalism): This rule does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

Congressional Review Act: Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), prior to issuing any final rule, the USPTO will submit a report containing the final rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the Government Accountability Office. The changes in this notice are not expected to result in an annual effect on the economy of 100 million dollars 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 notice is not expected to result in a ''major rule'' as defined in 5 U.S.C. 804(2).

Unfunded Mandates Reform Act of 1995: The changes set forth in this rulemaking do not involve a Federal intergovernmental mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, of 100 million dollars (as adjusted) or more in any one year, or a Federal private sector mandate that will result in the expenditure by the private sector of 100 million dollars (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1501 *et seq.*

Paperwork Reduction Act: This rule involves information collection requirements that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The collection of information involved in this rule has been reviewed and previously approved by OMB under control numbers 0651–0009, 0651–0040, 0651–0050, 0651–0051, 0651–0054, and 0651–0055.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

List of Subjects

37 CFR Part 2

Administrative practice and procedure, Trademarks.

37 CFR Part 7

Administrative practice and procedure, Trademarks, International registration.

For the reasons stated in the preamble and under the authority contained in Section 10(a) of the AIA, 15 U.S.C. 1113, 15 U.S.C. 1123, and 35 U.S.C. 2, as amended, the USPTO amends parts 2 and 7 of title 37 as follows:

PART 2—RULES OF PRACTICE IN TRADEMARK CASES

■ 1. The authority citation for 37 CFR part 2 continues to read as follows:

Authority: 15 U.S.C. 1113, 15 U.S.C. 1123, 35 U.S.C. 2, Section 10 of Pub. L. 112–29, unless otherwise noted.

■ 2. Revise § 2.6 to read as follows:

§ 2.6 Trademark fees.

(a) Trademark process fees.

(1) Application filing fees.

(i) For filing an application on paper, per class—$600.00

(ii) For filing an application through TEAS, per class—$400.00

(iii) For filing a TEAS Reduced Fee (RF) application through TEAS under § 2.23, per class—$275.00

(iv) For filing a TEAS Plus application through TEAS under § 2.22, per class—$225.00

(v) Additional processing fee under §§ 2.22(c) or 2.23(c), per class—$125.00

(2) Amendment to allege use.

(i) For filing an amendment to allege use under section 1(c) of the Act on paper, per class—$200.00

(ii) For filing an amendment to allege use under section 1(c) of the Act through TEAS, per class—$100.00

(3) Statement of use.

(i) For filing a statement of use under section 1(d)(1) of the Act on paper, per class—$200.00

(ii) For filing a statement of use under section 1(d)(1) of the Act through TEAS, per class—$100.00

(4) Extension of time for filing statement of use.

(i) For filing a request under section 1(d)(2) of the Act for a six-month extension of time for filing a statement of use under section 1(d)(1) of the Act on paper, per class—$225.00

(ii) For filing a request under section 1(d)(2) of the Act for a six-month extension of time for filing a statement of use under section 1(d)(1) of the Act through TEAS, per class—$125.00

(5) Application for renewal of a registration fees.

(i) For filing an application for renewal of a registration on paper, per class—$500.00

(ii) For filing an application for renewal of a registration through TEAS, per class—$300.00

(6) Renewal during grace period.

(i) Additional fee for filing a renewal application during the grace period on paper, per class—$200.00

(ii) Additional fee for filing a renewal application during the grace period through TEAS, per class—$100.00

(7) Publishing mark under section 12(c).

(i) For filing to publish a mark under section 12(c) on paper, per class—$200.00

(ii) For filing to publish a mark under section 12(c) through TEAS, per class—$100.00

(8) New certificate of registration.

(i) For issuing a new certificate of registration upon request of registrant, request filed on paper—$200.00

(ii) For issuing a new certificate of registration upon request of registrant, request filed through TEAS—$100.00

(9) Certificate of correction of registrant's error.

(i) For a certificate of correction of registrant's error, request filed on paper—$200.00

(ii) For a certificate of correction of registrant's error, request filed through TEAS—$100.00

(10) Disclaimer to a registration.

(i) For filing a disclaimer to a registration, on paper—$200.00

(ii) For filing a disclaimer to a registration, through TEAS or ESTTA—$100.00

(11) Amendment of registration.

(i) For filing an amendment to a registration, on paper—$200.00

(ii) For filing an amendment to a registration, through TEAS or ESTTA—$100.00

(12) Affidavit under section 8.

(i) For filing an affidavit under section 8 of the Act on paper, per class—$225.00

(ii) For filing an affidavit under section 8 of the Act through TEAS, per class—$125.00

(13) Affidavit under section 15.

(i) For filing an affidavit under section 15 of the Act on paper, per class—$300.00

(ii) For filing an affidavit under section 15 of the Act through TEAS, per class—$200.00

(14) Filing section 8 affidavit during grace period.

(i) Additional fee for filing a section 8 affidavit during the grace period on paper, per class—$200.00

(ii) Additional fee for filing a section 8 affidavit during the grace period through TEAS, per class—$100.00

(15) Petitions to the Director.

(i) For petitions to the Director filed on paper—$200.00

(ii) For petitions to the Director filed through TEAS—$100.00

(16) Petition to cancel.

(i) For filing a petition to cancel on paper, per class—$500.00

(ii) For filing a petition to cancel through ESTTA, per class—$400.00

(17) Notice of opposition.

(i) For filing a notice of opposition on paper, per class—$500.00

(ii) For filing a notice of opposition through ESTTA, per class—$400.00

(18) Ex parte appeal.

(i) For ex parte appeal to the Trademark Trial and Appeal Board filed on paper, per class—$300.00

(ii) For ex parte appeal to the Trademark Trial and Appeal Board filed through ESTTA, per class—$200.00

(19) Dividing an application.

(i) Request to divide an application filed on paper, per new application created—$200.00

(ii) Request to divide an application filed through TEAS, per new application created—$100.00

(20) Correcting deficiency in section 8 affidavit.

(i) For correcting a deficiency in a section 8 affidavit via paper filing—$200.00

(ii) For correcting a deficiency in a section 8 affidavit via TEAS filing—$100.00

(21) Correcting deficiency in renewal application.

(i) For correcting a deficiency in a renewal application via paper filing—$200.00

(ii) For correcting a deficiency in a renewal application via TEAS filing—$100.00

(22) Extension of time for filing notice of opposition under § 2.102(c)(1)(ii) or (c)(2).

(i) For filing a request for an extension of time to file a notice of opposition under § 2.102(c)(1)(ii) or (c)(2) on paper—$200.00

(ii) For filing a request for an extension of time to file a notice of opposition under § 2.102(c)(1)(ii) or (c)(2) through ESTTA—$100.00

(23) Extension of time for filing notice of opposition under § 2.102(c)(3).

(i) For filing a request for an extension of time to file a notice of opposition under § 2.102(c)(3) on paper—$300.00

(ii) For filing a request for an extension of time to file a notice of opposition under § 2.102(c)(3) through ESTTA—$200.00

(b) Trademark service fees.

(1) For printed copy of registered mark, copy only. Service includes preparation of copies by the Office within two to three business days and delivery by United States Postal Service; and preparation of copies by the Office within one business day of receipt and delivery to an Office Box or by electronic means (*e.g.,* facsimile, electronic mail)—$3.00

(2) Certified or uncertified copy of trademark application as filed processed within seven calendar days—$15.00

(3) Certified or uncertified copy of a trademark-related official record—$50.00

(4) Certified copy of a registered mark, showing title and/or status:

(i) Regular service—$15.00

(ii) Expedited local service—$30.00

(5) Certified or uncertified copy of trademark records, per document except as otherwise provided in this section—$25.00

(6) For recording each trademark assignment, agreement or other document relating to the property in a registration or application

(i) First property in a document—$40.00

(ii) For each additional property in the same document—$25.00

(7) For assignment records, abstract of title and certification, per registration—$25.00

(8) Additional Fee for Overnight Delivery—$40.00

(9) Additional Fee for Expedited Service—$160.00

(10) For processing each payment refused (including a check returned ''unpaid'') or charged back by a financial institution—$50.00

(11) Deposit account service charge for each month when the balance at the end of the month is below $1,000—$25.00

■ 3. Amend § 2.200 to revise paragraph (b) to read as follows:

§ 2.200 Assignment records open to public inspection.

* * * * *

(b) An order for a copy of an assignment or other document should identify the reel and frame number where the assignment or document is recorded.

■ 4. Amend § 2.208 to revise paragraph (a) to read as follows:

§ 2.208 Deposit accounts.

(a) For the convenience of attorneys, and the general public in paying any fees due, in ordering copies of records, or services offered by the Office, deposit accounts may be established in the Office. A minimum deposit of $1,000 is required for paying any fees due or in ordering any services offered by the

Office. The Office will issue a deposit account statement at the end of each month. A remittance must be made promptly upon receipt of the statement to cover the value of items or services charged to the account and thus restore the account to its established normal deposit. An amount sufficient to cover all fees, copies, or services requested must always be on deposit. Charges to accounts with insufficient funds will not be accepted. A service charge (§ 2.6(b)(11)) will be assessed for each month that the balance at the end of the month is below $1,000.

* * * * *

PART 7—RULES OF PRACTICE IN FILINGS PURSUANT TO THE PROTOCOL RELATING TO THE MADRID AGREEMENT CONCERNING THE INTERNATIONAL REGISTRATION OF MARKS

■ 5. The authority citation for 37 CFR Part 7 continues to read as follows:

Authority: 15 U.S.C. 1123, 35 U.S.C. 2, unless otherwise noted.

■ 6. Revise § 7.6 to read as follows:

§ 7.6 Schedule of U.S. process fees.

(a) The Office requires the following process fees:

(1) Certification of international application based on single application or registration.

(i) For certifying an international application based on a single basic application or registration, filed on paper, per class—$200.00

(ii) For certifying an international application based on a single basic application or registration, filed through TEAS, per class—$100.00

(2) Certification of international application based on more than one application or registration.

(i) For certifying an international application based on more than one basic application or registration filed on paper, per class—$250.00

(ii) For certifying an international application based on more than one basic application or registration filed through TEAS, per class—$150.00

(3) Transmission of subsequent designation.

(i) For transmitting a subsequent designation under § 7.21, filed on paper—$200.00

(ii) For transmitting a subsequent designation under § 7.21, filed through TEAS—$100.00

(4) Transmission of request to record an assignment or restriction.

(i) For transmitting a request to record an assignment or restriction, or release of a restriction, under § 7.23 or § 7.24 filed on paper—$200.00

(ii) For transmitting a request to record an assignment or restriction, or release of a restriction, under § 7.23 or § 7.24 filed through TEAS—$100.00

(5) Notice of replacement.

(i) For filing a notice of replacement under § 7.28 on paper, per class—$200.00

(ii) For filing a notice of replacement under § 7.28 through TEAS, per class—$100.00

(6) Affidavit under section 71.

(i) For filing an affidavit under section 71 of the Act on paper, per class—$225.00

(ii) For filing an affidavit under section 71 of the Act through TEAS, per class—$125.00

(7) Filing affidavit under section 71 during grace period.

(i) Surcharge for filing an affidavit under section 71 of the Act during the grace period on paper, per class—$200.00

(ii) Surcharge for filing an affidavit under section 71 of the Act during the grace period through TEAS, per class—$100.00

(8) Correcting deficiency in section 71 affidavit.

(i) For correcting a deficiency in a section 71 affidavit filed on paper—$200.00

(ii) For correcting a deficiency in a section 71 affidavit filed through TEAS—$100.00

(b) The fees required in paragraph (a) of this section must be paid in U.S. dollars at the time of submission of the requested action. *See* § 2.207 of this chapter for acceptable forms of payment and § 2.208 of this chapter for payments using a deposit account established in the Office.

Dated: October 17, 2016.

Michelle K. Lee,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2016–25506 Filed 10–20–16; 8:45 am]

BILLING CODE 3510–16–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2016–0335; FRL–9954–29–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Adoption of Control Techniques Guidelines for Control of Volatile Organic Compound Emissions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving three state implementation plan (SIP) revisions submitted by the Commonwealth of Virginia (Virginia). These revisions include amendments to the Virginia Department of Environmental Quality's (VADEQ) regulations and address the requirement to adopt reasonably available control technology (RACT) for sources covered by EPA's Control Techniques Guidelines (CTG) standards for the following categories: Offset lithographic printing and letterpress printing, industrial solvent cleaning operations, miscellaneous industrial adhesives, and miscellaneous metal and plastic parts coatings. EPA is approving these revisions to the Virginia SIP in accordance with the requirements of the Clean Air Act (CAA).

DATES: This final rule is effective on November 21, 2016.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2016–0335. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *http://www.regulations.gov,* or please contact the person identified in the ''For Further Information Contact'' section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Leslie Jones Doherty, (215) 814–3409, or by email at *jones.leslie@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On August 23, 2016 (87 FR 57531), EPA published a notice of proposed

rulemaking (NPR) for the Commonwealth of Virginia. In the NPR, EPA proposed approval of three revisions to the Virginia SIP concerning the adoption of EPA CTGs for offset lithographic printing and letterpress printing, industrial solvent cleaning operations, miscellaneous industrial adhesives, and miscellaneous metal and plastic parts coatings sources in the specific portion of Virginia known as the Northern Virginia Volatile Organic Compound Emissions Control Area.[1] The formal SIP revision was submitted by Virginia, through VADEQ, on February 1, 2016.

The ozone transport region (OTR) was established under section 184(a) of the CAA to address interstate transport of ozone and includes the northern portion of Virginia that is part of the Metropolitan Statistical Area of the District Columbia, which Virginia refers to as the ''Northern Virginia Volatile Organic Compound Emissions Control Area.'' Pursuant to section 184(b)(1)(B) of the CAA, all areas in the OTR must implement RACT with respect to sources of volatile organic compounds (VOCs) in the state covered by CTGs. Thus, Virginia must implement RACT with respect to sources of VOCs covered by CTGs in the Northern Virginia Volatile Organic Compound Emissions Control Area. CAA section 184(b)(1)(B) and (2). States can follow the CTGs and adopt state regulations to implement the recommendations contained therein, or they can adopt alternative approaches. In either case, states must submit their RACT rules to EPA for review and approval as part of the SIP process.

In 2006 and 2008, EPA published new CTGs entitled *Control Techniques Guidelines for Offset Lithographic and Letterpress Printing* (Publication No. EPA 453/R–06–002; September 2006); *Control Techniques Guidelines for Industrial Cleaning Solvents* (Publication No. EPA 453/R–06–001; September 2006); *Control Techniques Guidelines for Miscellaneous Industrial Adhesives* (Publication No. EPA 453/R–08–005; September 2008); and *Control Techniques Guidelines for Miscellaneous Metal and Plastic Parts Coatings* (Publication No. EPA 453/R–08–003; September 2008). EPA developed new CTGs for these industries after reviewing existing state and local VOC emission reduction approaches, new source performance standards (NSPS), previously issued CTGs, and national emission standards for hazardous air pollutants (NESHAP) for these source categories.

II. Summary of SIP Revision

On February 1, 2016, Virginia, through VADEQ, submitted amended and new regulations for inclusion in the Virginia SIP concerning the adoption of the EPA CTGs for offset lithographic printing and letterpress printing, industrial solvent cleaning operations, miscellaneous industrial adhesives, and miscellaneous metal and plastic parts coatings in the Northern Virginia Volatile Organic Compound Emissions Control Area. Virginia has adopted EPA's CTG standards for these industries by amending regulation 9VAC5, chapter 40, Existing Stationary Sources, articles 34 and 53 and adding articles 56, 56.1, 57, 58, and 59 to 9VAC5, chapter 40. Additionally, Virginia has amended supporting definitions in 9VAC5, chapter 20, General Provisions, which relate to the new CTG standards. The Virginia regulations adopt the equivalent of the specific EPA CTG recommendations and address CAA requirements for RACT (for sources covered by CTGs) in sections 172 and 182 as referenced by section 184. Other specific requirements and the rationale for EPA's proposed action are explained in the NPR and technical support document (TSD) and will not be restated here. No public comments were received on the NPR.

III. Final Action

EPA is approving VADEQ's February 1, 2016 SIP submittal as a revision to the Virginia SIP. The SIP submittal being approved consists of amendments to regulation 9VAC5 chapter 40, Existing Stationary Sources, and 9VAC5 chapter 20, General Provisions, and addresses the requirement to adopt RACT for sources located in the Northern Virginia VOC Emissions Control Area covered by EPA's CTG standards in accordance with CAA requirements in sections 172, 182 and 184 for the following categories: Offset lithographic printing and letterpress printing, industrial cleaning solvent operations, miscellaneous industrial adhesives, and miscellaneous metal and plastic parts coatings.

IV. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) ''privilege'' for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) Are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1–1198, precludes granting a privilege to documents and information ''required by law,'' including documents and information ''required by federal law to maintain program delegation, authorization or approval,'' since Virginia must ''enforce federally authorized environmental programs in a manner that is no less stringent than their federal counterparts. . . .'' The opinion concludes that ''[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by federal law to maintain program delegation, authorization or approval.''

Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that ''[t]o the extent consistent with requirements imposed by federal law,'' any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any federally authorized programs, since ''no immunity could be

[1] The northern portion of Virginia is defined as the Northern Virginia Volatile Organic Compound Emissions Control Area in 9VAC5–20–206 (General Provisions).

afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with federal law, which is one of the criteria for immunity.''

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

V. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the VADEQ regulations regarding control of VOC emissions from offset lithographic printing and letterpress printing, industrial solvent cleaning operations, miscellaneous industrial adhesives, and miscellaneous metal and plastic parts coatings in the Northern Virginia Volatile Organic Compound Emissions Control Area as well as related definitions as described in section II of this rulemaking action. Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference by the Director of the Federal Register in the next update to the SIP compilation.[2] EPA has made, and will continue to make, these materials generally available through *http://www.regulations.gov* and/or at the EPA Region III Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

[2] 62 FR 27968 (May 22, 1997).

VI. Statutory and Executive Order Reviews

A. General Requirements

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land as defined in 18 U.S.C. 1151 or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 20, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action approving RACT rules for sources in northern Virginia may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 29, 2016.

Shawn M. Garvin,

Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart VV—Virginia

■ 2. In § 52.2420:

■ a. In the table in paragraph (c):

■ i. Revise the entries ''5–40–4760'' and ''5–40–7800''.

■ ii. Add the heading ''Article 56, Emission Standards for Letterpress Printing Operations in the Northern Virginia Volatile Organic Compound Emissions Control Area, 8-hour Ozone Standard (Rule 4–56)'' and the entries ''5–40–8380''; ''5–40–8382''; ''5–40–8384''; ''5–40–8386''; ''5–40–8388''; ''5–40–8396''; ''5–40–8398''; ''5–40–8400''; ''5–40–8410''; ''5–40–8412''; ''5–40–8414''; and ''5–40–8418''; the heading ''Article 56.1 Emission Standards for Offset Lithographic Printing Operations in the Northern Virginia Volatile Organic Compound Emissions Control Area, 8-hour Ozone Standard (Rule 4–56.1)'' and the entries ''5–40–8420''; ''5–40–8422''; ''5–40–8424''; ''5–40–8426''; ''5–40–8428''; ''5–40–8434''; ''5–40–8436''; ''5–40–8438''; ''5–40–8440''; ''5–40–8450''; ''5–40–8460''; the heading ''Article 57 Emission Standards for Industrial Solvent Cleaning Operations in the Northern Virginia Volatile Organic Compound Emissions Control Area, 8-hour Ozone Standard (Rule 4–57)'' and the entries ''5–40–8510''; ''5–40–8520''; ''5–40–8530''; ''5–40–8540''; ''5–40–8550''; ''5–40–8580''; ''5–40–8590''; ''5–40–8600''; ''5–40–8610''; ''5–40–8620''; ''5–40–8630''; ''5–40–8650''; the heading ''Article 58 Emission Standards for Miscellaneous Industrial Adhesive Application Processes in the Northern Virginia Volatile Organic Compound Emissions Control Area, 8-hour Ozone Standard (Rule 4–58)'' and the entries ''5–40–8660''; ''5–40–8670''; ''5–40–8680''; ''5–40–8690''; ''5–40–8700''; ''5–40–8730''; ''5–40–8740''; ''5–40–8750''; ''5–40–8760''; ''5–40–8770''; ''5–40–8780''; ''5–40–8800''; the heading ''Article 59 Emission Standards for Miscellaneous Metal Parts and Products Coating Application Systems in the Northern Virginia Volatile Organic Compound Emissions Control Area, 8-hour Ozone Standard (Rule 4–58)'' and the entries ''5–40–8810''; ''5–40–8820''; ''5–40–8830''; ''5–40–8840''; ''5–40–8850''; ''5–40–8880''; ''5–40–8890''; ''5–40–8900''; ''5–40–8910''; ''5–40–8920''; ''5–40–8930''; and ''5–40–8950''.

■ b. In the table in paragraph (e), add the entry ''Documents incorporated by reference''.

The additions and revisions read as follows:

§ 52.2420 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
* * *	*	*	*	* *
9 VAC 5, Chapter 40 Existing Stationary Sources [Part IV]				
* * *	*	*	*	* *
Part II Emission Standards				
* * *	*	*	*	* *
Article 34 Emission Standards for Miscellaneous Metal Parts and Products Coating Application Systems (Rule 4–34)				
5–40–4760	Applicability and Designation of Affected Facility.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Amended to refer Northern VA VOC emission control area to Article 59.
* * *	*	*	*	* *
Article 53 Emission Standards for Lithographic Printing Processes (Rule 4–53) [Formerly Article 45]				
5–40–7800	Applicability and Designation of Affected Facility.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Amended to refer Northern VA VOC emission control area to Article 56.1.
* * *	*	*	*	* *
Article 56, Emission Standards for Letterpress Printing Operations in the Northern Virginia Volatile Organic Compound Emissions Control Area, 8-hour Ozone Standard (Rule 4–56)				
5–40–8380	Applicability and Designation of Affected Facility.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8382	Definitions	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8384	Standard for volatile organic compounds.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8386	Standard for visible emissions	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES—Continued

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
5–40–8388	Standard for fugitive/dust emissions.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8396	Compliance	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8398	Compliance schedule	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8400	Test methods and procedures	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8410	Monitoring	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8412	Notification, records, and reporting.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8414	Registration	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8418	Permits	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
Article 56.1 Emission Standards for Offset Lithographic Printing Operations in the Northern Virginia Volatile Organic Compound Emissions Control Area, 8-hour Ozone Standard (Rule 4–56.1)				
5–40–8420	Applicability and Designation of Affected Facility.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8422	Definitions	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8424	Standard for volatile organic compounds.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8426	Standard for visible emissions	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8428	Standard for fugitive/dust emissions.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8434	Compliance	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8436	Compliance schedule	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8438	Test methods and procedures	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8440	Monitoring	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8450	Notification, records, and reporting.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8460	Registration	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8480	Permits	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
Article 57 Emission Standards for Industrial Solvent Cleaning Operations in the Northern Virginia Volatile Organic Compound Emissions Control Area, 8-hour Ozone Standard (Rule 4–57)				
5–40–8510	Applicability and Designation of Affected Facility.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8520	Definitions	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8530	Standard for volatile organic compounds.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8540	Standard for visible emissions	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8550	Standard for fugitive/dust emissions.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8580	Compliance	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8590	Compliance schedule	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8600	Test methods and procedures	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8610	Monitoring	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8620	Notification, records, and reporting.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8630	Registration	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES—Continued

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
5–40–8650	Permits	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
Article 58 Emission Standards for Miscellaneous Industrial Adhesive Application Processes in the Northern Virginia Volatile Organic Compound Emissions Control Area, 8-hour Ozone Standard (Rule 4–58)				
5–40–8660	Applicability and Designation of Affected Facility.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8670	Definitions	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8680	Standard for volatile organic compounds.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8690	Standard for visible emissions	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8700	Standard for fugitive/dust emissions.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8730	Compliance	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8740	Compliance schedule	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8750	Test methods and procedures	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8760	Monitoring	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8770	Notification, records, and reporting.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8780	Registration	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8800	Permits	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
Article 59 Emission Standards for Miscellaneous Metal Parts and Products Coating Application Systems in the Northern Virginia Volatile Organic Compound Emissions Control Area, 8-hour Ozone Standard (Rule 4–58)				
5–40–8810	Applicability and Designation of Affected Facility.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8820	Definitions	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8830	Standard for volatile organic compounds.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8840	Standard for visible emissions	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8850	Standard for fugitive/dust emissions.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8880	Compliance	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8890	Compliance schedule	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8900	Test methods and procedures	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8910	Monitoring	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8920	Notification, records, and reporting.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8930	Registration	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.
5–40–8950	Permits	02/01/16	10/21/16, [Insert **Federal Register** citation].	Added.

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(e) * * *

Name of nonregulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
Documents incorporated by reference.	Northern Virginia VOC emissions control area.	02/01/16	10/21/16, [Insert **Federal Register** citation].	Section 15 added

[FR Doc. 2016–25441 Filed 10–20–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2013–0004; FRL–9954–32–Region 10]

Partial Approval and Partial Disapproval of Attainment Plan for Oakridge, Oregon $PM_{2.5}$ Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: On December 12, 2012, the Oregon Department of Environmental Quality (ODEQ) submitted, on behalf of the Governor of Oregon, a State Implementation Plan (SIP) submission to address violations of the National Ambient Air Quality Standards (NAAQS) for particulate matter with an aerodynamic diameter of less than or equal to a nominal 2.5 micrometers ($PM_{2.5}$) for the Oakridge $PM_{2.5}$ nonattainment area (2012 SIP submission). The Lane Regional Air Protection Agency (LRAPA), in coordination with the ODEQ, developed the 2012 SIP submission for purposes of attaining the 2006 24-hour $PM_{2.5}$ NAAQS. On February 22, 2016, the ODEQ withdrew certain provisions of the 2012 SIP submission (2016 SIP withdrawal). The Environmental Protection Agency (EPA) has evaluated whether the remaining portions of the 2012 SIP submission meet the applicable Clean Air Act (CAA) requirements. Based on this evaluation, the EPA is finalizing partial approval and partial disapproval of the remaining portions of the 2012 SIP submission.

DATES: This final rule is effective November 21, 2016.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R10–OAR–2013–0004. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air Planning Unit, Office of Air and Waste, EPA Region 10, 1200 Sixth Avenue, Seattle, WA, 98101. The EPA requests that, if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Christi Duboiski at (360) 753–9081, *duboiski.christi@epa.gov* or by using the above EPA, Region 10 address.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background Information
II. Final Action
III. Consequences of a Disapproved SIP
IV. Incorporation by Reference
V. Statutory and Executive Orders Review

I. Background Information

On July 28, 2016, the EPA proposed to partially approve and partially disapprove the attainment plan submitted by the ODEQ on December 12, 2012 (81 FR 49592). An explanation of the CAA attainment planning requirements, a detailed analysis of the submittal, and the EPA's reasons for proposing partial approval and partial disapproval were provided in the notice of proposed rulemaking, and will not be restated here. The public comment period for the proposed rule ended on August 29, 2016. The EPA received no comments on the proposal.

II. Final Action

The EPA is finalizing approval of the following elements of the 2012 SIP submission:

- Description of the Oakridge $PM_{2.5}$ nonattainment area and listing of the area as nonattainment, and
- The base year 2008 emission inventory submitted to meet the CAA section 172(c)(3) requirement for emissions inventories.

The EPA is finalizing disapproval of the following elements of the 2012 SIP submission:

- The attainment year emission inventory submitted to meet the CAA section 172(c)(3) requirement for emissions inventories,
- the reasonably available control measures (RACM), including reasonably available control technology (RACT), submitted to meet the CAA sections 172(c)(1) and 189(a)(1)(C) requirements for control measures for moderate nonattainment areas,
- the attainment demonstration submitted to meet the CAA section 189(a)(1)(B) requirement for a demonstration that the plan will provide for attainment by the applicable attainment date,
- the motor vehicle emissions budget (MVEB) submitted to meet CAA section 176 requirement for transportation conformity,
- the demonstration of reasonable further progress (RFP) and quantitative milestones submitted to meet section 172(c)(2) and 189(c) requirements for RFP and quantitative milestones, and
- the contingency measures submitted to meet the section 172(c)(9) requirement for the implementation of measures to be undertaken, without further action by the state or EPA, if the area fails to make RFP or attain the NAAQS by the applicable attainment date.

III. Consequences of a Disapproved SIP

This section explains the consequences of a disapproved SIP submission required under the CAA. The Act provides for the imposition of sanctions and the promulgation of a federal implementation plan (FIP) if a state fails to submit, and the EPA approve, a plan revision that corrects the deficiencies identified by the EPA in its disapproval.

The Act's Provisions for Sanctions

Once the EPA finalizes disapproval of a required SIP submission, such as an attainment plan submission, or a portion thereof, CAA section 179(a) provides for the imposition of sanctions, unless the deficiency is corrected within 18 months of the final rulemaking of disapproval. The first sanction would apply 18 months after the EPA disapproves the SIP submission, or portion thereof. Under the EPA's sanctions regulations at 40 CFR 52.31, the first sanction imposed would be 2:1 offsets for sources subject to the new source review requirements under section 173 of the CAA. If the state has still failed to submit a SIP submission to correct the identified deficiencies for which the EPA proposes full or conditional approval 6 months after the first sanction is imposed, the second sanction will apply. The second sanction is a prohibition on the approval or funding certain highway projects.[1]

[1] On April 1, 1996 the US Department of Transportation published a notice in the **Federal Register** describing the criteria to be used to determine which highway projects can be funded or approved during the time that the highway sanction is imposed in an area. (*See* 61 FR 14363)

Federal Implementation Plan Provisions That Apply if a State Fails To Submit an Approvable Plan

In addition to sanctions, once the EPA finds that a state failed to submit the required SIP revision, or finalizes disapproval of the required SIP revision or a portion thereof, the EPA must promulgate a FIP no later than two years from the date of the finding—if the deficiency has not been corrected within that time period.

Ramifications Regarding Conformity

One consequence of the EPA's action finalizing disapproval of a control strategy SIP submission is a conformity freeze.[2] If the EPA finalizes disapproval of the attainment demonstration SIP without a protective finding, a conformity freeze will be in place as of the effective date of the disapproval (40 CFR 93.120(a)(2)).[3] The Oakridge $PM_{2.5}$ nonattainment area is an isolated rural area as defined in the transportation conformity rule (40 CFR 93.101). As such, it does not have a metropolitan planning organization (MPO), and there is no long range transportation plan or TIP that would be subject to a freeze. However, the freeze does mean that no projects in the Oakridge $PM_{2.5}$ nonattainment area may be found to conform until another attainment demonstration SIP is submitted, and the motor vehicle emissions budgets are found adequate, or the attainment demonstration is approved.

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the regulations described in the amendments to 40 CFR part 52 set forth below. The EPA has made, and will continue to make, these documents generally available electronically through *http://www.regulations.gov* and/or in hard copy at the appropriate EPA office (see the **ADDRESSES** section of this preamble for more information).

V. Statutory and Executive Orders Review

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and it will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 20, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2) of the CAA).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: October 6, 2016.

Dennis J. McLerran,

Regional Administrator, Region 10.

For the reasons stated in the preamble, 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for Part 52 continues to read as follows:

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

[2] Control strategy SIP revisions as defined in the transportation conformity rules include reasonable further progress plans and attainment demonstrations (40 CFR 93.101).

[3] The EPA would give a protective finding if the submitted control strategy SIP contains adopted control measures, or written commitments to adopt enforceable control measures, that fully satisfy the emissions reductions requirements relevant to the statutory provision for which the implementation plan revision was submitted, such as reasonable further progress or attainment (40 CFR 93.101 and 93.120(a)(2) and (3)). The submitted attainment plan for the Oakridge NAA does not contain all necessary controls to attain the 2006 24-hour $PM_{2.5}$ NAAQS and therefore is not eligible for a protective finding.

Subpart MM—Oregon

■ 2. In 52.1970 (c), amend Table 4—EPA Approved Lane Regional Air Protection Agency (LRAPA) Rules for Oregon by:

■ A. Revising the heading for Title 29; and

■ B. Revising entries 29–0010 and 29–0030.

The revisions read as follows:

§ 52.1970 Identification of plan.

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(c) * * *

TABLE 4—EPA APPROVED LANE REGIONAL AIR PROTECTION AGENCY (LRAPA) RULES FOR OREGON

LRAPA citation	Title/subject	State effective date	EPA approval date	Explanations
*	*	*	*	*
Title 29—Designation of Air Quality Areas				
29–0010	Definitions	10/18/2012	10/21/2016, [Insert **Federal Register** citation].	Except 1–5, 7–9, and 11–15.
29–0030	Designation of Nonattainment Areas.	10/18/2012	10/21/2016, [Insert **Federal Register** citation].	
*	*	*	*	*

[FR Doc. 2016–25296 Filed 10–20–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2013–0145; FRL–9954–15–Region 8]

Approval and Promulgation of Air Quality Implementation Plans; North Dakota; Revisions to Air Pollution Control Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving State Implementation Plan (SIP) revisions submitted by the State of North Dakota on January 28, 2013 and April 22, 2014. The revisions are to Article 33–15 Air Pollution Control rules of the North Dakota Administrative Code. The revisions include amendments to update the Prevention of Significant Deterioration (PSD) rules and the definition of ''volatile organic compounds''; to add particulate matter less than 2.5 microns in diameter ($PM_{2.5}$) methods of measurement; to modify the $PM_{2.5}$ state ambient air quality standard, permissible open burning rule, and permit fee processes; and, to remove permitting fees for sources that operate an air monitoring site. The revisions also make clarifying changes. This action is being taken under section 110 of the Clean Air Act (CAA).

DATES: This rule is effective on November 21, 2016.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2013–0145. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *http://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Jaslyn Dobrahner, Air Program, U.S. Environmental Protection Agency (EPA), Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6252, *dobrahner.jaslyn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In our notice of proposed rulemaking published on August 25, 2016 (81 FR 53438), EPA proposed to approve revisions to Article 33–15 Air Pollution Control rules of the North Dakota Administrative Code submitted by the State of North Dakota on January 28, 2013 and April 22, 2014. In this rulemaking, we are taking final action on revisions submitted in the January 28, 2013 submittal to update the PSD rules; add $PM_{2.5}$ methods of measurement; revise permit fee processing; remove permitting fees for sources that operate an air monitoring site; and make clarifying changes. The North Dakota State Health Council adopted those amendments on August 14, 2012 (effective January 1, 2013). In addition, we are also taking final action on revisions submitted in the April 22, 2014 submittal to update the PSD rules and the definition of ''volatile organic compounds''; revise the $PM_{2.5}$ state ambient air quality standard and permissible open burning rule; and clarify excess emissions reporting requirements. The North Dakota State Health Council adopted those amendments on February 11, 2014 (effective April 1, 2014). The reasons for our approval are provided in detail in the proposed rule.

II. Response to Comments

We received no comments on our proposed rule.

III. Final Action

For the reasons expressed in the proposed rule, EPA is approving revisions to sections of the State's Air Pollution Control rules from the January 28, 2013 and April 22, 214 submittals. A comprehensive summary of the revisions in North Dakota's Air Pollution Control rules organized by the EPA's action, reason for ''no action'' and submittal date are provided in Table 1 and Table 2 below.

TABLE 1—LIST OF NORTH DAKOTA REVISIONS THAT THE EPA IS APPROVING

Revisions in January 28, 2013 and April 22, 2014 Submittals That EPA Is Approving
January 28, 2013 submittal: 33–15–01–05; 33–15–01–13.3; 33–15–03–04.5; 33–15–05–04.3; 33–15–14–02.13.c(4); 33–15–15–01.2 †; 33–15–17–02.4; 33–15–17–02.6; 33–15–23–02.2.c; 33–15–23–03.1
April 22, 2014 submittal: 33–15–01–04; 33–15–02, Table 1.; 33–15–04–02.2.a; 33–15–06–05.1; 33–15–15–01.2; 33–15–23–03

† Except for the incorporation by reference date in the first paragraph and the revision associated with 40 CFR 52.21(l)(1).

TABLE 2—LIST OF NORTH DAKOTA REVISIONS THAT THE EPA IS TAKING NO ACTION ON

Revised section	Reason for "No Action"		
	Revision superseded by April 22, 2014 submittal	Revision acted on in 79 FR 63045	Revision will be acted on in a future submittal
Revisions in January 28, 2013 and April 22, 2014 Submittals That EPA Is Taking No Action on			
January 28, 2013 Submittal:			
33–15–01–04	x		
33–15–03–04.4		x	
33–15–05–01.2a(1)		x	
33–15–14–02.1			x
33–15–14–02.5.a			x
33–15–15–01.2 ‡	x		
33–15–15–01.2 §			x
April 22, 2014 Submittal:			
33–15–03–05			x

‡ Only the revision to the incorporation by reference date in the first paragraph.
§ Only the revision associated with 40 CFR 52.21(l)(1).

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of North Dakota Air Pollution Control rules described in the amendments set forth to 40 CFR part 52 below. Therefore, these materials have been approved by the EPA for inclusion in the State implementation plan, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference by the Director of the Federal Register in the next update to the SIP compilation.[1] The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and/or at the EPA Region 8 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Orders Review

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, Oct. 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, Aug. 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and,
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, Feb. 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must

[1] 62 FR 27968 (May 22, 1997).

submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 20, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See CAA section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Greenhouse gases, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: September 29, 2016.

Shaun L. McGrath,

Regional Administrator, Region 8.

40 CFR part 52 is amended to read as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for Part 52 continues to read as follows:

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

Subpart JJ—North Dakota

■ 2. Section 52.1820 (c) is amended as follows:

■ a. Under "33–15–01. General Provisions" by revising entries "33–15–01–04", "33–15–01–05", and "33–15–01–13";

■ b. Under "33–15–02. Ambient Air Quality Standards" by revising entry "Table 1";

■ c. Under "33–15–03. Restriction of Emission of Visible Air Contaminants" by revising entry "33–15–03–04";

■ d. Under "33–15–04. Open Burning Restrictions" by revising entry "33–15–04–02";

■ e. Under "33–15–05. Emissions of Particulate Matter Restricted" by revising entry "33–15–05–04";

■ f. Under "33–15–06. Emissions of Sulfur Compounds Restricted" by revising entry "33–15–06–05";

■ g. Under "33–15–14. Designated Air Contaminant Sources Permit to Construct Minor Source Permit to Operate Title V Permit to Operate" by revising entry "33–15–14–02";

■ h. Under "33–15–15. Prevention of Significant Deterioration of Air Quality" by revising entry "33–15–15–01.2";

■ i. Under "33–15–17. Restriction of Fugitive Emissions" by revising entry "33–15–17–02"; and

■ j. Under "33–15–23. Fees" by revising entries "33–15–23–02" and "33–15–23–03."

The revisions read as follows:

§ 52.1820 Identification of plan.

* * * * *

(c) * * *

Rule No.	Rule title	State effective date	EPA effective date	Final rule citation/date	Comments
		33–15–01. General Provisions			
*	*	*	*	*	* *
33–15–01–04	Definitions	4/1/2014	11/21/16	[Insert **Federal Register** citation], 10/21/16.	
33–15–01–05	Abbreviations	1/1/2013	11/21/16	[Insert **Federal Register** citation], 10/21/16.	
*	*	*	*	*	* *
33–15–01–13	Shutdown and malfunction of an installation—Requirement for notification.	1/1/2013	11/21/16	[Insert **Federal Register** citation], 10/21/16.	
*	*	*	*	*	* *
		33–15–02. Ambient Air Quality Standards			
*	*	*	*	*	* *
Table 1	Ambient Air Quality Standards.	4/1/2014	11/21/16	[Insert **Federal Register** citation], 10/21/16.	
*	*	*	*	*	* *
		33–15–03. Restriction of Emission of Visible Air Contaminants			
*	*	*	*	*	* *
33–15–03–04	Exceptions	1/1/2013	11/21/16	[Insert **Federal Register** citation], 10/21/16.	

Rule No.	Rule title	State effective date	EPA effective date	Final rule citation/date	Comments
* * * * * * *					
33–15–04. Open Burning Restrictions					
* * * * * * *					
33–15–04–02	Permissible open burning.	4/1/2014	11/21/16	[Insert **Federal Register** citation], 10/21/16.	
33–15–05. Emissions of Particulate Matter Restricted					
* * * * * * *					
33–15–05–04	Methods of measurement.	1/1/2013	11/21/16	[Insert **Federal Register** citation], 10/21/16.	
33–15–06. Emissions of Sulfur Compounds Restricted					
* * * * * * *					
33–15–06–05	Reporting and recordkeeping requirements.	4/1/2014	11/21/16	[Insert **Federal Register** citation], 10/21/16.	
* * * * * * *					
33–15–14. Designated Air Contaminant Sources Permit to Construct Minor Source Permit to Operate Title V Permit to Operate					
* * * * * * *					
33–15–14–02	Permit to construct	1/1/2013	11/21/16	[Insert **Federal Register** citation], 10/21/16.	Excluding subsections 1, 12, 13, 3.c., 13.b.1., 5, 13.c., 13.i(5), 13.o., and 19 (one sentence) which were subsequently revised and approved. See 57 FR 28619 (6/26/92), regarding State's commitment to meet requirements of EPA's "Guideline on Air Quality Models (revised)."
* * * * * * *					
33–15–15. Prevention of Significant Deterioration of Air Quality					
* * * * * * *					
33–15–15–01.2	Scope	1/1/2013 4/1/2014	11/21/16	[Insert **Federal Register** citation], 10/21/16.	Except for the revision associated with 40 CFR 52.21(l)(1).
* * * * * * *					
33–15–17. Restriction of Fugitive Emissions					
* * * * * * *					
33–15–17–02	Restriction of fugitive particulate emissions.	1/1/2013	11/21/16	[Insert **Federal Register** citation], 10/21/16.	
* * * * * * *					
33–15–23. Fees					
* * * * * * *					
33–15–23–02	Permit to construct fees	1/1/2013	11/21/16	[Insert **Federal Register** citation], 10/21/16.	
33–15–23–03	Minor source permit to operate fees.	1/1/2013 4/1/2014	11/21/16	[Insert **Federal Register** citation], 10/21/16.	
* * * * * * *					

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§ 52.1829 [Amended]

■ 3. Section 52.1829 is amended by removing paragraphs (c) and (d).

[FR Doc. 2016–25302 Filed 10–20–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2016–0016; FRL–9954–16–Region 8]

Approval and Promulgation of Air Quality Implementation Plans; State of Colorado; Motor Vehicle Inspection and Maintenance, Clean Screen Program and the Low Emitter Index, On-Board Diagnostics, and Associated Revisions

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving three State Implementation Plan (SIP) revisions submitted by the State of Colorado. The revisions involve amendments to Colorado's Regulation Number 11 ''Motor Vehicle Emissions Inspection Program.'' The revisions address the implementation of the Low Emitter Index (LEI) component of Regulation No. 11's Clean Screen Program, the implementation of the On-Board Diagnostics (OBD) component of Regulation No. 11, and several other associated revisions. The EPA is approving these SIP revisions in accordance with the requirements of section 110 of the Clean Air Act (CAA).

DATES: This final rule is effective on November 21, 2016.

ADDRESSES: EPA has established a docket for this action under Docket Identification Number EPA–R08–OAR–2016–0016. All documents in the docket are listed on the *http://www.regulations.gov* index. Although listed in the index, some information may not be publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado, 80202–1129. EPA requests that you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Tim Russ, Air Program, EPA, Region 8, Mailcode 8P–AR, 1595 Wynkoop, Denver, Colorado 80202–1129, (303) 312–6479, *russ.tim@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In this action, the EPA is approving SIP revisions to Colorado's Regulation No. 11 (hereafter ''Reg. No. 11'') contained in three submittals from Colorado. The State's submittals were dated June 11, 2008, March 15, 2013, and March 3, 2014. Much of the content of the revisions involved minor updates to several sections of Reg. No. 11 and deletion of obsolete language. Those revisions of greater significance involved: (1) Colorado's 2007 revisions to Reg. No. 11 for the implementation of the LEI portion of the Clean Screen Program contained in Reg. No. 11; (2) Colorado's 2012 revisions to Reg. No. 11 for the implementation of the OBD test requirements contained in Reg. No. 11 along with the Seven Model Year Emissions Test Exemption provisions; and (3) Colorado's 2013 revisions to Reg. No. 11, Appendix A, Incorporation by Reference of Technical Materials, the addition of new Technical Information/Requirements, and minor revisions to Appendix B.

On August 12, 2016, the EPA published a notice of proposed rulemaking (NPR) which proposed to approve the State's three Reg. No. 11 SIP revision requests and in addition, provided a thorough evaluation of the changes, additions, and deletions to Reg. No. 11 contained in each of the three SIP revision submittals. *See* 81 FR 53370. The details of Colorado's three SIP submittals and the rationale for the EPA's proposed action to approve the SIP revision materials are explained in the NPR and will not be restated here. The EPA notes that the NPR's public comment period closed on September 12, 2016 and we did not receive any comments.

II. Final Action

The EPA is taking final action to approve the following revisions to Reg. No. 11 that were discussed in our August 12, 2016 NPR (81 FR 53370) and as provided below:

a.) The sections of Reg. No. 11 that were revised with the State's June 11, 2008 submittal:

1.) Part A, section II: Modify definition number 15 ''Clean Screened Vehicle'' to reflect the addition of the LEI; modify definition number 17 ''Colorado '94'' to clarify the use of the BAR 90 test analyzer systems for use after 1994; and add a new definition ''Low Emitting Vehicle Index.'' Renumber definitions number 18 and higher.

2.) Part C, section XII: Modify section XIIA.3 regarding the requirements and procedures to clean screen an eligible vehicle and add section XIIE.4 regarding low emitting vehicles and the LEI.

3.) Part F, section VI: Renumber section VI.B as VI.C; add new section VI.B.1 which requires the development of the LEI each year; add new section VI.B.2 which establishes the 98% minimum passing criteria for the LEI; and add new section VI.B.3 which allows the Colorado Department of Public Health and Environment (CDPHE) to use a greater than 98% passing criteria if needed to equate to a second remote sensing device reading.

4.) Appendix A, Technical Specifications, Attachment 1: Sections of Attachment 1 of the Technical Specifications contain the specifications for the PDF 1000 Scanner; some sections were unreadable and a full, retyped PDF 1000 Scanner section was provided.

5.) Appendix A, Technical Specifications, Attachment 2: Sections of Attachment 2 of the Technical Specifications contain the specifications for the Thermal Transfer Printer; some sections were unreadable and a full, retyped Thermal Transfer Printer section was provided.

The EPA notes that Part F, section III.A.2 of Reg. No. 11 was also provided with the State's June 11, 2008 submittal. This section contains IM240 [1] test light duty vehicle emissions cutpoints for 1996 and newer vehicles (all in grams per mile). The carbon monoxide (CO), hydrocarbon (HC), and nitrogen oxides (NO_X) entries for calendar year 2006 are incorrect as the State had previously provided an August 8, 2006 SIP revision submittal to remove these 2006 cutpoints (*i.e.,* HC 0.6, CO 10.0, and NO_X 1.5). The EPA approved the removal of these 2006 cutpoints on December 20, 2012 (77 FR 75388).

[1] See 40 CFR part 51, subpart S for a complete description of EPA's IM240 test. The IM240 test is essentially an enhanced motor vehicle emissions test to measure mass tailpipe emissions while the vehicle follows a computer generated driving cycle trace for 240 seconds and while the vehicle is on a dynamometer.

b.) The sections of Reg. No. 11 that were revised with the State's March 15, 2013 submittal:

1.) Part A, section I: Minor wording changes to add new language and remove obsolete language in sections I.B, I.C.3, I.C.3.a, I.C.3.b, I.C.3.c, I.C.4, I.C.7, I.C.7.c, I.C.8, and I.C.9.b.

2.) Part A, section II: A new definition number 20 was added entitled ''Colorado On-Board Diagnostic (OBD) Test Analyzer System;'' a new definition number 22 was added entitled ''Diagnostic Trouble Code (DTC);'' and definitions number 23 to 43 were renumbered. A new definition number 44 was added and entitled ''On-Board Diagnostics II (OBD or OBDII) Test'' and definitions numbered 45 to 52 were renumbered.

3.) Part A, section IV: Section IV.D was removed which involved obsolete language and section IV.E was renumbered IV.D and also had obsolete language removed.

4.) Part B, section IX: Section IX was added and is entitled ''Approval of the Colorado On-Board Diagnostic (OBD) Test Analyzer System.'' Also, Part B, section X was added and is entitled ''The Colorado On-Board Diagnostic (OBD) Test Analyzer System.''

5.) Part C, title: The title was modified by removing ''Chlorofluorocarbon Leak Detection'' and adding ''On-Board Diagnostics (OBD).''

6.) Part C, section I.C.3: This involved minor language changes to clarify data transmission and analyzer requirements.

7.) Part C, section II.A: This section was renumbered from II.A through II.F to instead become II.A.1 through II.A.11. Minor clarification language was added along with revised references to sections in Part C.

8.) Part C, section II.G: This section was renumbered to II.B and clarifying language was added regarding OBD testing. Sections II.G.1 through II.G.6 were renumbered II.B.1 through II.B.6. Section II.B.4 had clarifying language added regarding applicable vehicles that were unable to be tested with the IM240 test would then be OBD tested.

9.) Part C, section II.C: A new section II.C (II.C 1 through II.C.9) was added which specifies which vehicles are to be OBD tested and the requirements and testing procedures for an OBD test.

10.) Part C, section III.A: This section had clarifying language added and sections III.B and III.C were removed as they addressed the model year 1996 and newer visual inspection procedures. The remaining applicable portions of section III.C were then renumbered III.B. Sections III.D and III.E were renumbered to III.C and III.D.

11.) Part C, section IV: The prior section IV was renumbered section V and the provisions of the existing section V were deleted. The new section IV addressed the requirements for applicable vehicles (1996 through those vehicles that had reached their 11th model year of age) to be evaluated with and OBD test.

12.) Part C, prior section IV: The existing section IV was renumbered section V and also modified with clarifying language regarding the requirement for a full retest of vehicles which previously had a missing or malfunctioning gas cap.

13.) Part C, section VIII.A.2: A new section VIII.A.2 was added which states that vehicles in their model years seven through ten need to meet the OBD passing criteria in Part F, section VII. Sections VIII.A.2 through VIII.A.4 were renumbered VIII.A.3 through VIII.A.5.

14.) Part C, sections VIII.B.1, VIII.B.2, and VIII.B.3: These sections had minor wording changes and deletion of obsolete language.

15.) Part C, sections VIII.D.A through VIII.D.E: These sections were renumbered VIII.D.1 through VIII.D.5.

16.) Part C, sections IX.G and X.A: These sections had minor clarifying language added.

17.) Part F, section V: This section was retitled ''Visible Smoke.''

18.) Part F, section VII: A new section VII was added (sections VII.A through VII.F) which stated the required OBD diagnostic inspection test passing criteria.

19.) Part G: This part had previously contained obsolete high-emitting vehicle identification pilot project language which was removed and Part G was retitled ''Reserved.''

c.) The sections of Reg. No. 11 that were revised with the State's March 3, 2014 submittal:

1.) Part A, section I.C.3.c: This section was revised to clarify that the seven year new vehicle exemption, which excused vehicles from an emissions test for seven years and was previously adopted by the Colorado Air Quality Control Commission (AQCC) in December 2012, would take effect on January 1, 2015. Also, this exemption would apply retroactively to existing vehicles in their fourth, fifth, and sixth years of service.

2.) Part A, sections I.C.8, I.C.9, and I.C.10: These sections were revised to clarify ambiguous, contradictory and obsolete Reg. No. 11 language concerning the issuance of and duration periods for ''Verification of Emissions Test'' exemption windshield stickers issued by motor vehicle dealers. Part A, section I.C.8 was further clarified to note that vehicles in their fourth, fifth, and sixth years of service would have the seven year exemption applied retroactively.

3.) Part A, section I.C.3 and Part C, sections III and IV: These sections were revised to clarify that the seven-year new vehicle exemption from emissions testing, OBD testing requirements and procedures, and other changes made to Reg. No. 11 by the AQCC in December 2012, would go into effect January 1, 2015. In addition, the visual inspection procedures for 1996 and newer vehicles would be retained through December 2014.

4.) Part C, section C VIII.B.3: This section was revised to codify in Reg. No. 11 the vehicle emissions repair cost waiver amount of $715. The AQCC has previously directed the CDPHE to change the amount from $450 to $715 in November 2002, which was done. However, at that time, the AQCC had declined to note the changed repair amount in the text of Reg. No. 11.

5.) Part C, section VIII.D.4: This section was revised regarding the qualifying criteria for an economic hardship waiver for a vehicle failing its emissions test. Section VIII.D.4 was further revised to allow the economic hardship waiver to apply to households owning two vehicles rather than restricting hardship waivers to households owning only one vehicle.

6.) Appendix A of Reg. No. 11 was revised as follows:

a.) Appendix A was revised to remove the text of three technical document attachments and to note that the documents are available at CDPHE's Emissions Technical Center Procedures Manual. The technical documents are incorporated by reference into Reg. No. 11. Appendix A. The technical documents that are incorporated by reference into Reg. No. 11 are: Attachment I ''PDF 1000 Scanner,'' Attachment II ''Thermal Transfer Printer,'' and Attachment III ''Colorado Automobile Dealers Transient Mode Test Analyzer System.''

b.) Updated Attachment IV, entitled ''Colorado Department of Public Health and Environment Specification for Colorado 97 Analyzer,'' to reflect technological changes to data specifications, communications protocols, and forms generation.

c.) To include a new Attachment V *''Test Analyzer Specification for On-board Diagnostics''* for licensed fleets who self-inspect their own vehicles. Note: Part B section X required this Test Analyzer Specification to be in place by December 31, 2013.

7.) Appendix B of Reg. No. 11 was revised as follows: Attachment II; the ''Calibration Span Gas'' labels were

updated to reflect the current version of the State-official labels.

8.) Overall revised formatting and other non-substantive changes were made throughout Reg. No. 11.

III. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the Colorado Air Quality Control Commission, Regulation Number 11 revisions as discussed in section II, Final Action, of this preamble. Therefore, these materials have been approved by the EPA for inclusion in the State Implementation Plan, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference by the Director of the Federal Register in the next update to the SIP compilation. The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and/or at the EPA Region 8 Office (please contact the person identified in the ''For Further Information Contact'' section of this preamble for more information).

IV. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, Oct. 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, Aug. 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and,
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, Feb. 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian Country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 20, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See CAA section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, and Volatile organic compounds.

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

Dated: September 21, 2016.

Shaun L. McGrath,

Regional Administrator, Region 8.

40 CFR part 52 is amended to read as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart G—Colorado

■ 2. In § 52.320, the table in paragraph (c) is amended by:

■ a. Revising the entries ''I. Applicability''; ''II. Definitions''; ''IV. Clean Screen/Remote Emissions Sensing''; and ''IX. Approval of the Colorado On-Board Diagnostic (OBD) Test Analyzer System''.

■ b. Adding the entry ''X. The Colorado On-Board Diagnostic (OBD) Test Analyzer System'' in numerical order.

■ c. Revising the center heading to ''5 CCR 1001–13, Regulation Number 11, Motor Vehicle Emissions Inspection Program—Part C, Inspection Procedures and Requirements for Exhaust Emissions, Fuel Evaporation Control, Visible Smoke Emissions, Emissions Control Systems, On-Board Diagnostics (OBD); and Practices to Ensure Proper Emissions Related Adjustments and Repairs'' and the entries ''I. Pre-inspection Requirements''; ''II. Exhaust Emissions Inspection Procedures''; ''III. Emissions Control Systems Inspection Procedures''; ''IV. On-Board Diagnostic Inspection Procedures''; ''V. Evaporative Fuel Control Inspection Procedures''; ''VIII. Certification of Emissions Control''; ''IX. Adjustment Procedures''; ''X. Emissions Related Repairs''; and

"XII. Clean Screen Inspection Program Procedures".

■ d. Revising the entries "V. Visible Smoke" and "VI. Clean Screen Program Maximum Allowable Emissions Limits".

■ e. Adding the entry "VII. On-Board Diagnostic Inspection Passing Criteria" in numerical order.

■ f. Revising the entries "Appendix A, Specifications for Colorado 94 Analyzer" and "Appendix B, Standards and Specifications for the Suppliers of Span and Calibration Gases".

The additions and revisions read as follows:

§ 52.320 Identification of plan.

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(c) * * *

Title	State effective date	EPA effective date	Final rule citation/date	Comments
* * * * * * *				
5 CCR 1001–13, Regulation Number 11, Motor Vehicle Emissions Inspection Program—Part A, General Provisions, Area of Applicability, Schedules for Obtaining Certification of Emissions Control, Definitions, Exemptions, and Clean Screening/Remote Sensing				
I. Applicability	2/15/2013 12/30/2013	11/21/2016	[Insert **Federal Register** citation], 10/21/2016.	
II. Definitions	8/30/2007 2/15/2013	11/21/2016	[Insert **Federal Register** citation], 10/21/2016.	
* * * * * * *				
IV. Clean Screen/Remote Emissions Sensing	2/15/2013	11/21/2016	[Insert **Federal Register** citation], 10/21/2016.	
5 CCR 1001–13, Regulation Number 11, Motor Vehicle Emissions Inspection Program—Part B, Standards and Procedures for the Approval, Operation, Gas Span Adjustment, Calibration and Certification of the Division Approved Test Analyzer Systems for Use in the Basic and Enhanced Areas and Test Analyzer Systems for Licensed Dealers in the Enhanced Area				
* * * * * * *				
IX. Approval of the Colorado On-Board Diagnostic (OBD) Test Analyzer System.	2/15/2013	11/21/2016	[Insert **Federal Register** citation], 10/21/2016.	
X. The Colorado On-Board Diagnostics (OBD) Test Analyzer System.	2/15/2013	11/21/2016	[Insert **Federal Register** citation], 10/21/2016.	
5 CCR 1001–13, Regulation Number 11, Motor Vehicle Emissions Inspection Program—Part C, Inspection Procedures and Requirements for Exhaust Emissions, Fuel Evaporation Control, Visible Smoke Emissions, Emissions Control Systems, On-Board Diagnostics (OBD); and Practices to Ensure Proper Emissions Related Adjustments and Repairs				
I. Pre-inspection Requirements	2/15/2013	11/21/2016	[Insert **Federal Register** citation], 10/21/2016.	
II. Exhaust Emissions Inspection Procedures	2/15/2013	11/21/2016	[Insert **Federal Register** citation], 10/21/2016.	
III. Emissions Control Systems Inspection Procedures.	2/15/2013	11/21/2016	[Insert **Federal Register** citation], 10/21/2016.	
IV. On-Board Diagnostic II Inspection Procedures	2/15/2013	11/21/2016	[Insert **Federal Register** citation], 10/21/2016.	
V. Evaporative Fuel Control Inspection Procedures	2/15/2013	11/21/2016	[Insert **Federal Register** citation], 10/21/2016.	
* * * * * * *				
VIII. Certification of Emissions Control	2/15/2013 12/30/2013	11/21/2016	[Insert **Federal Register** citation], 10/21/2016.	
IX. Adjustment Procedures	2/15/2013	11/21/2016	[Insert **Federal Register** citation], 10/21/2016.	
X. Emissions Related Repairs	2/15/2013	11/21/2016	[Insert **Federal Register** citation], 10/21/2016.	
* * * * * * *				
XII. Clean Screen Inspection Program Procedures	8/30/2007	11/21/2016	[Insert **Federal Register** citation], 10/21/2016.	

Title	State effective date	EPA effective date	Final rule citation/date	Comments
* * * * * * *				
5 CCR 1001–13, Regulation Number 11, Motor Vehicle Emissions Inspection Program—Part F, Maximum Allowable Emissions Limits for Motor Vehicle Exhaust, Evaporative and Visible Emissions for Light-Duty and Heavy-Duty Vehicles				
* * * * * * *				
V. Visible Smoke	2/15/2013	11/21/2016	[Insert **Federal Register** citation], 10/21/2016.	
VI. Clean Screen Program Maximum Allowable Emissions Limits.	8/30/2007	11/21/2016	[Insert **Federal Register** citation], 10/21/2016.	
VII. On-Board Diagnostic Inspection Passing Criteria	2/15/2013	11/21/2016	[Insert **Federal Register** citation], 10/21/2016.	
5 CCR 1001–13, Regulation Number 11, Appendices				
Appendix A, Specifications for Colorado 94 Analyzer	8/30/2007 12/30/2013	11/21/2016	[Insert **Federal Register** citation], 10/21/2016.	
Appendix B, Standards and Specifications for the Suppliers of Span and Calibration Gases.	12/30/2013	11/21/2016	[Insert **Federal Register** citation], 10/21/2016.	
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[FR Doc. 2016–25295 Filed 10–20–16; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2016–0308; FRL–9954–18–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Removal of Stage II Gasoline Vapor Recovery Requirements for Gasoline Dispensing Facilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking direct final action to approve revisions to the Commonwealth of Virginia's state implementation plan (SIP). The revision serves to remove requirements for vapor recovery equipment (also referred to as Stage II vapor recovery, or simply as Stage II) from subject gasoline stations in areas of Virginia that were formerly required to install and operate Stage II under the prior approved SIP. In 2012, EPA determined that new, gasoline-powered vehicles equipped with onboard vapor recovery systems (beginning with those manufactured in model year 1998) were in widespread use and have, in great part, supplanted emission reductions formerly controlled via Stage II vapor recovery on gasoline dispensers at service stations. In two prior rulemakings, EPA has already approved Virginia's demonstrations showing that the emission benefits generated by Stage II vapor recovery have been fully offset, without impacting the affected Virginia areas' ability to attain and maintain any national ambient air quality standard (NAAQS). Virginia amended its existing rules to remove Stage II as a required measure by January 2017 and added decommissioning procedures for stations electing to opt out of the program. EPA is approving this SIP revision to amend the Virginia Stage II vapor recovery program in accordance with the requirements of the Clean Air Act (CAA).

DATES: This rule is effective on December 20, 2016 without further notice, unless EPA receives adverse written comment by November 21, 2016. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R03–OAR–2016–0308 at *http://www.regulations.gov,* or via email to *pino.maria@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. For either manner of submission, 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. 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, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For 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: Brian Rehn, (215) 814–2176, or by email at *rehn.brian@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Stage II vapor recovery is a means of capturing volatile organic compounds (VOCs) emitted as vapors displaced from a vehicle's gas tank during refueling operations, via vapor controls equipped on a gasoline pump at a gasoline dispensing facility (GDF). Stage II vapor recovery uses special refueling nozzles and coaxial hoses on the gasoline dispenser to capture these vapors that might otherwise be emitted to the atmosphere during vehicle

fueling. These gasoline vapors contain toxic air emissions and serve as precursors to the formation of ground-level ozone—an ambient air pollutant regulated under the CAA. Under section 182(b)(3) of the CAA, areas classified as moderate or worse ozone nonattainment were required to adopt a Stage II vapor recovery program. Areas in the Ozone Transport Region (OTR) were required under section 184(a) and (b)(2) to adopt Stage II, or a comparable measure that could achieve similar emission reductions.

Virginia has three areas that have approved Stage II SIPs meeting Stage II requirements under the 1990 amendments to the CAA. The Richmond area was designated as moderate nonattainment under the 1-hour ozone NAAQS, and again under the 1997 8-hour ozone NAAQS. On July 26, 1996, Virginia submitted a request to redesignate the Richmond area to attainment of the 1-hour ozone NAAQS. EPA's approval of this request was published in the November 17, 1997 **Federal Register** (62 FR 61237). On September 26, 2006, Virginia requested redesignation of the Richmond area to attainment for the 1997 8-hour ozone NAAQS. EPA approved that redesignation request in the June 1, 2007 **Federal Register** (72 FR 30485). However, Virginia's plans for maintenance of the respective NAAQS relied upon the emissions reductions from Stage II as a means to ensure continued maintenance of the ozone NAAQS. Although the 1-hour ozone NAAQS was revoked June 15, 2005, EPA's implementation rule for the 1997 ozone NAAQS retained Stage II as a required measure to prevent backsliding under the NAAQS.

The Virginia portion of the Washington, DC–MD–VA ozone nonattainment area (hereafter referred to as the Washington area) was subject to Stage II not only because of its designation as nonattainment for the ozone NAAQS, but also because this area lies in a CAA-established OTR. The area was designated serious nonattainment under the 1-hour ozone NAAQS. Under the 1997 8-hour ozone NAAQS, both the Northern Virginia area and the neighboring Fredericksburg area were designated as moderate nonattainment. On November 13, 2002, EPA reclassified the Virginia portion of the Washington, DC–MD–VA area as severe nonattainment under the 1-hour ozone NAAQS. 67 FR 68805. Virginia subsequently submitted and EPA approved attainment plans for the 1-hour and 1997 8-hour NAAQS for the Washington area, and approved a redesignation and maintenance plan for the Fredericksburg area. Although the 1-hour ozone NAAQS was revoked effective June 2005, EPA's implementation rule for the 1997 ozone NAAQS retained Stage II-related requirements under CAA section 182(b)(3) for certain areas. Therefore, Stage II continued to apply in the Washington, DC nonattainment area as an anti-backsliding measure (for the revoked 1-hour ozone NAAQS) and in the Fredericksburg area as a maintenance measure (under the 1997 ozone NAAQS) pending EPA determination that onboard refueling vapor recovery (ORVR) was in widespread use and Virginia could demonstrate that Stage II was no longer a necessary component of its air quality plans.

Virginia adopted Stage II regulations in the November 2, 1992 edition of the Virginia Register of Regulations (Vol. 9, Issue 3) effective January 1, 1993. Stage II applicability was limited to the to the Northern Virginia volatile organic compound (VOC) Emission Control Area (comprised of Arlington, Alexandria, Fairfax, Loudon, Prince William and Stafford Counties, plus the cities of Alexandria, Fairfax, Falls Church, Manassas, and Stafford) and to the Richmond VOC Emission Control Area (comprised of the Counties of Charles City, Chesterfield, Hanover, and Henrico, plus the cities of Colonial Heights, Hopewell, and Richmond). Virginia submitted its Stage II regulation to EPA as a SIP revision on November 5, 1992. EPA approved Virginia's Stage II SIP revision on June 23, 1993 (59 FR 32353).

ORVR is an emissions control system equipped on new, gasoline-powered vehicles (beginning with model year 1998 vehicles) for the purpose of capturing refueling gasoline vapors before they escape the vehicle gas tank and to store them in an underhood canister for later engine combustion. Section 202(a)(6) of the CAA directed that Stage II requirements under 182(b)(3) would no longer apply to moderate ozone nonattainment areas upon promulgation of standards for ORVR systems as part of the emission control system on newly manufactured vehicles. Section 202(a)(6) further directs that Stage II requirements no longer apply to ozone nonattainment areas designated serious or worse upon EPA's determination that ORVR technology is in ''widespread use.'' EPA issued its widespread use determination on May 16, 2012 (77 FR 28772), indicating that ORVR was in widespread use throughout the U.S. vehicle fleet, and that at that time ORVR vehicles were essentially equal to and would soon surpass the emissions reductions achieved by Stage II alone.

Virginia has examined whether Stage II vapor recovery continues to be necessary for ozone control purposes, given the prevalence of ORVR-equipped gasoline-powered vehicles and the redundancy between ORVR and Stage II systems in reducing gasoline tank displacement emissions associated with refueling. Additionally, Virginia has analyzed the interference effect between certain Stage II systems and ORVR systems. As a result, Virginia determined that Stage II vapor recovery is no longer necessary as a control measure to address ambient ozone in the Washington, Fredericksburg, and Richmond areas.

On November 12, 2013 and March 18, 2014, Virginia submitted SIP revisions to EPA that evaluate and address the emissions impacts to each of those affected areas associated with removal of the Stage II program. These plans serve to amend the ozone maintenance plan for the Richmond area and the attainment plan for the Washington area to demonstrate that removal of the Stage II programs will not interfere with those areas' ability to attain and maintain any NAAQS. On May 26, 2015 (80 FR 29959), EPA approved the Commonwealth's March 18, 2014 SIP revision amending the approved ozone attainment plan for the Virginia portion of Washington nonattainment area and the approved ozone maintenance plan for the Fredericksburg area to remove the Stage II program. On August 11, 2014, EPA approved Virginia's November 12, 2013 SIP revision amending the approved ozone maintenance plan SIP for the Richmond area to remove the Stage II program.

II. Summary of SIP Revision and EPA Analysis

On October 15, 2015, the Commonwealth of Virginia submitted a formal revision to remove the requirements for Stage II vapor recovery controls in Virginia ozone nonattainment areas from the approved Virginia SIP (Revision C14). This October 2015 SIP revision contains the amended Stage II vapor recovery regulatory provisions of Virginia Rule 4–37, entitled ''Emission Standards for Volatile Organic Compounds from Petroleum Liquid Storage and Transfer Operations.'' The October 2015 SIP revision includes Virginia's regulatory amendments listed at 9VAC5–20 and 9VAC5–40 that were adopted by Virginia in June of 2014, and published in the Virginia Register of Regulations on June 15, 2015. The purpose of the Commonwealth's 2015 SIP revision

submittal is to remove Stage II vapor recovery requirements applicable in covered areas in Virginia from the Commonwealth's rule provisions governing petroleum liquid storage and transfer operations. Under Virginia's amended Rule 4–37, gasoline stations in the Washington and Fredericksburg areas were no longer required to employ Stage II systems as of January 2014, and Richmond area stations will no longer be required to employ Stage II vapor recovery systems as of January 2017. Virginia's amendment to Rule 4–37 also requires facilities electing to decommission Stage II to meet established decommissioning procedures and those electing to continue to operate Stage II to continue to properly operate and maintain their Stage II systems.

As described in the Background section of this action, EPA has already approved Virginia's SIP revisions submitted on November 12, 2013 and March 18, 2014 demonstrating that removal of Stage II as a control measure from the SIP will not interfere with the Washington, Fredericksburg, and Richmond areas' ability to attain and maintain any applicable NAAQS.

Virginia's Department of Environmental Quality (VA DEQ) examined whether Stage II vapor recovery is necessary for ozone control purposes, and determined this program is no longer beneficial to air quality of the Commonwealth, given EPA's widespread use determination for ORVR equipment in new vehicles manufactured since 1998 and the inherent redundancies between Stage II vapor recovery equipment and vehicle-based ORVR systems, as well as the known incompatibilities between certain types of Stage II vapor recovery equipment and vehicle-based, ORVR systems.

EPA has evaluated the regulatory amendments adopted by Virginia to its Rule 4–37 to rescind Stage II vapor recovery requirements for new and existing stations, to adopt decommissioning procedures and requirements for GDFs electing to no longer operate existing Stage II systems, and to require the continued operation and maintenance of Stage II equipment for stations that elect to continue participation in the program. Virginia's regulatory changes meet EPA guidance and the related requirements of sections 182 and 202 of the CAA with respect to the applicability of Stage II requirements after EPA's issuance of its widespread use policy of ORVR determination in 2012, as described in the Background section of this document. Virginia has properly analyzed the impact of removal of the Stage II program in adherence with EPA's "Guidance on Removing Stage II Gasoline Vapor Control Programs from State Implementation Plans and Assessing Comparable Measures," dated August 7, 2012 (EPA–457/B–12–001), including applicability of Stage II or comparable measures in the OTR, per section 184 of the CAA. As previously found by EPA, Virginia has demonstrated that removal of the Stage II requirement does not interfere with any affected area's ability to attain or maintain a NAAQS, under section 110(l) of the CAA.

For further information on Virginia's analysis of the impacts of removal of the Stage II programs in the Washington and Fredericksburg areas, please refer to EPA's May 26, 2015 approval of the SIP demonstration applicable to those areas. *See 80 FR 29959.* For further information with respect to Virginia's analysis of the removal of Stage II in the Richmond area, please refer to EPA's August 11, 2014 approval of the Commonwealth's demonstration applicable to Richmond. *See 79 FR 4671.*

III. Final Action

EPA is approving Virginia's revision to its SIP to include revised Stage II vapor recovery provisions to remove the requirement for Virginia area GDFs to operate Stage II in areas formerly subject to Stage II under CAA sections 182 and 184, and to add provisions setting requirements for GDFs opting to decommission existing Stage II systems. As described previously, EPA previously approved two earlier, related Virginia SIP revisions demonstrating that Virginia's Stage II-affected areas (*i.e.,* the Virginia portion of Washington, DC, Fredericksburg, and Richmond ozone nonattainment areas) will not be adversely affected by the removal of the Stage II vapor recovery requirement. EPA is publishing this rule without prior proposal because EPA views this as a noncontroversial amendment and anticipates no adverse comment.

However, in the "Proposed Rules" section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on December 20, 2016 without further notice unless EPA receives adverse comment by November 21, 2016. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

IV. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) "privilege" for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) Are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege Law, Va. Code § 10.1–1198, precludes granting a privilege to documents and information "required by law," including documents and information "required by federal law to maintain program delegation, authorization or approval," since Virginia must "enforce federally authorized environmental programs in a manner that is no less stringent than their federal counterparts . . . ." The opinion concludes that "[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by federal law to maintain program delegation, authorization or approval."

Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that ''[t]o the extent consistent with requirements imposed by federal law,'' any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any federally authorized programs, since ''no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with federal law, which is one of the criteria for immunity.''

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

V. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of Virginia's amendments to Article 37 of 9VAC5–40, relating also to amendments to Virginia's general provisions at 9VAC5–20–21, reflecting the addition of a new source of documents incorporated by reference, effective on July 20, 2015. Additionally, Virginia amended its Rule 4–37 governing petroleum liquid and transfer operations applicable to existing stationary sources. Specifically, Virginia modified requirements for the Commonwealth's Stage II vapor recovery program in 9–VAC5–5220 and 9VAC5–5270, effective July 20, 2015. These materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference by the Director of the **Federal Register** in the next update of the SIP compilation.[1] EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and/or at the EPA Region III Office (please contact the person identified in the ''For Further Information Contact'' section of this preamble for more information).

VI. Statutory and Executive Order Reviews

A. General Requirements

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land as defined in 18 U.S.C. 1151 or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 20, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking action. This action to amend Virginia's approved Stage II

[1] 62 FR 27968 (May 22, 1997).

vapor recovery SIP to amend the Commonwealth's requirements for the Stage II vapor recovery program may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 29, 2016.

Shawn M. Garvin,

Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart VV—Virginia

■ 2. Amend § 52.2420:

■ a. In the table in paragraph (c) by revising the entry ''5–40–5220'' and adding in numerical order an entry for ''5–40–5270'': and

■ b. In the table in paragraph (e) by revising an entry ''Documents Incorporated by Reference (9 VAC 5–20–21, Section B.)'' and adding ''Documents Incorporated by Reference (9 VAC 5–20–21, Section E.15.)'' at the end of the table.

The revised and added text reads as follows:

§ 52.2420 Identification of plan.

* * * * *

(c) * * *

EPA–APPROVED VIRGINIA REGULATIONS AND STATUTES

State citation	Title/Subject	State effective date	EPA Approval date	Explanation [former SIP citation]
* * *	*	*	*	* *
9 VAC 5, Chapter 40 Existing Stationary Sources[Part IV]				
* * *	*	*	*	* *
Part II Emissions Standards				
* * *	*	*	*	* *
Article 37 Emission Standards for Petroleum Liquid Storage and Transfer Operations (Rule 4–37)				
* * *	*	*	*	* *
5–40–5220	Standard for Volatile Organic Compounds	07/30/2015	10/21/2016 [*Insert* **Federal Register** *Citation*].	
* * *	*	*	*	* *
5–40–5270	Standard for Toxic Pollutants	07/30/2015	10/21/2016 [*Insert* **Federal Register** *Citation*].	
* * *	*	*	*	* *

* * * * *

(e) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA Approval date	Additional explanation
* * *	*	*	*	* *
Documents Incorporated by Reference (9 VAC 5–20–21, Section B.).	Northern Virginia (Metropolitan Washington) Ozone Nonattainment Area, Fredericksburg Ozone Maintenance Area, Richmond-Petersburg Ozone Maintenance Area.	10/1/2015	10/21/2016 [*Insert* **Federal Register** *Citation*].	State effective date is 7/30/15.

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA Approval date	Additional explanation
* * * * * * *				
Documents Incorporated by Reference (9 VAC 5–20–21, Section E.15.).	Northern Virginia (Metropolitan Washington) Ozone Nonattainment Area, Fredericksburg Ozone Maintenance Area, Richmond-Petersburg Ozone Maintenance Area.	10/1/2015	10/21/2016 [*Insert* **Federal Register** *Citation*].	State effective date is 7/30/15.
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[FR Doc. 2016–25301 Filed 10–20–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2009–0734; FRL–9954–38–OAR]

Reconsideration of Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final action denying petition for reconsideration.

SUMMARY: This action provides notice that the U.S. Environmental Protection Agency (EPA) Administrator, Gina McCarthy, denied a petition for reconsideration of the final Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces published in the **Federal Register** on March 16, 2015.

DATES: This action is effective on October 21, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Amanda Aldridge, Outreach and Information Division (C304–05), Office of Air Quality Planning and Standards, Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–5268; fax number (919) 541–2664; email address: *aldridge.amanda@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. How can I get copies of this document and other related information?

This **Federal Register** notice, the petition for reconsideration and the EPA's letter addressing the petition for reconsideration are available in the docket under Docket ID No. EPA–HQ–OAR–2009–0734.

Docket. The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2009–0734. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Docket Center (EPA/DC), EPA WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742. This action, the petition for reconsideration and the EPA's letter addressing the petition can also be found on the EPA's Web site at *http://www.epa.gov/ttn/oarpg.*

Electronic access. You may access this **Federal Register** document electronically from the Government Printing Office under the ''**Federal Register**'' listings at FDSys (*http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR*).

II. Judicial Review

Section 307(b)(1) of the Clean Air Act (CAA) indicates which Federal Court of Appeals have venue over petitions for review of final EPA actions. This section provides, in part, that the petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit if: (i) The agency action consists of ''nationally applicable regulations promulgated, or final action taken, by the Administrator;'' or (ii) such actions are locally or regionally applicable, if ''such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.''

The EPA has determined that its action denying the petition for reconsideration is nationally applicable for purposes of CAA section 307(b)(1) because the action directly affects the final Standards of Performance for New Residential Wood Heaters, new Residential Hydronic Heaters and Forced-Air Furnaces published on March 16, 2015, (''2015 New Source Performance Standards (NSPS)''), which are nationally applicable regulations. Thus, any petitions for review of the EPA's decision to deny the petition for reconsideration described in this document must be filed in the United States Court of Appeals for the District of Columbia Circuit by December 20, 2016.

III. Description of Action

The 2015 NSPS finalizes amendments to the 1988 Standards of Performance for New Residential Wood Heaters (40 CFR part 60, subpart AAA), *i.e.,* the 1988 NSPS, and adds one new subpart: Standards of Performance for the New Residential Hydronic Heaters and Forced-Air Furnaces (40 CFR part 60, subpart QQQQ). The 2015 NSPS was developed following a CAA section 111(b)(1)(B) review of the 1988 NSPS (53 FR 5860, February 26, 1988). This information is contained in the docket, which is available at *http://www.regulations.gov.* On February 3, 2014, the EPA proposed Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces (79 FR 6373). The EPA received additional data and comments during the public comment period. These data and comments were considered and analyzed and, where appropriate, the EPA revised the proposed rule. The final rule was published on March 16, 2015 (80 FR 13671).

On June 2, 2015, Richard S. Burns & Company, Inc. (''Burns'') submitted a petition for reconsideration of the 2015 NSPS (80 FR 13671, March 16, 2015). In its petition, Burns asks the EPA to reconsider aspects of the final rule's pellet fuel requirements in 40 CFR

60.532(f). Specifically, Burns asked that the EPA reconsider the ban on pellet fuels made from construction and demolition waste and the ban on pellet fuels made from ''prohibited fuels'' which includes construction or demotion debris and allow certain wood that has been sorted from construction or demolition waste to be used in the manufacture of pellet fuels for residential wood heaters.

Burns' reconsideration petition was submitted under Section 307(d)(7)(B) of the CAA, which sets forth the criteria for reconsideration. That section states that ''(o)nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impractical to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.''

The EPA has carefully considered the petition and supporting information and evaluated whether the petition meets the CAA section 307(d)(7)(B) criteria for reconsideration. The EPA has concluded that the petition does not meet the criteria for reconsideration. Thus, in a letter to the petitioner, the EPA Administrator, Gina McCarthy, denied the Richard S. Burns & Company, Inc.'s petition, and explained the reasons for the denial. This letter is available in the docket for this action.

IV. Conclusion

For the reasons discussed in the letter to the petitioner, their petition to reconsider the final Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces is denied.

List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practices and procedures, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: October 14, 2016.

Gina McCarthy,

Administrator.

[FR Doc. 2016–25512 Filed 10–20–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 271 and 272

[EPA–R06–RCRA–2015–0664; FRL–9951–21–Region 6]

Louisiana: Final Authorization of State-Initiated Changes and Incorporation by Reference of Approved State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: During a review of Louisiana's regulations, the Environmental Protection Agency (EPA) identified a variety of State-initiated changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). The EPA has determined that these changes are minor and satisfy all requirements needed to qualify for final authorization and is authorizing the State-initiated changes through this direct final action.

The Solid Waste Disposal Act, as amended, commonly referred to as the Resource Conservation and Recovery Act (RCRA), allows the Environmental Protection Agency (EPA) to authorize States to operate their hazardous waste management programs in lieu of the Federal program. The EPA uses the regulations entitled ''Approved State Hazardous Waste Management Programs'' to provide notice of the authorization status of State programs and to incorporate by reference those provisions of the State statutes and regulations that will be subject to the EPA's inspection and enforcement. The rule codifies in the regulations the prior approval of Louisiana's hazardous waste management program and incorporates by reference authorized provisions of the State's statutes and regulations.

The EPA is publishing this rule to authorize the State-initiated changes and incorporate by reference the State's hazardous waste program without a prior proposal because we believe these actions are not controversial and do not expect comments that oppose them. Unless we receive written comments which oppose the authorization in this codification document during the comment period, the decision to authorize Louisiana's State-initiated changes to its hazardous waste program will take effect. If we receive comments that oppose the authorization, we will publish a document in the **Federal Register** withdrawing this rule before it takes effect, and a separate document in the proposed rules section of this **Federal Register** will serve as a proposal to authorize the State-initiated changes.

DATES: This regulation will be effective December 20, 2016, unless the EPA receives adverse written comment by November 21, 2016. If the EPA receives such comment, it will publish a timely withdrawal of this direct final rule in the **Federal Register** and inform the public that this rule will not take effect. The Director of the Federal Register approves this incorporation by reference as of December 20, 2016 in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

ADDRESSES: Submit any comments identified by Docket ID No. EPA–R06–RCRA–2015–0664, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
2. *Email: patterson.alima@epa.gov or banks.julia@epa.gov.*
3. *Mail:* Alima Patterson, Region 6, Regional Authorization Coordinator, or Julia Banks, Codification Coordinator, Permit Section (RPM), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733.
4. *Hand Delivery or Courier:* Deliver your comments to Alima Patterson, Region 6, Regional Authorization Coordinator, or Julia Banks, Codification Coordinator, Permit Section (RPM), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733.

Instructions: Do not submit information that you consider to be Confidential Business Information (CBI) or otherwise protected through *http://www.regulations.gov,* or email. Direct your comments to Docket ID No. EPA–R06–RCRA–2015–0664. The Federal *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in

the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

You can view and copy the documents that form the basis for this authorization and codification and associated publicly available materials from 8:30 a.m. to 4 p.m. Monday through Friday at the following location: EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, phone number: (214) 665–8533 or (214) 665–8178. Interested persons wanting to examine these documents should make an appointment with the office at least two weeks in advance.

FOR FURTHER INFORMATION CONTACT:

Alima Patterson, Region 6, Regional Authorization Coordinator, or Julia Banks, Codification Coordinator, Permit Section (RPM), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, Phone number: (214) 665–8533 or (214) 665–8178, and Email address: *patterson.alima@epa.gov or banks.julia@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Authorization of State-Initiated Changes

A. Why are revisions to State programs necessary?

States which 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 hazardous waste program. As the Federal program changes, the States must change their programs and ask the EPA to authorize the changes. Changes to State hazardous waste 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. States can also initiate their own changes to their hazardous waste program and these changes must then be authorized.

B. What decisions have we made in this rule?

We conclude that Louisiana's revisions to its authorized program meet all of the statutory and regulatory requirements established by RCRA. We found that the State-initiated changes make Louisiana's rules more clear or conform more closely to the Federal equivalents and are so minor in nature that a formal application is unnecessary. Therefore, we grant Louisiana final authorization to operate its hazardous waste program with the changes described in the table at Section G below. Louisiana has responsibility for permitting Treatment, Storage, and Disposal Facilities (TSDFs) within its borders (except in Indian Country) and for carrying out all authorized aspects of the RCRA program, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA). New Federal requirements and prohibitions imposed by Federal regulations that EPA promulgates under the authority of HSWA take effect in authorized States before they are authorized for the requirements. Thus, the EPA will implement those requirements and prohibitions in Louisiana, including issuing permits, until the State is granted authorization to do so.

C. What is the effect of this authorization decision?

The effect of this decision is that a facility in Louisiana subject to RCRA will now have to comply with the authorized State requirements instead of the equivalent Federal requirements in order to comply with RCRA. Louisiana has enforcement responsibilities under its State hazardous waste program for violations of such program, but the EPA retains its authority under RCRA sections 3007, 3008, 3013, and 7003, which include, among others, authority to:

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

This action does not impose additional requirements on the regulated community because the statutes and regulations for which Louisiana is being authorized by this direct action are already effective and are not changed by this action.

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

The EPA did not publish a proposal before this rule because we view this as a routine program change and do not expect comments that oppose this approval. We are providing an opportunity for public comment now. In addition to this rule, in the proposed rules section of this **Federal Register**, we are publishing a separate document that proposes to authorize the State program changes.

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

If the EPA receives comments that oppose the authorization of the State-initiated changes in this codification document, we will withdraw this 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 the State program changes on the proposal mentioned in the previous paragraph. We will then address all public 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 we receive comments that oppose only the authorization of a particular change to the State hazardous waste program we may withdraw only that part of this rule, but the authorization of the program changes 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 of the State program will become effective and which part is being withdrawn.

In addition to the authorization of the rules described above in this document, the purpose of this **Federal Register** document is to codify Louisiana's base hazardous waste management program and its revisions to that program. The EPA has already provided notices and opportunity for comments on the Agency's decisions to authorize the Louisiana program, and the EPA is not now reopening the decisions, nor requesting comments, on the Louisiana authorizations as published in the **Federal Register** documents specified in Section I.F of this preamble.

F. For what has Louisiana previously been authorized?

The State of Louisiana initially received final authorization on January 24, 1985, effective February 7, 1985 (50 FR 3348), to implement its base Hazardous Waste Management Program. We granted authorization for changes to their program on November 28, 1989 (54 FR 48889) effective January 29, 1990; August 26, 1991 (56 FR 41958), as corrected October 15, 1991 (56 FR 51762) effective October 25, 1991; November 7, 1994 (59 FR 55368) effective January 23, 1995 (Note: On January 23, 1995 (60 FR 4380), the EPA

responded to adverse public comments and affirmed the effective date for the November 7, 1994 final rule. Then on April 11, 1995 (60 FR 18360); the EPA also made administrative corrections for the January 23, 1995 **Federal Register** document); December 23, 1994 (59 FR 66200) effective March 8, 1995; October 17, 1995 (60 FR 53704 and 60 FR 53707) effective January 2, 1996; March 28, 1996 (61 FR 13777) effective June 11, 1996; December 29, 1997 (62 FR 67572) effective March 16, 1998; October 23, 1998 (63 FR 56830) effective December 22, 1998; August 25, 1999 (64 FR 46302) effective October 25, 1999; September 2, 1999 (64 FR 48099) effective November 1, 1999; February 28, 2000 (65 FR 10411) effective April 28, 2000; January 2, 2001 (66 FR 23) effective March 5, 2001; December 9, 2003 (68 FR 68526) effective February 9, 2004; June 10, 2005 (70 FR 33852) effective August 9, 2005; November 13, 2006 (71 FR 66116) effective January 12, 2007; August 16, 2007 (72 FR 45905) effective October 15, 2007; May 20, 2009 (74 FR 23645) effective July 20, 2009; August 5, 2010 (75 FR 47223) effective October 4, 2010; June 24, 2011 (76 FR 37021) effective August 23, 2011; June 28, 2011 (77 FR 38530) effective August 27, 2012; July 13, 2012 (77 FR 41292) effective September 11, 2012; and September 14, 2015 (80 FR 55032) effective November 13, 2015.

G. What changes are we authorizing with this action?

The State has made amendments to the provisions listed in the table which follows. These amendments clarify the State's regulations and make the State's regulations more internally consistent. The State's laws and regulations, as amended by these provisions, provide authority which remains equivalent to and, no less stringent than the Federal laws and regulations. These State-initiated changes satisfy the requirements of 40 CFR 271.21(a). We are granting Louisiana final authorization to carry out the following provisions of the State's program in lieu of the Federal program. These provisions are analogous to the indicated RCRA regulations found at 40 CFR as of July 1, 2012. The Louisiana provisions are from the Louisiana Administrative Code (LAC), Title 33, Part V dated September 2014.

State requirement	Analogous federal requirement
705.B.2	40 CFR 124.15
4999, Appendix E	40 CFR part 261, Appendix IX

H. Who handles permits after the authorization takes effect?

This authorization does not affect the status of State permits and those permits issued by the EPA because no new substantive requirements are a part of these revisions.

I. How does this action affect Indian Country (18 U.S.C. 1151) in Louisiana?

Louisiana is not authorized to carry out its Hazardous Waste Program in Indian Country within the State. This authority remains with EPA. Therefore, this action has no effect in Indian Country.

II. Incorporation-by-Reference

A. What is codification?

Codification is the process of placing a State's statutes and regulations that comprise the State's authorized hazardous waste management program into the Code of Federal Regulations (CFR). Section 3006(b) of RCRA, as amended, allows the Environmental Protection Agency (EPA) to authorize State hazardous waste management programs to operate in lieu of the Federal hazardous waste management regulatory program. The EPA codifies its authorization of State programs in 40 CFR part 272 and incorporates by reference State statutes and regulations that the EPA will enforce under sections 3007 and 3008 of RCRA and any other applicable statutory provisions.

The incorporation by reference of State authorized programs in the CFR should substantially enhance the public's ability to discern the current status of the authorized State program and State requirements that can be Federally enforced. This effort provides clear notice to the public of the scope of the authorized program in each State.

B. What is the history of the codification of Louisiana's hazardous waste management program?

The EPA incorporated by reference Louisiana's then authorized hazardous waste management program effective March 16, 1998 (62 FR 67578), October 4, 2010 (75 FR 47223), September 11, 2012 (77 FR 41292), and November 25, 2013 (78 FR 58890).

In this document, the EPA is revising Subpart T of 40 CFR part 272 to include the authorization revision actions effective November 13, 2015 (80 FR 55032).

C. What codification decisions has EPA made in this rule?

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the Louisiana rules described in the amendments to 40 CFR part 272 set forth below. The EPA has made, and will continue to make, these documents available electronically through *http://www.regulations.gov* and in hard copy at the appropriate EPA office (see the **ADDRESSES** section of this preamble for more information).

The purpose of this **Federal Register** document is to codify Louisiana's base hazardous waste management program and its revisions to that program. This document incorporates by reference Louisiana's hazardous waste statutes and regulations and clarifies which of these provisions are included in the authorized and Federally enforceable program. By codifying Louisiana's authorized program and by amending the Code of Federal Regulations, the public will be more easily able to discern the status of Federally approved requirements of the Louisiana hazardous waste management program.

The EPA is incorporating by reference the Louisiana authorized hazardous waste management program in subpart T of 40 CFR part 272. Section 272.951 incorporates by reference Louisiana's authorized hazardous waste statutes and regulations. Section 272.951 also references the statutory provisions (including procedural and enforcement provisions) which provide the legal basis for the State's implementation of the hazardous waste management program, the Memorandum of Agreement, the Attorney General's Statements and the Program Description, which are approved as part of the hazardous waste management program under Subtitle C of RCRA.

D. What is the effect of Louisiana's codification on enforcement?

The EPA retains its authority under statutory provisions, including but not limited to, RCRA sections 3007, 3008, 3013, and 7003, and other applicable statutory and regulatory provisions to undertake inspections and enforcement actions and to issue orders in authorized States. With respect to these actions, the EPA will rely on Federal sanctions, Federal inspection authorities, and Federal procedures rather than any authorized State analogues to these provisions. Therefore, the EPA is not incorporating by reference such particular, approved Louisiana procedural and enforcement authorities. Section 272.951(c)(2) of 40 CFR lists the statutory and regulatory provisions which provide the legal basis for the State's implementation of the hazardous

waste management program, as well as those procedural and enforcement authorities that are part of the State's approved program, but these are not incorporated by reference.

E. What state provisions are not part of the codification?

The public needs to be aware that some provisions of Louisiana's hazardous waste management program are not part of the Federally authorized State program. These non-authorized provisions include:

(1) Provisions that are not part of the RCRA subtitle C program because they are ''broader in scope'' than RCRA subtitle C (see 40 CFR 271.1(i));

(2) Federal rules adopted by Louisiana but for which the State is not authorized;

(3) Unauthorized amendments to authorized State provisions;

(4) New unauthorized State requirements; and

(5) Federal rules for which Louisiana is authorized but which were vacated by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Cir. No. 98–1379 and 98–1379; June 27, 2014).

State provisions that are ''broader in scope'' than the Federal program are not part of the RCRA authorized program and the EPA will not enforce them. Therefore, they are not incorporated by reference in 40 CFR part 272. For reference and clarity, 40 CFR 272.951(c)(3) lists the Louisiana regulatory provisions which are ''broader in scope'' than the Federal program and which are not part of the authorized program being incorporated by reference. ''Broader in scope'' provisions cannot be enforced by the EPA; the State, however, may enforce such provisions under State law.

Additionally, Louisiana's hazardous waste regulations include amendments which have not been authorized by the EPA. Since the EPA cannot enforce a State's requirements which have not been reviewed and authorized in accordance with RCRA section 3006 and 40 CFR part 271, it is important to be precise in delineating the scope of a State's authorized hazardous waste program. Regulatory provisions that have not been authorized by the EPA include amendments to previously authorized State regulations as well as certain Federal rules and new State requirements.

Federal rules Louisiana has adopted but is not authorized for include those published in the **Federal Register** on August 8, 1986 (51 FR 28664); December 1, 1987 (52 FR 45788; Post-Closure Permits requirements); April 12, 1996 (61 FR 16290); and December 17, 2010 (75 FR 78915). In those instances where Louisiana has made unauthorized amendments to previously authorized sections of State code, the EPA is identifying in 40 CFR 272.951(c)(4) any regulations which, while adopted by the State and incorporated by reference, include language not authorized by the EPA. Those unauthorized portions of the State regulations are not Federally enforceable. Thus, notwithstanding the language in Louisiana hazardous waste regulations incorporated by reference at 40 CFR 272.951(c)(1), the EPA will only enforce those portions of the State regulations that are actually authorized by the EPA. For the convenience of the regulated community, the actual State regulatory text authorized by the EPA for the citations listed at 272.951(c)(4) (*i.e.,* without the unauthorized amendments) is compiled as a separate document, *Addendum to the EPA Approved Louisiana Regulatory Requirements Applicable to the Hazardous Waste Management Program, dated November 2015.* This document is available from EPA Region 6, Sixth Floor, 1445 Ross Avenue, Dallas, Texas 75202–2733, Phone number: (214) 665–8533, and also Louisiana Department of Environmental Quality, 602 N. Fifth Street, Baton Rouge, Louisiana 70884–2178, phone number (225) 219–3559.

State regulations that are not incorporated by reference in this rule at 40 CFR 272.951(c)(1), or that are not listed in 40 CFR 272.951(c)(2) (''legal basis for the State's implementation of the hazardous waste management program''), 40 CFR 272.951(c)(3) (''broader in scope'') or 40 CFR 272.951(c)(4) (''unauthorized state amendments''), are considered new unauthorized State requirements. These requirements are not Federally enforceable.

With respect to any requirement pursuant to the Hazardous and Solid Waste Amendments of 1984 (HSWA) for which the State has not yet been authorized, the EPA will continue to enforce the Federal HSWA standards until the State is authorized for these provisions.

F. What will be the effect of federal HSWA requirements on the codification?

The EPA is not amending 40 CFR part 272 to include HSWA requirements and prohibitions that are implemented by the EPA. Section 3006(g) of RCRA provides that any HSWA requirement or prohibition (including implementing regulations) takes effect in authorized and not authorized States at the same time. A HSWA requirement or prohibition supersedes any less stringent or inconsistent State provision which may have been previously authorized by the EPA (50 *FR* 28702, July 15, 1985). The EPA has the authority to implement HSWA requirements in all States, including authorized States, until the States become authorized for such requirement or prohibition. Authorized States are required to revise their programs to adopt the HSWA requirements and prohibitions, and then to seek authorization for those revisions pursuant to 40 CFR part 271.

Instead of amending the 40 CFR part 272 every time a new HSWA provision takes effect under the authority of RCRA section 3006(g), the EPA will wait until the State receives authorization for its analog to the new HSWA provision before amending the State's 40 CFR part 272 incorporation by reference. Until then, persons wanting to know whether a HSWA requirement or prohibition is in effect should refer to 40 CFR 271.1(j), as amended, which lists each such provision.

Some existing State requirements may be similar to the HSWA requirement implemented by the EPA. However, until the EPA authorizes those State requirements, the EPA can only enforce the HSWA requirements and not the State analogs. The EPA will not codify those State requirements until the State receives authorization for those requirements.

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 therefore this action is not subject to review by OMB. This rule incorporates by reference Louisiana's authorized hazardous waste management regulations and imposes no additional requirements beyond those imposed by State law. 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 rule merely incorporates by reference certain existing State hazardous waste management program requirements which the EPA already approved under 40 CFR part 271, and with which regulated entities must already comply, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

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 incorporates by reference existing State hazardous waste management program requirements without altering the relationship or the distribution of power and responsibilities established by RCRA. This action also does not have Tribal implications within the meaning of Executive Order 13175 (65 *FR* 67249, November 6, 2000).

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.

The requirements being codified are the result of Louisiana's voluntary participation in the EPA's State program authorization process under RCRA Subtitle C. 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 issuing this rule, 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 the rule 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 rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Executive Order 12898 (59 FR 7629, Feb. 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 rule 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, the rule is not subject to Executive Order 12898.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this document and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This action will be effective December 20, 2016.

List of Subjects

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.

40 CFR Part 272

Environmental protection, Hazardous materials transportation, Hazardous waste, Incorporation by reference, Intergovernmental relations, Water pollution control, Water supply.

Authority: This rule 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).

Dated: August 1, 2016.

Ron Curry,

Regional Administrator,

Region 6.

For the reasons set forth in the preamble, under the authority at 42 U.S.C. 6912(a), 6926, and 6974(b), the EPA is granting final authorization under part 271 to the State of Louisiana for revisions to its hazardous waste program under the Resource Conservation and Recovery Act and is amending 40 CFR part 272 as follows.

PART 272—APPROVED STATE HAZARDOUS WASTE MANAGEMENT PROGRAMS

■ 1. The authority citation for part 272 continues to read as follows:

Authority: Sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. 6912(a), 6926, and 6974(b).

■ 2. Revise § 272.951 to read as follows:

§ 272.951 Louisiana State-administered program: Final authorization.

(a) Pursuant to section 3006(b) of RCRA, 42 U.S.C. 6926(b), the EPA granted Louisiana final authorization for the following elements as submitted to EPA in Louisiana's base program application for final authorization which was approved by EPA effective on February 7, 1985. Subsequent program revision applications were approved effective on January 29, 1990, October 25, 1991 as corrected October 15, 1991; January 23, 1995 as corrected April 11, 1995; March 8, 1995; January 2, 1996; June 11, 1996, March 16, 1998, December 22, 1998, October 25, 1999, November 1, 1999, April 28, 2000, March 5, 2001, February 9, 2004, August 9, 2005, January 12, 2007, October 15, 2007, July 20, 2009, October 4, 2010, August 23, 2011, August 27, 2012, September 11, 2012, November 25, 2013, November 13, 2015 and December 20, 2016.

(b) The State of Louisiana has primary responsibility for enforcing its hazardous waste management program. However, EPA retains the authority to exercise its inspection and enforcement authorities in accordance with sections 3007, 3008, 3013, 7003 of RCRA, 42 U.S.C. 6927, 6928, 6934, 6973, and any other applicable statutory and regulatory provisions, regardless of whether the State has taken its own actions, as well as in accordance with other statutory and regulatory provisions.

(c) *State Statutes and Regulations.* (1) The Louisiana statutes and regulations cited in paragraph (c)(1)(i) of this section are incorporated by reference as part of the hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.* The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain copies of the Louisiana regulations that are incorporated by reference in this paragraph from the Office of the State Register, P.O. Box 94095, Baton Rouge, LA 70804–9095; Phone number: (225) 342–5015; Web site: *http://*

doa.louisiana.gov/osr/lac/lac.htm. The statutes are available from West Publishing Company, 610 Opperman Drive, P.O. Box 64526, St. Paul, Minnesota 55164 0526; Phone: 1–800–328–4880; Web site: *http://west.thomson.com.* You may inspect a copy at EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202 (Phone number (214) 665–8533), or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

(i) The binder entitled ''EPA-Approved Louisiana Statutory and Regulatory Requirements Applicable to the Hazardous Waste Management Program,'' dated November, 2015.

(ii) [Reserved]

(2) The following provisions provide the legal basis for the State's implementation of the hazardous waste management program, but they are not being incorporated by reference and do not replace Federal authorities:

(i) Louisiana Statutes Annotated, Revised Statutes, 2000 Main Volume (effective August 15, 1999), Volume 17B, Subtitle II of Title 30, Louisiana Environmental Quality Act, 2000: Chapter 1, Section 2002; Chapter 2, Sections 2013, 2014.2, 2020, 2021, 2022.1(B), 2024, 2026 through 2029, 2033.A–D; Chapter 2–A, Section 2050.8; Chapter 9, Sections 2172, 2174, 2175, 2181, 2183.1.B, 2183.2, 2184.B, 2187, 2188.A and C, 2189.A and B, 2190.A–D, 2191.A–C, 2192, 2193, 2196, 2200, 2203.B and C, 2204.A(2), A(3) and B; Chapter 13, Sections 2294(6), 2295.C; Chapter 16, Section 2369.

(ii) Louisiana Statutes Annotated, Revised Statutes, 2014 (effective August 1, 2013) Cumulative Annual Pocket Part, Volume 17B, Subtitle II of Title 30, Louisiana Environmental Quality Act: Chapter 2, 2011.A(1), 2011.B and C (except 2011.C(1)(b)), 2011.D (except 2011.D(4), (10)–(12), (16), (19), (20), (23) and (25)), 2011.E–G, 2012, 2014.A (except 2014.A.3), 2017, 2019.A–C, 2022.A (except the first sentence of 2022.A(1)), 2022.B and C, 2023 (except 2023.A(2) and phrase ''Except as otherwise provided in this Subsection,'' in 2023.A(1)), 2025 (except 2025.D, .F(3), .H and .K); Chapter 3, Sections 2054.B(1), 2054.B(2)(a); Chapter 9, Sections 2180.A–C, 2183.C, and .F–.H, 2186.A–C, 2199; Chapter 18, Section 2417.A.

(iii) Louisiana Administrative Code, Title 33, Part I, Office of The Secretary Part I, Subpart 1: Departmental Administrative Procedures: Chapter 5, Sections 501.A, effective October 20, 2007, 501.B, effective October 20, 2005, 502, effective September 20, 2008, and 503 through 511, effective October 20, 2005; Chapter 7, Section 705, effective October 20, 2006; Chapter 19, Sections 1901 through 1909, effective November 20, 2010; Chapter 23, Sections 2303 through 2309, effective October 20, 2009.

(iv) Louisiana Administrative Code, Title 33, Part V, Hazardous Waste and Hazardous Materials, Louisiana Hazardous Waste Regulations, dated September 2014, unless otherwise specified: Chapter 1, Sections 101, 107.A.–C; Chapter 3, Sections 301, 311.A, 311.C, 315 introductory paragraph, 323.B.3; 323.B.4.d and e; Chapter 5, Section, 503; Chapter 7, Sections 703, 705, 707, 709 through 721; and Chapter 22, Sections 2201.A, 2201.E, 2201.F.

(3) The following statutory and regulatory provisions are broader in scope than the Federal program, are not part of the authorized program, and are not incorporated by reference:

(i) Louisiana Statutes Annotated, Revised Statutes, 2000 Main Volume (effective August 15, 1999), Volume 17B, Subtitle II of Title 30, Louisiana Environmental Quality Act, 2000: Chapter 9, Sections 2178 and 2197.

(ii) Louisiana Statutes Annotated, Revised Statutes, 2014 (effective August 1, 2013) Cumulative Annual Pocket Part, Volume 17B, Subtitle II of Title 30, Louisiana Environmental Quality Act: Chapter 2, Sections 2014.B and D.

(iii) Louisiana Administrative Code, Title 33, Part I, Office of The Secretary Part I, Subpart 1: Departmental Administrative Procedures: Chapter 19, Section 1911, effective November 20, 2010.

(iv) Louisiana Administrative Code, Title 33, Part V, Hazardous Waste And Hazardous Materials, Louisiana Hazardous Waste Regulations, dated September 2014, unless otherwise specified: Chapter 1, Section, 108.G.5; Chapter 3, Section 327; Chapter 11, Sections 1101.G and 1109.E.7.f ; Chapter 13, Section 1313; Chapter 51.

(4) *Unauthorized State Amendments.* (i) Louisiana has adopted but is not authorized to implement the HSWA rules that are listed in the Table in lieu of the EPA. The EPA will enforce the Federal HSWA standards for which Louisiana is not authorized until the State receives specific authorization from EPA.

Federal requirement	**Federal Register** reference	Publication date
Exports of Hazardous Waste (HSWA)	51 FR 28664	August 8, 1986.
HSWA Codification Rule 2: Post-Closure Permits (HSWA)	52 FR 45788	December 1, 1987.
Imports and Exports of Hazardous Waste: Implementation of OECD Council Decision (HSWA).	61 FR 16290	April 12, 1996.

(ii)(A) The following authorized provisions of the Louisiana regulations include amendments published in the Louisiana Register that are not approved by EPA. Such unauthorized amendments are not part of the State's authorized program and are, therefore, not Federally enforceable. Thus, notwithstanding the language in the Louisiana hazardous waste regulations incorporated by reference at paragraph (c)(1)(i) of this section, EPA will enforce the State provisions that are actually authorized by EPA. The effective dates of the State's authorized provisions are listed in the following Table.

State provision	Effective date of authorized provision
LAC 1111.B.1.c	March 20, 1984.
LAC 1113	March 20, 1984.
LAC 4407.A.12	March 20, 1984.

(B) The actual State regulatory text authorized by EPA (*i.e.,* without the unauthorized amendments) is available as a separate document, *Addendum to the EPA-Approved Louisiana Regulatory and Statutory Requirements Applicable to the Hazardous Waste Management Program, dated November 2015.* Copies of the document can be obtained from U.S. EPA Region 6, 1445 Ross Avenue, Dallas, TX 75202 or Louisiana Department of Environmental Quality, 602 N. Fifth Street, Baton Rouge, Louisiana 70884–2178.

(5) *Vacated Federal Rules.* Louisiana adopted and was authorized for the following Federal rules which have since been vacated by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Cir. No. 98–1379 and 08–1144, respectively; June 27, 2014):

Federal requirement	**Federal Register** reference	Publication date
Hazardous Waste Combustors; Revised Standards (HSWA) (Checklist 168—40 CFR 261.4(a)(16) and 261.38 only).	63 FR 33782	June 19, 1998.
Exclusion of Oil-Bearing Secondary Materials Processed in a Gasification System to Produce Synthesis Gas (Checklist 216—Definition of "Gasification" at 40 CFR 260.10 and amendment to 40 CFR 261.4(a)(12)(i)).	73 FR 57	January 2, 2008.
Withdrawal of the Emission Comparable Fuel Exclusion under RCRA (Checklist 224—amendments to 40 CFR 261.4(a)(16) and 261.38).	7 FR 33712	June 15, 2010.

(6) *Memorandum of Agreement.* The Memorandum of Agreement between EPA Region 6 and the State of Louisiana, signed by the Secretary of the State of Louisiana Department of Environmental Quality (LDEQ) on October 30, 2014 and the EPA Regional Administrator on August 21, 2015 is referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

(7) *Statement of Legal Authority.* "Attorney General's Statement for Final Authorization", signed by the Attorney General of Louisiana on December, 13, 1996 and revisions, supplements and addenda to that Statement dated January 13, 1998, January 13, 1999, January 27, 1999, August 19, 1999, August 29, 2000, October 17, 2001, February 25, 2003, October 20, 2004, December 19, 2005, September 5, 2006, October 9, 2008, January 14, 2010, April 18, 2012, and June 11, 2014 are referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

(8) *Program Description.* The Program Description and any other materials submitted as part of the original application or as supplements thereto are referenced as part of the authorized hazardous waste management program under subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

■ 3. Appendix A to part 272 is amended by revising the listing for "Louisiana" to read as follows:

Appendix A to Part 272—State Requirements

* * * * *

Louisiana

The statutory provisions include:

Louisiana Statutes Annotated, Revised Statutes, 2000 Main Volume (effective August 15, 1999), Volume 17B, Subtitle II of Title 30, Louisiana Environmental Quality Act, 2000: Chapter 2, Section 2022.1(A); Chapter 8, Section 2153(1); Chapter 9, Sections 2173 (except 2173(9)), 2183.1.A, 2184.A, 2188.B, 2189.C, 2202, 2203.A, 2204.A(1) and C; Chapter 13, Sections 2295.A and B.

Louisiana Statutes Annotated, Revised Statutes, 2014 (effective August 1, 2013) Cumulative Annual Pocket Part, Volume 17B, Subtitle II of Title 30, Louisiana Environmental Quality Act: Chapter 1, Sections 2003, 2004 introductory paragraph, 2004(2)–(4), 2004(7)–(10), 2004(13), 2004(14) (except 2004(14)(b)–(d)), 2004(15), 2004(18); Chapter 2, Section 2022.A(1), first sentence; Chapter 9, Sections 2183.A, B, D, E, and I; Chapter 18, Section 2417.E(5).

Copies of the Louisiana statutes that are incorporated by reference are available from West Publishing Company, 610 Opperman Drive, Eagan, Minnesota 55123; Phone: 1–800–328–4880; Web site: *http://west.thomson.com.*

The regulatory provisions include:

Louisiana Administrative Code, Title 33, Part V, Hazardous Waste and Hazardous Materials, Louisiana Hazardous Waste Regulations, Part V, Subpart 1: Department of Environmental Quality—Hazardous Waste, dated September 2014. Please note that for some provisions, the authorized version is found in the LAC, Title 33, Part V, dated September 2011, December 31, 2009 or June 1995.

Chapter 1—General Provisions And Definitions, Sections 103; 105 (except the phrase ", gasification (as defined in LAC 33:V.109)" in 105.D.1.l.i, 105.D.1.q, and 105.P); 108 (except 108.G.5); 109 (except "Batch tank", "Competent Authorities", "Concerned Countries", "Continuous flow tank", "Country of Export", "Country of Import", "Country of Transit", "EPA Acknowledgement of Consent", "Exporter", "Exporting Country", "Gasification", "Importer", "Importing Country", "OECD", "Organization for Economic Cooperation and Development (OECD) Area", "Primary Exporter", "Receiving Country", "Recognized Trader", "Recovery Facility", "Recovery Operations", "Transboundary Movement", "Transit Country"); 110 (except 110.G.1 and reserved provisions); 111;

Chapter 3—General Conditions for Treatment, Storage, and Disposal Facility Permits, Sections 303; 305 (except 305.F and .G); 307; 309; 311 (except 311.A and .C); 313; 315.A–.D; 317; 319; 321.A (except the phrase "and in accordance with LAC 33.I.Chapter 15"); 321.B and .C; 322 (except 322.D.1.g); 323 (except 323.B.3, .B.4.d and .e); 325; 329;

Chapter 5—Permit Application Contents, Sections 501; 505 through 516; 517 (except the following phrases in 517.V: "or 2271, or a determination made under LAC 33:V.2273," and, "or a determination"); 519 through 528; 529 (except 529.E); 530 through 536; 537 (except 537.B.2.f and .B.2.l); 540 through 699;

Chapter 7—Administrative Procedures for Treatment, Storage, and Disposal Facility Permits, Sections 701; 706; 708;

Chapter 11—Generators, Sections 1101 (except 1101.B and .G); 1103; 1105; 1107 (except reserved provision); 1109 (except 1109.E.1 introductory paragraph, .E.1.a.ii, .E.1.a.iv, .E.1.b, .E.1.c, .E.7.f, and reserved provision); 1109.E.1 introductory paragraph (September 2011); 1109.E.1.a.ii (December 31, 2009); 1109.E.1.a.iv, .E.1.b, and .E.1.c (September 2011); 1111.A; 1111.B.1 introductory paragraph (except the phrase "to a treatment, storage, or disposal facility within the United States"); 1111.B.1.a.–.c; 1111.B.1.d (except the phrase "within the United States"); 1111.B.1.e (except the phrase "within the United States"); 1111.B.1.f.–.h; 1111.B.2 (except the phrase "for a period of at least three years from the date of the report" and the third and fourth sentences); 1111.C–.E; 1113; 1121; 1199 Appendix A;

Chapter 13—Transporters, Sections 1301 (except 1301.F); 1303; 1305; 1307.A introductory paragraph (except the third sentence); 1307.B; 1307.C (except the last sentence); 1307.D; 1307.E (except the phrase "and, for exports, an EPA Acknowledgment of Consent" at .E.2); 1307.F (except the phrase "and, for exports, an EPA Acknowledgment of Consent" at 1307.F.2); 1307.G (except 1307.G.4); 1307.H; 1309; 1311; 1315 through 1323;

Chapter 15—Treatment, Storage, and Disposal Facilities, Sections 1501 (except reserved provision); 1503 through 1529; 1531 (except 1531.B); 1533; 1535;

Chapter 17—Air Emission Standards, Sections 1701 through 1799; Appendix Table 1;

Chapter 18—Containment Buildings, Sections 1801; 1802; 1803 (except 1803.B.2);

Chapter 19—Tanks, Sections 1901 (December 31, 2009); 1903; 1905; 1907.A–.D; 1907.E (December 31, 2009); 1907.F–.I; 1909.A–.C; 1911 through 1921;

Chapter 20—Integration With Maximum Achievable Control Technology (MACT), Section 2001;

Chapter 21—Containers, Sections 2101 through 2119;

Chapter 22—Prohibitions On Land Disposal, Sections 2201.B–.D; 2201.G (except 2201.G.3); 2201.H; 2201.I; 2203.A (except "Cone of Influence", "Confining Zone", "Formation", "Injection Interval", "Injection Zone", "Mechanical Integrity", "Transmissive Fault or Fracture", "Treatment", "Underground Source of Drinking Water"); 2203.B; 2205 (except the phrase "or a determination made under LAC 33:V.2273," in 2205.D); 2207; 2208; 2209 (except the phrase "or a determination made under LAC 33:V.2273," in 2209.D.1); 2211; 2213; 2215; 2216 (except the phrase "or 2271" in 2216.E.2); 2218 (except the phrase "or 2271" in 2218.B.2); 2219; 2221.D–.F; 2223; 2227 (except 2227.B), 2230, 2231.G–.M,

2233, 2236, 2237, 2245.A–I.; 2246; 2247 (except 2247.G and .H); 2299 Appendix (except Tables 4 and 12);

Chapter 23—Waste Piles, Sections 2301 through 2313; 2315 (except the word ''either'' at the end of 2315.B introductory paragraph; the word ''or'' at the end of 2315.B.1; and 2315.B.2); 2317;

Chapter 24—Hazardous Waste Munitions And Explosives Storage, Sections 2401 through 2405;

Chapter 25—Landfills, Sections 2501 through 2523;

Chapter 26—Corrective Action Management Units And Temporary Units, Sections 2601 through 2607;

Chapter 27—Land Treatment, Sections 2701 through 2723;

Chapter 28—Drip Pads, Sections 2801 through 2807; 2809 (except the word ''either'' at the end of 2809.B introductory paragraph; the word ''or'' at the end of 2809.B.1; and 2809.B.2);

Chapter 29—Surface Impoundments, Sections 2901 through 2909; 2911 (except the word ''either'' at end of 2911.B introductory paragraph and 2911.B.1); 2913 through 2919;

Chapter 30—Hazardous Waste Burned In Boilers And Industrial Furnaces, Sections 3001 through 3007; 3009 (except reserved provision); 3011 through 3025; 3099 Appendices A through L;

Chapter 31—Incinerators, Sections 3101 through 3121;

Chapter 32—Miscellaneous Units, Sections 3201; 3203; 3205; 3207 (except 3207.C.2);

Chapter 33—Groundwater Protection, Sections 3301 through 3321; 3322 (except 3322.D); 3323; 3325;

Chapter 35—Closure and Post-Closure, Sections 3501 through 3505; 3507 (except 3507.B); 3509 through 3519; 3521 (except 3521.A.3); 3523 through 3527;

Chapter 37—Financial Requirements, Sections 3701 through 3719;

Chapter 38—Universal Wastes, Sections 3801 through 3811; 3813 (except ''Mercury-containing Lamp''); 3815 through 3833; 3835 (except the phrase '', other than to those OECD countries . . . requirements of LAC 33:V.Chapter 11.Subchapter B),'' at 3835.A introductory paragraph); 3837 through 3855; 3857 (except the phrase '', other than to those OECD countries . . . requirements of LAC 33:V.Chapter 11.Subchapter B),'' at 3857.A introductory paragraph); 3859 through 3869; 3871 (except the phrase ''other than to those OECD countries . . . requirements of LAC 33:V.Chapter 11.Subchapter B)'' at 3871.A introductory paragraph); 3873 through 3877; 3879 (except 3879.B); 3881; 3883;

Chapter 40—Used Oil, Sections 4001 through 4093;

Chapter 41—Recyclable Materials, Sections 4101; 4105 (except.A.1.a.i and ii, and .A.4); 4139; 4141; 4143 (except the word ''and'' at the end of 4143.B.4; and 4143.B.5); 4145;

Chapter 42—Conditional Exemption for Low-Level Mixed Waste Storage and Disposal, Sections 4201 through 4243;

Chapter 43—Interim Status, Sections 4301.A; 4301.B (June 1995); 4301.B; 4301.C (June 1995); 4301.C –.I; 4302 through 4371; 4373 (except the last two sentences ''The administrative authority . . . as demonstrated in accordance with LAC 33:I.Chapter 13.'' in 4373.K.1); 4375; 4377; 4379 (except 4379.B); 4381 through 4387; 4389 (except 4389.C); 4391 through 4397; 4399 (except 4399.A.6.i); 4401 through 4413; 4417 through 4435; 4437 (except 4437.E.1, 4437.E.2, and 4437.J); 4437.E.1 and .E.2 (December 31, 2009); 4438 through 4456; 4457.A (except 4457.A.2); 4457.B (except the phrase: ''If the owner or operator . . . he must'' in the introductory paragraph); 4457.C; 4459 through 4474; 4475 (except the word ''either'' at the end of 4475.B introductory paragraph; the word ''or'' at the end of 4475.B.1; and 4475.B.2); 4476 through 4499; 4501 (except 4501.D.3); 4502 through 4703; 4705 (except the word ''either'' at the end of 4705.B introductory paragraph; the word ''or'' at the end of 4705.B.1; and 4705.B.2); 4707 through 4739;

Chapter 49—Lists Of Hazardous Wastes, Sections 4901; 4903; 4907; 4911 through 4915; 4999 Appendices C through E;

Chapter 53—Military Munitions, Sections 5301 through 5311;

Louisiana Administrative Code, Title 33, Part VII, Solid Waste, as amended through June 2011; Sections 301.A.2.a and 315.J.

Copies of the Louisiana Administrative Code as published by the Office of the State Register, P. O. Box 94095, Baton Rouge, LA 70804–9095; Phone: (225) 342–5015; Web site: *http://doa.louisiana.gov/osr/lac/lac.htm.*

* * * * *

[FR Doc. 2016–25318 Filed 10–20–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 106

[Docket No. USCG–2015–0086]

RIN 1625–AC23

Requirements for Vessels With Registry Endorsements or Foreign-Flagged Vessels That Perform Certain Aquaculture Support Operations

AGENCY: Coast Guard, DHS.

ACTION: Final rule; information collection approval.

SUMMARY: The Coast Guard announces that it has received approval from the Office of Management and Budget (OMB) for an information collection request associated with the Requirements for Vessels with Registry Endorsements or Foreign-Flagged Vessels that Perform Certain Aquaculture Support Operations final rule we published in the **Federal Register** on September 15, 2016. In that rule, we stated the final rule will impose a new information collection requirement and that we would submit this new information collection requirement to OMB for its review. OMB approved this new collection of information on September 28, 2016, and assigned it OMB Control Number 1625–0126.

DATES: On September 28, 2016, the Office of Management and Budget (OMB) approved the Coast Guard's collection of information request associated with the Requirements for Vessels with Registry Endorsements or Foreign-Flagged Vessels that Perform Certain Aquaculture Support Operations final rule published on September 15, 2016 at 81 FR 63420. OMB's approval for this collection of information expires on September 30, 2019.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. David Belliveau, Fishing Vessels Division (CG–CVC–3), U.S. Coast Guard; telephone 202–372–1247, email *David.J.Belliveau@uscg.mil.*

SUPPLEMENTARY INFORMATION:

Viewing Items Associated With This Document

To view OMB's approval memo or the Requirements for Vessels with Registry Endorsements or Foreign-Flagged Vessels that Perform Certain Aquaculture Support Operations final rule, go to *www.regulations.gov,* type the docket number, USCG–2015–0086, in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Open Docket Folder'' in the first item listed. Use the following link to go directly to the docket: *http://www.regulations.gov/docket?D=USCG–2015–0086.*

Background

On September 15, 2016, the Coast Guard published a final rule (81 FR 63420) that implemented Requirements for Vessels with Registry Endorsements or Foreign-Flagged Vessels that Perform Certain Aquaculture Support Operations. Section 46 CFR 106.115 in that rule contains a collection-of-information provision that requires approval by OMB under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. On September 28, 2016, OMB approved the Coast Guard's collection of information request for this final rule and assigned OMB Control Number 1625–0126 to the collection. The approval for this collection of information expires on September 30, 2019.

This document is issued under the authority of 5 U.S.C. 552(a).

Dated: October 15, 2016.

V.B. Gifford, Jr.,

Captain, U.S. Coast Guard, Director of Inspections and Compliance.

[FR Doc. 2016–25364 Filed 10–20–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

[FAC 2005–91; FAR Case 2014–018; Corrections; Docket 2014–0018; Sequence No. 1]

Federal Acquisition Regulation; Contractors Performing Private Security Functions; Corrections

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule; correction.

SUMMARY: DoD, GSA, and NASA are issuing a correction to FAC 2005–91; FAR Case 2014–018; Contractors Performing Private Security Functions; (Item IX), which was published in the **Federal Register** at 81 FR 67776, on September 30, 2016. This correction corrects paragraph designations.

DATES: *Effective:* October 31, 2016.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–91, FAR Case 2014–018; Corrections.

SUPPLEMENTARY INFORMATION:

Corrections

In rule FR Doc. 2016–23203, published in the **Federal Register** at 81 FR 67776, on September 30, 2016, make the following corrections:

52.212–5 [Corrected]

■ 1. On page 67777, in the center column, correct amendatory instruction number 6.b. by removing from paragraph 3. ‘‘paragraph (e)(1)(ii)(T)’’ and adding ‘‘paragraph (e)(1)(ii)(O)’’ in its place; and

■ 2. On page 67777, in the third column, in Alternate II, redesignate paragraph ‘‘(e)(1)(ii)(T)’’ as paragraph ‘‘(e)(1)(ii)(O)’’.

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

Dated: October 17, 2016.

William Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2016–25548 Filed 10–20–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 246, and 252

[Docket DARS–2016–0023]

Defense Federal Acquisition Regulation Supplement; Technical Amendments

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is making technical amendments to the Defense Federal Acquisition Regulation Supplement (DFARS) to provide needed editorial changes.

DATES: Effective October 21, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer L. Hawes, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060. Telephone 571–372–6115; facsimile 571–372–6094.

SUPPLEMENTARY INFORMATION: This final rule amends the DFARS as follows—

1. Provides direction to contracting officers at DFARS 204.270–2(c) to follow the procedures at DFARS Procedures, Guidance, and Information (PGI) 204.270–2(c) regarding the creation and processing of contract deficiency reports;

2. Corrects a reference at DFARS 246.870–2(a)(2) to the clause at 252.246–7008, Sources of Electronic Parts; and

3. Corrects a reference at DFARS 252.246–7008(b)(3)(i) to another paragraph of the clause.

List of Subjects in 48 CFR 204, 246, and 252

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 204, 246, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 204, 246, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 204—ADMINISTRATIVE MATTERS

204.270 [Amended]

■ 2. Amend section 204.270–2 by—

■ a. Redesignating the introductory text as paragraph (b);

■ b. In the newly redesignated paragraph (b), removing ‘‘contract documents’’ and adding ‘‘contract documents and data’’ in its place; and

■ c. Adding paragraph (c).

The addition reads as follows:

204.270–2 Procedures

* * * * *

(c) The procedures at PGI 204.270–2(c) provide details on the creation and processing of contract deficiency reports, which are used to correct problems with contracts distributed in EDA.

* * * * *

PART 246—QUALITY ASSURANCE

246.870–2 [Amended]

■ 3. Amend section 204.870–2(a)(2) introductory text by removing ‘‘(b)(3)(ii) through (b)(3)(iv)’’ and adding ‘‘(b)(3)(ii)’’ in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.246–7008 [Amended]

■ 4. Amend section 252.246–7008 by—

■ a. Removing the clause date ‘‘(AUG 2016)’’ and adding ‘‘(OCT 2016)’’ in its place; and

■ b. In paragraph (b)(3)(i) introductory text, removing ‘‘paragraphs (b)(3)(ii) through (b)(3)(iv)’’ and adding ‘‘paragraph (b)(3)(ii)’’ in its place.

[FR Doc. 2016–25425 Filed 10–20–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 192

[Docket No. PHMSA–2011–0009; Amdt. No 192–121]

RIN 2137–AE71

Pipeline Safety: Expanding the Use of Excess Flow Valves in Gas Distribution Systems to Applications Other Than Single-Family Residences

Correction

In rule document 2016–24817, appearing on pages 70987 through 71002 in the issue of Friday, October 14, 2016, make the following correction:

§ 192.383 Excess flow valve installation.

■ On page 71001, in the third column, in paragraph § 192.383 (b), on the fourth line, ''April 17, 2016'' should read ''April 14, 2017''.

[FR Doc. C1–2016–24817 Filed 10–20–16; 8:45 am]

BILLING CODE 1301–00–D

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 150916863–6211–02]

RIN 0648–XE950

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch in the Bering Sea Subarea of the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; modification of a closure.

SUMMARY: NMFS is opening directed fishing for Pacific ocean perch in the Bering Sea subarea of the Bering Sea and Aleutian Islands management area. This action is necessary to fully use the 2016 total allowable catch of Pacific ocean perch specified for the Bering Sea subarea of the Bering Sea and Aleutian Islands management area.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), October 20, 2016, through 1200 hrs, A.l.t., December 31, 2016. Comments must be received at the following address no later than 4:30 p.m., A.l.t., November 4, 2016.

ADDRESSES: You may submit comments on this document, identified by FDMS Docket Number 2015–0118 by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *http://www.regulations.gov/docket?D=NOAA-NMFS-2015-0118,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the Bering Sea and Aleutian Islands management area (BSAI) exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands management area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

NMFS closed directed fishing for Pacific ocean perch (POP) in the Bering Sea subarea of the BSAI under § 679.20(d)(1)(iii) (81 FR 14773; March 18, 2016).

NMFS has determined that approximately 4,280 metric tons of POP remain in the directed fishing allowance. Therefore, in accordance with § 679.25(a)(1)(i), (a)(2)(i)(C), and (a)(2)(iii)(D), and to fully utilize the 2016 total allowable catch of POP in the Bering Sea subarea of the BSAI, NMFS is terminating the previous closure and is opening directed fishing for POP in Bering Sea subarea of the BSAI, effective 1200 hrs, A.l.t., October 20, 2016, through 1200 hrs, A.l.t., December 31, 2016. This will enhance the socioeconomic well-being of harvesters dependent on POP in this area.

The Administrator, Alaska Region considered the following factors in reaching this decision: (1) The current catch of POP in the BSAI and, (2) the harvest capacity and stated intent on future harvesting patterns of vessels participating in this fishery.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B), as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the opening of POP directed fishing in the Bering Sea subarea of the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of October 17, 2016.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

Without this inseason adjustment, NMFS could not allow the fishery for POP in the Bering Sea subarea of the BSAI to be harvested in an expedient manner and in accordance with the regulatory schedule. Under § 679.25(c)(2), interested persons are invited to submit written comments on this action to the above address until November 4, 2016.

This action is required by §§ 679.20 and 679.25 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: October 18, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–25505 Filed 10–20–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 150916863–6211–02]

RIN 0648–XE969

Fisheries of the Exclusive Economic Zone Off Alaska; Exchange of Flatfish in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is exchanging unused flathead sole and rock sole Community Development Quota (CDQ) for yellowfin sole CDQ acceptable biological catch (ABC) reserves in the Bering Sea and Aleutian Islands management area. This action is necessary to allow the 2016 total allowable catch of yellowfin sole in the Bering Sea and Aleutian Islands management area to be harvested.

DATES: Effective October 21, 2016 through December 31, 2016.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the Bering Sea and Aleutian Islands management area (BSAI) according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2016 flathead sole, rock sole, and yellowfin sole CDQ reserves specified in the BSAI are 1,537 metric tons (mt), 5,215 mt, and 17,013 mt as established by the final 2016 and 2017 harvest specifications for groundfish in the BSAI (81 FR 14773, March 18, 2016) and following revision (81 FR 69442, October 6, 2016). The 2016 flathead sole, rock sole, and yellowfin sole CDQ ABC reserves are 5,552 mt, 12,023 mt, and 5,639 mt as established by the final 2016 and 2017 harvest specifications for groundfish in the BSAI (81 FR 14773, March 18, 2016) and following revision (81 FR 69442, October 6, 2016).

The Bristol Bay Economic Development Corporation has requested that NMFS exchange 304 mt of flathead sole and 245 mt of rock sole CDQ reserves for 549 mt of yellowfin sole CDQ ABC reserves under § 679.31(d). Therefore, in accordance with § 679.31(d), NMFS exchanges 304 mt of flathead sole, 245 mt of rock sole CDQ reserves for 549 mt of yellowfin sole CDQ ABC reserves in the BSAI. This action also decreases and increases the TACs and CDQ ABC reserves by the corresponding amounts. Tables 11 and 13 of the final 2016 and 2017 harvest specifications for groundfish in the BSAI (81 FR 14773, March 18, 2016), and following revision (81 FR 69442, October 6, 2016), are revised as follows:

TABLE 11—FINAL 2016 COMMUNITY DEVELOPMENT QUOTA (CDQ) RESERVES, INCIDENTAL CATCH AMOUNTS (ICAS), AND AMENDMENT 80 ALLOCATIONS OF THE ALEUTIAN ISLANDS PACIFIC OCEAN PERCH, AND BSAI FLATHEAD SOLE, ROCK SOLE, AND YELLOWFIN SOLE TACS

[Amounts are in metric tons]

Sector	Pacific ocean perch			Flathead sole	Rock sole	Yellowfin sole
	Eastern Aleutian District	Central Aleutian District	Western Aleutian District	BSAI	BSAI	BSAI
TAC	7,900	7,000	9,000	16,086	54,935	151,079
CDQ	845	749	963	1,233	4,970	17,562
ICA	200	75	10	5,000	6,000	3,500
BSAI trawl limited access	685	618	161	0	0	14,979
Amendment 80	6,169	5,558	7,866	9,853	43,965	115,038
Alaska Groundfish Cooperative	3,271	2,947	4,171	1,411	11,129	43,748
Alaska Seafood Cooperative	2,898	2,611	3,695	8,442	32,836	71,290

Note: Sector apportionments may not total precisely due to rounding.

TABLE 13—FINAL 2016 AND 2017 ABC SURPLUS, COMMUNITY DEVELOPMENT QUOTA (CDQ) ABC RESERVES, AND AMENDMENT 80 ABC RESERVES IN THE BSAI FOR FLATHEAD SOLE, ROCK SOLE, AND YELLOWFIN SOLE

[Amounts are in metric tons]

Sector	2016 Flathead sole	2016 Rock sole	2016 Yellowfin sole	2017 Flathead sole	2017 Rock sole	2017 Yellowfin sole
ABC	66,250	161,100	211,700	64,580	145,000	203,500
TAC	16,086	54,935	151,079	21,000	57,100	144,000
ABC surplus	50,164	106,165	60,621	43,580	87,900	59,500
ABC reserve	50,164	106,165	60,621	43,580	87,900	59,500
CDQ ABC reserve	5,856	12,268	5,090	4,663	9,405	6,367
Amendment 80 ABC reserve	44,308	93,897	55,531	38,917	78,495	53,134
Alaska Groundfish Cooperative for 2016 [1]	4,145	22,974	24,019	n/a	n/a	n/a
Alaska Seafood Cooperative for 2016 [1]	40,163	70,923	31,512	n/a	n/a	n/a

[1] The 2017 allocations for Amendment 80 species between Amendment 80 cooperatives and the Amendment 80 limited access sector will not be known until eligible participants apply for participation in the program by November 1, 2016.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the flatfish exchange by the Bristol Bay Economic Development Corporation in the BSAI. Since these fisheries are currently open, it is important to immediately inform the industry as to the revised allocations. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet as well as processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of October 12, 2016.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: October 17, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–25446 Filed 10–20–16; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 81, No. 204

Friday, October 21, 2016

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9254; Directorate Identifier 2015–CE–030–AD]

RIN 2120–AA64

Airworthiness Directives; Piper Aircraft, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede Airworthiness Directive (AD) 95–26–13, which applies to certain Piper Aircraft, Inc. Models PA–28–140, PA–28–150, PA–28–151, PA–28–161, PA–28–160, PA–28–180, PA–28–181, PA–28–235, PA–28–236, PA–28R–180, PA–28R–200, PA–28R–201, PA–28S–160, PA–28S–180, PA–32–260, PA–32–300, PA–32–301, PA–32–301T, PA–32R–300, PA–32R–301 (SP), PA–32R–301 (HP), PA–32R–301T, PA–32RT–300, PA–32RT–300T, and PA–32S–300 airplanes equipped with oil cooler hose assemblies that do not meet certain technical standard order (TSO) requirements. AD 95–26–13 requires inspections, replacement, and adjustment of the oil cooler hose assemblies, as well as providing for a terminating action. Since we issued AD 95–26–13, the FAA has received requests to clarify the intent of AD 95–26–13. This proposed AD would maintain all of the actions required by AD 95–26–13 and add language to clarify those requirements. We are proposing this AD to prevent rupture or failure of the oil cooler hose assemblies, which could result in engine stoppage with consequent loss of control.

DATES: We must receive comments on this proposed AD by December 5, 2016.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9254; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Gary Wechsler, Aerospace Engineer, FAA, Atlanta Aircraft Certification Office, 1701 Columbia Avenue, College Park, Georgia 30337; telephone: (404) 474–5575; fax: (404) 474–5606; email: *gary.wechsler@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2016–9254; Directorate Identifier 2015–CE–030–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

On December 19, 1995, we issued AD 95–26–13, Amendment 39–9472 (60 FR 67321, December 29, 1995) (''AD 95–26–13''), for certain Piper Aircraft, Inc. Models PA–28–140, PA–28–150, PA–28–151, PA–28–161, PA–28–160, PA–28–180, PA–28–181, PA–28–235, PA–28–236, PA–28R–180, PA–28R–200, PA–28R–201, PA–28S–160, PA–28S–180, PA–32–260, PA–32–300, PA–32–301, PA–32–301T, PA–32R–300, PA–32R–301 (SP), PA–32R–301 (HP), PA–32R–301T, PA–32RT–300, PA–32RT–300T, and PA–32S–300 airplanes equipped with oil cooler hose assemblies that do not meet TSO–C53a Type D requirements. AD 95–26–13 requires repetitive inspections of the oil cooler hose assemblies for deterioration; replacement of the hose assemblies if damage is found; inspection for a minimum clearance between the oil cooler assemblies and the front exhaust stacks, depending on oil cooler location; and adjustment of the clearance if minimum clearance is not found. AD 95–26–13 also provides the option of installing TSO–C53a Type D oil cooler hose assemblies as a terminating action for the repetitive inspections. AD 95–26–13 resulted from numerous incidents/accidents caused by rupture or failure of the oil cooler hose assemblies. We issued AD 95–26–13 to prevent rupture or failure of the oil cooler hose assemblies, which could result in engine stoppage with consequent loss of control.

Actions Since AD 95–26–13 Was Issued

The FAA received several recent inquiries repeatedly asking for clarification of the AD's applicability and compliance requirements. For example, the AD did not apply to airplanes equipped with TSO–C53a Type D specification oil cooler hoses, yet, callers repeatedly asked whether the AD applied to airplanes with such hoses. It became apparent that a rewrite of the AD was necessary to stem the mounting time engineers were spending researching and responding to the inquiries. The FAA believes that the proposed NPRM will provide the level of clarification necessary to prevent similar inquiries in the future.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would retain all of the requirements of AD 95–26–13 and add language to clarify those requirements.

Costs of Compliance

We estimate that this proposed AD affects 23,643 airplanes of U.S. registry.

This proposed AD retains the same actions as AD 95–26–13 and the proposed costs do not add any cost burden than that already in effect by AD 95–26–13. The difference in the Costs of Compliance with the proposed AD and AD 95–26–13 is that we use $85 an hour as a labor rate in 2016 as opposed to $60 per hour in 1995.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection of the oil cooler hose assembly	1 work-hour × $85 per hour = $85.	Not applicable	$85	$2,009,655.
Inspection of the clearance between the oil cooler hose assembly and the front exhaust stacks.	.5 work-hour × $85 per hour = $42.50.	Not applicable	$42.50	$1,004,827.50 See note 1 to Cost of Compliance.
Replacement of the oil cooler hose assembly	1 work-hour × $85 per hour = $85.	$430	$515	$12,176,145.

Note to Costs of Compliance: The estimated cost of the inspection of the clearance between the oil cooler hose assembly and the front exhaust stacks is for all airplanes affected by this proposed AD; however, the inspection applies only to airplanes with the oil cooler mounted in a location other than at or aft of the rear of the engine. We have no way of knowing how many affected airplanes have that particular installation.

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Adjustment of the clearance between the oil cooler hose assembly and the front exhaust stacks.	1 work-hour × $85 per hour = $85.	Not applicable	$85

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 95–26–13, Amendment 39–9472 (60 FR 67321, December 29, 1995), and adding the following new AD:

Piper Aircraft, Inc.: Docket No. FAA–2016–9254; Directorate Identifier 2015–CE–030–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by December 5, 2016.

(b) Affected ADs

This AD replaces AD 95–26–13, Amendment 39–9472 (60 FR 67321, December 29, 1995) (''AD 95–26–13'').

(c) Applicability

This AD applies to Piper Aircraft, Inc. Models PA–28–140, PA–28–150, PA–28–151, PA–28–161, PA–28–160, PA–28–180, PA–28–181, PA–28–235, PA–28–236, PA–28R–180, PA–28R–200, PA–28R–201, PA–28S–160, PA–28S–180, PA–32–260, PA–32–300, PA–32–301, PA–32–301T, PA–32R–300, PA–32R–301 (SP), PA–32R–301 (HP), PA–32R–301T, PA–32RT–300, PA–32RT–300T, and PA–32S–300 airplanes, all serial numbers, that are:

(1) Equipped with oil cooler hose assemblies that do not meet TSO–C53a, Type D requirements; and

(2) Certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 79, Engine Oil.

(e) Unsafe Condition

AD 95–26–13 was prompted by numerous incidents/accidents caused by rupture or failure of the oil cooler hose assemblies. This AD action was prompted by requests to clarify the intent of AD 95–26–13. We are issuing this AD to prevent rupture or failure of the oil cooler hose assemblies, which could result in engine stoppage with consequent loss of control.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done. You may review the flow chart found in appendix 1 to assist you in complying with the actions of this AD.

(g) Oil Cooler Mounted at or Aft of the Rear of the Engine

For applicable airplanes with the oil cooler mounted at or aft of the rear of the engine (See figure 1 to paragraphs (g) and (h)): Within the next 100 hours time-in-service (TIS) after February 5, 1996 (the effective date retained from AD 95–26–13), and repetitively thereafter at intervals not to exceed 100 hours TIS, inspect the oil cooler hose assembly for oil soaked in the fire sleeve of the oil hose assembly, a brownish or whitish color of the fire sleeve of the oil hose assembly, and any evidence of brittleness or deterioration of the fire sleeve of the oil hose assembly as a result of heat or oil seepage.

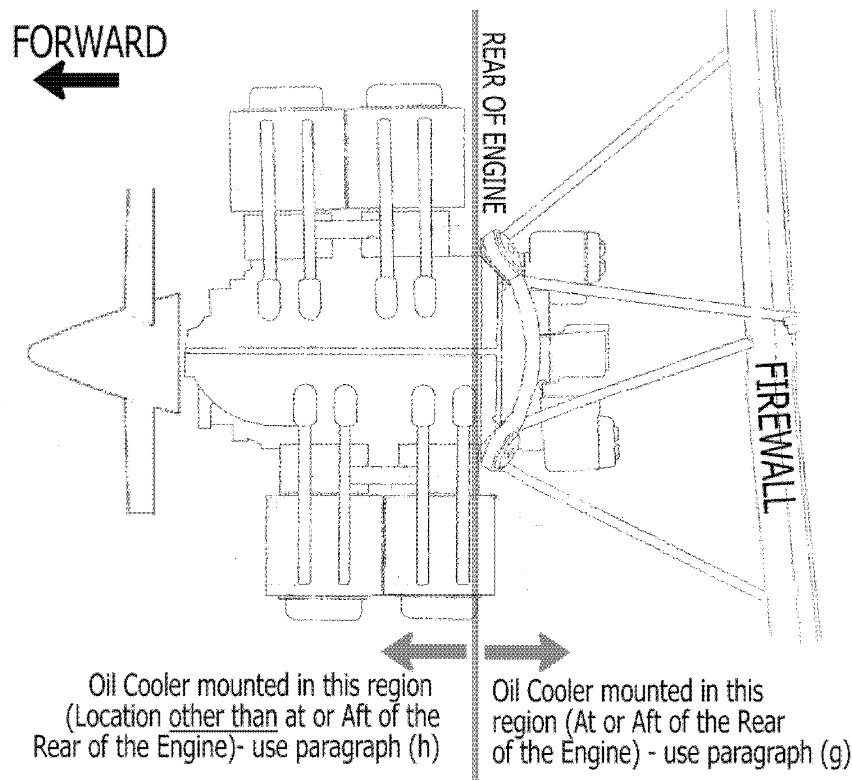


Figure 1 to paragraphs (g) and (h) of this AD: Oil cooler

(1) If any of the conditions described in paragraph (g) of this AD are found on the oil cooler hose assembly during the inspection required in paragraph (g) of this AD, before further flight, replace the oil cooler hose assembly with TSO–C53a Type D oil cooler hose assembly or TSO–C53a Type C oil cooler hose assembly that has been inspected following paragraph (g) of this AD and found to be airworthy.

(2) Replacement of the oil cooler hose assembly with TSO–C53a Type D oil cooler hose assembly is terminating action for this AD.

Note 1 to paragraphs (g) and (h)(1) of this AD: Although not required by this AD, the FAA recommends that an oil cooler assembly flexibility test be done at 100-hour TIS intervals. Oil cooler hose assembly flexibility may be determined by gently lifting each oil cooler hose assembly in several places from the bottom of its downward arc to the oil cooler. If the oil cooler hose assembly moves slightly either from side-to-side or upward, with the hand at the center of an even arc, then some flexibility remains. If the oil cooler hose assembly appears hardened or inflexible, replacement is recommended.

Note 2 to paragraphs (g)(1), (h)(1)(i), and (i) of this AD: If one of the oil cooler hose assemblies requires replacing, the FAA recommends replacing both of the oil cooler hose assemblies to simplify tracking the TIS of the assemblies.

(h) Oil Cooler Mounted in Location Other Than Aft of the Rear of the Engine

(1) *For applicable airplanes with the oil cooler mounted in a location other than at or aft of the rear of the engine (See figure 1 to paragraphs (g) and (h)):* Within the next 100 hours TIS after February 5, 1996 (the effective date retained from AD 95–26–13), and repetitively thereafter at intervals not to exceed 100 hours TIS, inspect the oil cooler hose assembly for oil soaked in the fire sleeve of the oil hose assembly, a brownish or whitish color of the fire sleeve of the oil hose

assembly, and any evidence of brittleness or deterioration of the fire sleeve of the oil hose assembly as a result of heat or oil seepage.

(2) If any of the conditions described in paragraph (h)(1) of this AD are found on the oil cooler hose assembly during the inspection required in paragraph (h)(1) of this AD, before further flight, replace the oil cooler hose assembly with TSO–C53a Type D oil cooler hose assembly or TSO–C53a Type C oil cooler hose assembly that has been inspected following paragraph (h)(1) of this AD and found to be airworthy.

(3) Within the next 100 hours TIS after February 5, 1996 (the effective date retained from AD 95–26–13) and each time the oil cooler hose assembly is replaced for any reason or inspected following paragraph (h)(1) inspect to ensure the installation conditions in paragraphs (h)(3)(i) through (iii) of this AD are met. If the conditions listed in paragraphs (h)(3)(i) through (iii) of this AD are not met, before further flight, make any necessary adjustments. Please see figure 2 to paragraph (h) of this AD for additional information.

(i) The oil cooler hose assemblies pass underneath and behind the electrical ground cable and in front of the lower of the two engine mount.

(ii) The oil cooler hose assemblies are secured to the engine mount strut and a clearance of at least 2 inches exists between the oil cooler hose assemblies and the exhaust stack.

(iii) Oil cooler hose assemblies with a minimum outer diameter of 0.75 inch are installed with a bend radius of at least 6.5 inches.

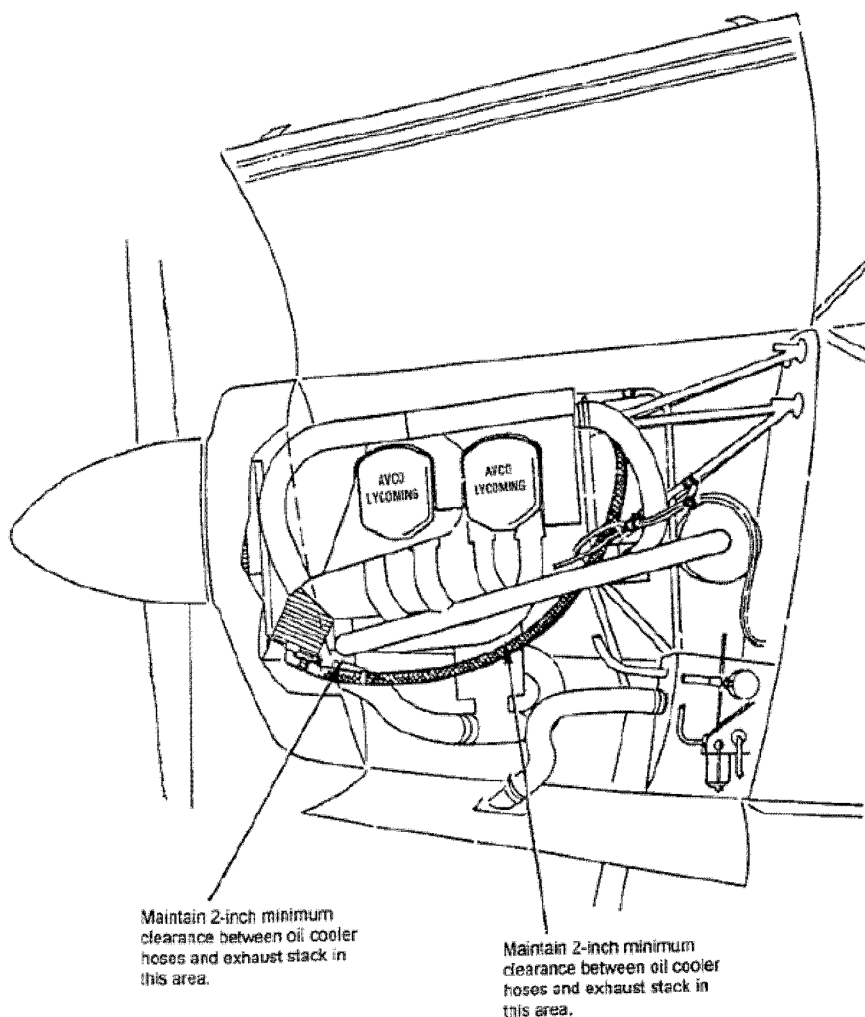


Figure 2 to paragraph (h) of this AD: Acceptable clearances

(3) Replacement of the oil cooler hose assembly with TSO–C53a Type D oil cooler hose assembly and meeting the installation conditions listed in paragraphs (h)(3)(i) through (iii) of this AD terminate the requirements of this AD.

(i) Replacement of Oil Cooler Hose Assembly

For all applicable airplanes installed with a TSO–C53a Type C oil cooler hose assembly: When the oil cooler hose assembly accumulates 8 years or 1,000 hours TIS, whichever occurs first, replace the oil cooler hose assembly. If the oil cooler is mounted in a location other than at or aft of the rear of the engine, before further flight after replacement, you must do the actions required in paragraph (h)(3) of this AD.

(1) Replacement of the oil cooler hose assembly with TSO–C53a Type D oil cooler hose assembly terminates the requirements of this AD provided it meets the installation conditions listed in paragraph (h)(3)(i) through (iii) of this AD.

(2) You may at any time before 8 years or 1,000 hours TIS, whichever occurs first, replace the oil cooler hose assembly with TSO–C53a Type D oil cooler hose assembly to terminate the requirements of this AD provided it meets the installation conditions listed in paragraph (h)(3)(i) through (iii) of this AD.

(j) Alternative Methods of Compliance (AMOCs)

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

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

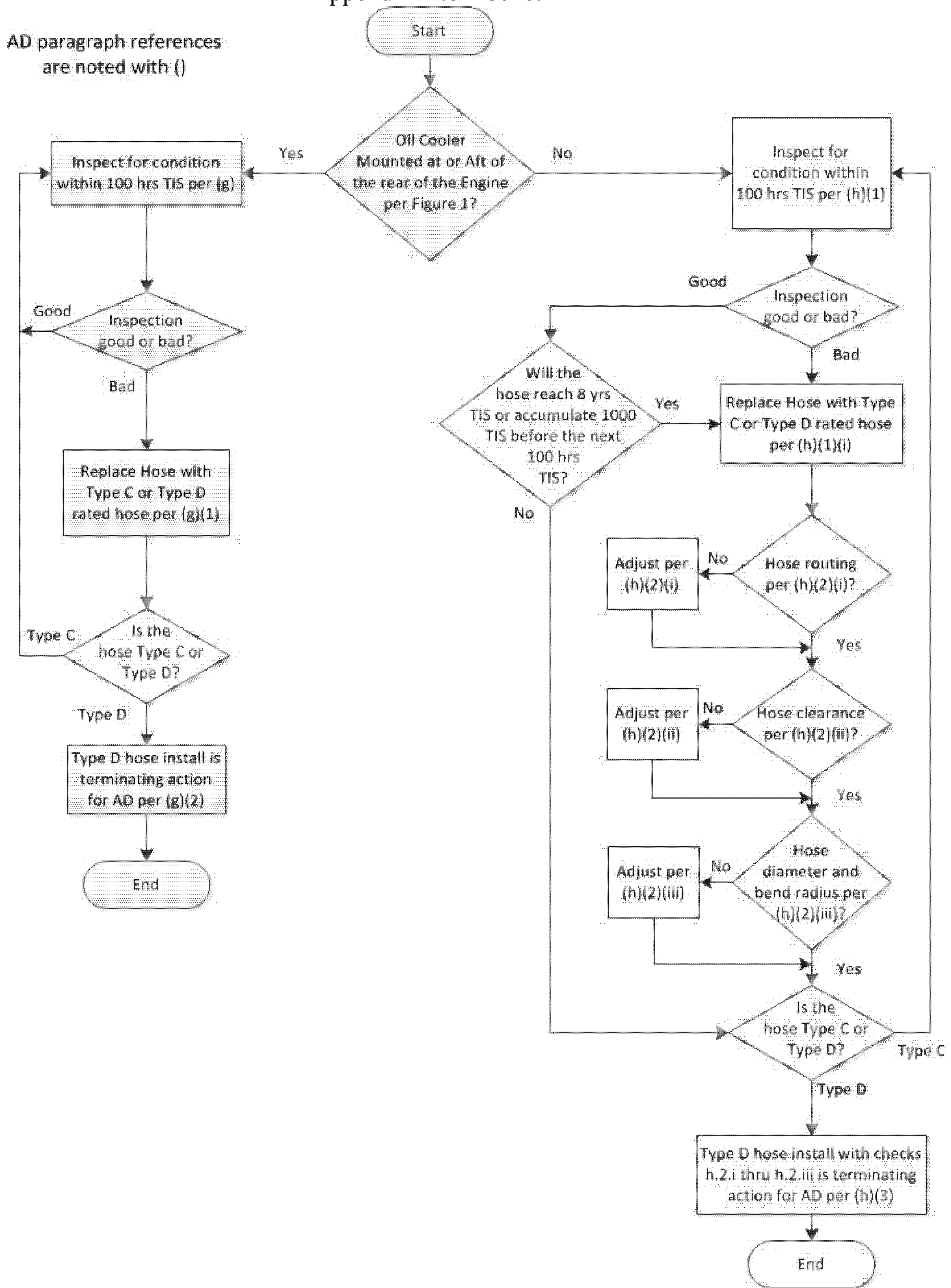
(3) AMOCs approved for AD 95–26–13 (60 FR 67321, December 29, 1995) are approved as AMOCs for the corresponding provisions of this AD.

(k) Related Information

For more information about this AD, contact Gary Wechsler, Aerospace Engineer, FAA, Atlanta Aircraft Certification Office, 1701 Columbia Avenue, College Park, Georgia 30337; telephone: (404) 474–5575; fax: (404) 474–5606; email: *gary.wechsler@faa.gov.*

BILLING CODE 4910–13–P

Appendix 1 to Docket FAA-2016-9254



Issued in Kansas City, Missouri, on October 7, 2016.

Pat Mullen,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–24857 Filed 10–20–16; 8:45 am]

BILLING CODE 4910–13–C

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2015–7526; Directorate Identifier 2014–NM–217–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (SNPRM); reopening of comment period.

SUMMARY: We are revising an earlier proposed airworthiness directive (AD) for all Airbus Model A318, A319, A320, and A321 series airplanes. This action revises the notice of proposed rulemaking (NPRM) by requiring an additional action for sealant application on some nuts and bolts on the National Advisory Committee for Aeronautics (NACA) duct assembly and adding a grace period to the compliance time. We are proposing this SNPRM to detect and correct corroded circlips. Such corrosion could lead to failure of the circlips and consequent movement of the FVP and result in a reduction of the flame protector capability of the FVP cartridge. Such a condition could result in damage to the airplane in case of lightning impact or fire on the ground. Since the additional actions impose an additional burden over those proposed in the NPRM, we are reopening the comment period to allow the public the chance to comment on these proposed changes.

DATES: The comment period for the NPRM published in the **Federal Register** on December 23, 2015 (80 FR 79742), is reopened.

We must receive comments on this SNPRM by December 5, 2016.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–7526; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2015–7526; Directorate Identifier 2014–NM–217–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Airbus Model A318, A319, A320, and A321 series airplanes. The NPRM published in the **Federal Register** on December 23, 2015 (80 FR 79742) (''the NPRM''). The NPRM was prompted by the discovery of corroded circlips in FVPs having a certain part number. The NPRM proposed to require an inspection to determine the part number and serial number of the FVP, and replacement if necessary.

Actions Since the NPRM Was Issued

Since we issued the NPRM, Airbus has issued revised service information to include an additional action to apply sealant on nuts and bolts of the NACA duct assembly. Airplanes on which the installation in the original service information was done would be required to do this additional action. In addition, we determined that a grace period is needed so operators have sufficient time to comply with the requirements in this proposed AD.

In addition, the European Aviation Safety Agency (EASA) superseded EASA Airworthiness Directive 2014–0234R1, dated December 11, 2014 (which was referred to in the NPRM), and issued EASA Airworthiness Directive 2016–0114, dated June 15, 2016; corrected June 23, 2016; which retains the requirements of EASA AD 2014–0234R1 and includes an additional action.

The EASA, which is the Technical Agent for the Member States of the European Union, has issued Airworthiness Directive 2016–0114, dated June 15, 2016; corrected June 23, 2016 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Airbus Model A318, A319, A320, and A321 series airplanes. The MCAI states:

> On each aeroplane wing, a NACA duct assembly is installed, including a Fuel Vent Protector (FVP) which is used as flame arrestor. This FVP is maintained in its NACA duct assembly by a circlip (also known as C-clip). Following a wing water pressure test, the FVP is removed and dried with heat. During an inspection after this test, several circlips were reported to be discoloured. Investigation revealed that a batch of circlips fitted on some FVP Part Number (P/N) 786073–1–0 have an increased risk of

corrosion due to a manufacturing quality issue.

This condition, if not detected and corrected, could lead to circlip failure and consequent FVP movement, reducing the flame protector capability of the FVP cartridge, possibly resulting in damage to the aeroplane in case of lightning impact or fire on ground.

Airbus issued Service Bulletin (SB) A320–28–1221, providing instructions for identification by serial number (s/n) and removal from service of the affected FVP P/N 786073–1–0, and EASA issued AD 2014–0234, later revised, to require those actions and to implement installation requirements for the FVP.

After that [EASA] AD was issued, one step in the FVP re-installation instructions was identified as missing. Consequently, Airbus revised SB A320–28–1221 to provide instructions for sealant installation on some nuts and bolts on the NACA duct assembly.

For the reasons described above, this [EASA] AD retains the requirements of EASA AD 2014–0234R1, which is superseded, and requires additional work for aeroplanes already modified in accordance with Airbus SB A320–28–1221 original issue or Revision 01.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–7526.

Related Service Information Under 1 CFR Part 51

Airbus has issued Service Bulletin A320–28–1221, Revision 02, dated January 11, 2016. The service information describes procedures for inspecting the FVP to determine the part number and serial number, replacing any affected FVP, and applying sealant to the nuts and bolts of the FVP. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Comments

We gave the public the opportunity to participate in developing this proposed AD. We considered the comments received.

Request To Refer to Revised Service Information

Airbus requested that the service information referred to in the NPRM be revised. Since the NPRM was published, Airbus issued Service Bulletin A320–28–1221, Revision 02, dated January 11, 2016, which includes an additional action (*i.e.*, the application of sealant to the nuts and bolts of a FVP after installation). The additional action was not included in the Accomplishment Instructions of Airbus Service Bulletin A320–28–1221, Revision 01, dated June 23, 2015, which was referred to as the appropriate source of service information for accomplishing the required actions proposed in the NPRM.

We agree with the commenter's request to refer to the revised service information in this SNPRM. We have revised paragraphs (g) and (i) of this proposed AD to refer to the revised service information, Airbus Service Bulletin A320–28–1221, Revision 02, dated January 11, 2016.

Request To Extend the Compliance Time

American Airlines (AAL) requested that the compliance time in paragraph (h) of the proposed AD be changed from ''at the earliest of the times'' to ''at the latest of the times,'' or be simplified to ''within 6 months after the effective date.'' AAL stated that its 4 affected airplanes would be out of compliance when the NPRM became a final rule because the airplanes have already accumulated approximately 9,000 flight hours and 4,000 flight cycles, and have been in service for 34 months.

We partially agree with the commenter's request. We revised paragraph (h) of this proposed AD to include a grace period of 30 days from the effective date of the AD to accomplish the required actions. In regard to the compliance times in paragraphs (h)(1), (h)(2), and (h)(3) of this AD, we do not agree to change ''at the earliest of the times'' to ''at the latest of the times,'' or to simplify the compliance time to ''within 6 months after the effective date of this AD.'' In developing an appropriate compliance time, we considered the safety implications and the time necessary to do the inspection to determine the part number and serial number of the FVP, and any necessary replacements. In light of these items, we have determined that the compliance times specified in paragraphs (h)(1), (h)(2), and (h)(3) of this proposed AD are appropriate. However, under the provisions of paragraph (k)(1) of this proposed AD, we will consider requests for approval of an extension of the compliance time if sufficient data are submitted to substantiate that the extension would provide an acceptable level of safety. We have not changed this AD regarding this issue.

Request To Revise Costs of Compliance

AAL requested that the ''Costs of Compliance'' section of the NPRM be revised to increase the number of work-hours from 5 to 12. AAL stated that there are multiple positions on each airplane that need to be inspected and may need corrective actions.

We agree with the commenter's request. Based on the reason provided by the commenter, and the new additional action included in this SNPRM, we have revised the ''Costs of Compliance'' section to increase the work-hours from 5 to 19.

FAA's Determination and Requirements of This SNPRM

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of these same type designs.

Certain changes described above expand the scope of the NPRM. As a result, we have determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this SNPRM.

Costs of Compliance

We estimate that this SNPRM affects 7 airplanes of U.S. registry.

We also estimate that it would take about 19 work-hours per product to comply with the new basic requirements of this SNPRM. The average labor rate is $85 per work-hour. Required parts would cost about $25,640 per product. Based on these figures, we estimate the cost of this SNPRM on U.S. operators to be $190,785, or $27,255 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus: Docket No. FAA–2015–7526; Directorate Identifier 2014–NM–217–AD.

(a) Comments Due Date

We must receive comments by December 5, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the airplanes specified in paragraphs (c)(1), (c)(2), (c)(3), and (c)(4) of this AD, certificated in any category, all manufacturer serial numbers.

(1) Airbus Model A318–111, –112, –121, and –122 airplanes.

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

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

(4) Airbus Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 28, Fuel.

(e) Reason

This AD was prompted by the discovery of corroded circlips in fuel vent protectors (FVP) having a certain part number. We are issuing this AD to detect and correct corroded circlips. Such corrosion could lead to failure of the circlips and consequent movement of the FVP and result in a reduction of the flame protector capability of the FVP cartridge, which could result in damage to the airplane in case of lightning impact or fire on the ground.

(f) Compliance

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

(g) Inspection of FVP and Corrective Action

For airplanes having a manufacturer serial number specified in figure 1 to paragraphs (g) and (i) of this AD: At the time specified in paragraph (h) of this AD, do an inspection to determine the part number and serial number of the FVP. If the FVP has part number (P/N) 786073–1–0 with a serial number that is specified in figure 2 to paragraphs (g) and (i) of this AD, and the FVP is not marked ''Amdt B,'' replace the FVP with a serviceable part, at the time specified in paragraph (h) of this AD, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–28–1221, Revision 02, dated January 11, 2016. A review of airplane maintenance records is acceptable in lieu of this inspection if the part number and serial number of the FVP can be conclusively determined from that review.

FIGURE 1 TO PARAGRAPHS (g) AND (i) OF THIS AD—AFFECTED AIRPLANE MANUFACTURER SERIAL NUMBERS

5438
5441
5444
5445
5447
5457
5459
5460
5461
5463
5464
5469
5473 through 5478 inclusive
5481
5482
5483
5485 through 5488 inclusive
5490 through 5493 inclusive
5495 through 5505 inclusive
5507 through 5515 inclusive
5517
5518
5520 through 5527 inclusive
5530
5536
5539
5541
5544
5547
5551
5553
5556

FIGURE 2 TO PARAGRAPHS (g) AND (i) OF THIS AD—AFFECTED SERIAL NUMBERS FOR PART NUMBER 786073–1–0

[Manufactured during August 2012]

Serial number 786073IN0xxxx (xxxx indicates the last four digits)					
3752	3821	3868	3911	3966	4010
3753	3826	3871	3914	3967	4011
3754	3827	3874	3922	3969	4013
3755	3829	3877	3925	3971	4017
3756	3830	3878	3927	3972	4019
3757	3833	3882	3930	3977	4023
3758	3834	3893	3937	3978	4024
3759	3836	3897	3938	3980	4025
3760	3839	3898	3940	3981	4026
3761	3840	3899	3945	3982	4039
3787	3848	3900	3946	3983	4048
3788	3849	3901	3947	3984	4065
3810	3850	3904	3948	3985	4066
3812	3851	3905	3951	3986	4068
3814	3853	3906	3961	3987	4070
3817	3859	3907	3962	3996	4184
3819	3860	3908	3964	3997	4187
3820	3867	3910	3965	4009	None

(h) Compliance Times for the Requirements of Paragraph (g) of This AD

Do the actions required by paragraph (g) of this AD at the earliest of the times specified in paragraphs (h)(1), (h)(2), and (h)(3) of this AD, or within 30 days after the effective date of this AD, whichever occurs later.

(1) Before the accumulation of 5,000 total flight cycles after the date of manufacture of the airplane.

(2) Before the accumulation of 7,500 total flight hours after the date of manufacture of the airplane.

(3) Within 30 months after the date of manufacture of the airplane.

(i) Exclusion From Actions Required by Paragraph (g) of This AD

An airplane that does not have a manufacturer serial number specified in figure 1 to paragraphs (g) and (i) of this AD is excluded from the requirements of paragraph (g) of this AD, provided that, a FVP having P/N 786073–1–0 with a serial number specified in figure 2 to paragraphs (g) and (i) of this AD has not been installed on that airplane after July 2012. If a FVP having P/N 786073–1–0 with a serial number specified in figure 2 to paragraphs (g) and (i) of this AD is installed, or the serial number cannot be identified: Within 12 months after the effective date of this AD, replace the FVP with a serviceable part, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–28–1221, Revision 02, dated January 11, 2016. A review of airplane maintenance records is acceptable if it can be conclusively determined from that review that a FVP having a serial number specified in figure 2 to paragraphs (g) and (i) of this AD has not been installed on that airplane after July 2012.

(j) Parts Installation Limitation

As of the effective date of this AD, a FVP having P/N 786073–1–0 and a serial number listed in figure 2 to paragraphs (g) and (i) of this AD may be installed on any airplane, provided the FVP is marked with ''Amdt B.''

(k) Other FAA AD Provisions

The following provisions also apply to this AD:

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

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* If any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(l) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2016–0114, dated June 15, 2016; corrected June 23, 2016; for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–7526.

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

Issued in Renton, Washington, on September 26, 2016.

Dionne Palermo,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–23787 Filed 10–20–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–130314–16]

RIN 1545–BN68

Treatment of Certain Interests in Corporations as Stock or Indebtedness

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulation.

SUMMARY: The Department of the Treasury (Treasury Department) and the IRS are issuing temporary regulations that affect corporations and partnerships that issue purported indebtedness to related corporations or partnerships in the Rules and Regulations section of this issue of the **Federal Register**. The temporary regulations provide rules addressing the treatment of instruments issued by partnerships, consolidated groups, and certain transactions involving qualified cash-management arrangements. The text of the temporary regulations also serves as the text of these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by January 19, 2017.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–130314–16), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20224. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–130314–16), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–130314–16).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Austin M. Diamond-Jones, (202) 317–5363, or Joshua G. Rabon, (202) 317–6937; concerning submissions of comments or requests for a public hearing, Regina Johnson, (202) 317–5177 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

The temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** contain rules under sections 385 and 752 of the Internal Revenue Code (Code) that establish requirements that ordinarily must be satisfied in order for certain related-party interests in a corporation to be treated as indebtedness for federal tax purposes. The text of the temporary regulations also serves as the text of the proposed regulations herein. The preamble to the temporary regulations explains the temporary regulations and the corresponding proposed regulations.

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, of reducing costs, of harmonizing rules, and of promoting flexibility. Related rules in the final and temporary regulations under section 385 in TD 9790, published in the Rules and Regulations section of this issue of the **Federal Register**, have been designated a ''significant regulatory action'' under section 3(f) of Executive Order 12866. For a discussion of the economic impact of those final and temporary regulations, as well as these proposed regulations, please see the Regulatory Assessment accompanying TD 9790, published in the Rules and Regulations section of this issue of the **Federal Register**.

II. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. Chapter 6), it is hereby certified that the final and temporary regulations in TD 9790, published in the Rules and Regulations section of this issue of the **Federal Register**, and accordingly, these proposed regulations proposed by cross-reference to the temporary regulations, will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

To facilitate the federal tax analysis of an interest in a corporation, taxpayers are required under existing law to substantiate their classification of an interest as stock or indebtedness for federal tax purposes. Section 1.385–3 provides that certain interests in a corporation that are held by a member of the corporation's expanded group and that otherwise would be treated as indebtedness for federal tax purposes are treated as stock. Section 1.385–3T provides that for certain debt instruments issued by a controlled partnership, the holder is deemed to transfer all or a portion of the debt instrument to the partner or partners in the partnership in exchange for stock in the partner or partners. Section 1.385–4T provides rules regarding the application of §§ 1.385–3 and 1.385–3T to members of a consolidated group. Sections 1.385–3 and 1.385–3T include multiple exceptions that limit their application. In particular, the threshold exception provides that the first $50 million of expanded group debt instruments that otherwise would be reclassified as stock or deemed to be transferred to a partner in a controlled partnership under § 1.385–3 or § 1.385–3T will not be reclassified or deemed transferred under § 1.385–3 or § 1.385–3T. Although it is possible that the classification rules in §§ 1.385–3, 1.385–3T, and 1.385–4T could have an effect on small entities, the threshold exception of the first $50 million of debt instruments otherwise subject to recharacterization or deemed transfer under §§ 1.385–3, 1.385–3T, and 1.385–4T makes it unlikely that a substantial number of small entities will be affected by §§ 1.385–3T or 1.385–4T.

Pursuant to section 7805(f) of the Code, the final regulations in TD 9790, published in the Rules and Regulations section of this issue of the **Federal Register**, have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business. Comments were received requesting that the monetary thresholds contained in proposed §§ 1.385–2, 1.385–3, and 1.385–4 be increased in order to mitigate the impact on small businesses. These comments are addressed in Parts IV.B.1.d and V.E.4 of the Summary of Comments and Explanation of Revisions in the preamble of TD 9790, published in the Rules and Regulations section of this issue of the **Federal Register**. No comments were received concerning the economic impact on small entities from the Small Business Administration.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the ''Addresses'' heading. Treasury and the IRS request comments on all aspects of the proposed rules. All comments will be available at *www.regulations.gov* or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits electronic or written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these regulations are Austin M. Diamond-Jones of the Office of Associate Chief Counsel (Corporate) and Joshua G. Rabon of the Office of Associate Chief Counsel (International). 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.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry in numerical order to read in part as follows:

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

Section 1.385–4 also issued under 26 U.S.C. 385 and 1502.

■ **Par. 2.** Section 1.385–3 is amended by:

■ 1. Revising paragraph (b)(3)(vii).

■ 2. Revising paragraph (d)(4).

■ 3. Revising paragraph (f).

■ 4. Revising paragraphs (g)(5)–(8), (15)–(17), and (22)–(23).

■ 5. Revising *Example 12* through *Example 19* in paragraph (h)(3).

■ 6. Adding paragraph (k).

The revisions and additions read as follows:

§ 1.385–3 Transactions in which debt proceeds are distributed or that have a similar effect.

* * * * *

(b) * * *

(3) * * *

(vii) [The text of the proposed amendment to § 1.385–3(b)(3)(vii) is the same as the text of § 1.385–3T(b)(3)(vii) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(d) * * *

(4) [The text of the proposed amendment to § 1.385–3(d)(4) is the same as the text of § 1.385–3T(d)(4) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(f) [The text of the proposed amendment to § 1.385–3(f) is the same as the text of § 1.385–3T(f) published elsewhere in this issue of the **Federal Register**.]

(g) * * *

(5) [The text of the proposed amendment to § 1.385–3(g)(5) is the same as the text of § 1.385–3T(g)(5) published elsewhere in this issue of the **Federal Register**.]

(6) [The text of the proposed amendment to § 1.385–3(g)(6) is the

same as the text of § 1.385–3T(g)(6) published elsewhere in this issue of the **Federal Register**.]

(7) [The text of the proposed amendment to § 1.385–3(g)(7) is the same as the text of § 1.385–3T(g)(7) published elsewhere in this issue of the **Federal Register**.]

(8) [The text of the proposed amendment to § 1.385–3(g)(8) is the same as the text of § 1.385–3T(g)(8) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(15) [The text of the proposed amendment to § 1.385–3(g)(15) is the same as the text of § 1.385–3T(g)(15) published elsewhere in this issue of the **Federal Register**.]

(16) [The text of the proposed amendment to § 1.385–3(g)(16) is the same as the text of § 1.385–3T(g)(16) published elsewhere in this issue of the **Federal Register**.]

(17) [The text of the proposed amendment to § 1.385–3(g)(16) is the same as the text of § 1.385–3T(g)(17) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(22) [The text of the proposed amendment to § 1.385–3(g)(22) is the same as the text of § 1.385–3T(g)(22) published elsewhere in this issue of the **Federal Register**.]

(23) [The text of the proposed amendment to § 1.385–3(g)(23) is the same as the text of § 1.385–3T(g)(23) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(h) * * *

(3) * * *

Example 12. [The text of the proposed amendment to § 1.385–3(h)(3), *Example 12* is the same as the text of § 1.385–3T(h)(3), *Example 12* published elsewhere in this issue of the **Federal Register**.]

Example 13. [The text of the proposed amendment to § 1.385–3(h)(3), *Example 13* is the same as the text of § 1.385–3T(h)(3), *Example 13* published elsewhere in this issue of the **Federal Register**.]

Example 14. [The text of the proposed amendment to § 1.385–3(h)(3), *Example 14* is the same as the text of § 1.385–3T(h)(3), *Example 14* published elsewhere in this issue of the **Federal Register**.]

Example 15. [The text of the proposed amendment to § 1.385–3(h)(3), *Example 15* is the same as the text of § 1.385–3T(h)(3), *Example 15* published elsewhere in this issue of the **Federal Register**.]

Example 16. [The text of the proposed amendment to § 1.385–3(h)(3), *Example 16* is the same as the text of § 1.385–3T(h)(3), *Example 16* published elsewhere in this issue of the **Federal Register**.]

Example 17. [The text of the proposed amendment to § 1.385–3(h)(3), *Example 17* is the same as the text of § 1.385–3T(h)(3), *Example 17* published elsewhere in this issue of the **Federal Register**.]

Example 18. [The text of the proposed amendment to § 1.385–3(h)(3), *Example 18* is the same as the text of § 1.385–3T(h)(3), *Example 18* published elsewhere in this issue of the **Federal Register**.]

Example 19. [The text of the proposed amendment to § 1.385–3(h)(3), *Example 19* is the same as the text of § 1.385–3T(h)(3), *Example 19* published elsewhere in this issue of the **Federal Register**.]

* * * * *

(k) [The text of the proposed amendment to § 1.385–3(k) is the same as the text of § 1.385–3T(k) published elsewhere in this issue of the **Federal Register**.]

■ **Par. 3.** Section 1.385–4 is added to read as follows:

§ 1.385–4 Treatment of consolidated groups.

[The text of proposed § 1.385–4 is the same as the text of § 1.385–4T published elsewhere in this issue of the **Federal Register**.]

■ **Par. 4.** Section 1.752–2 is amended by:

■ 1. Revising paragraph (c)(3).

■ 2. Revising paragraph (l)(4).

The addition and revision read as follows

§ 1.752–2 Partner's share of recourse liabilities.

* * * * *

(c) * * *

(3) [The text of the proposed amendment to § 1.752–2(c)(3) is the same as the text of § 1.752–2T(c)(3) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(l) * * *

(4) [The text of the proposed amendment to § 1.752–2(l)(4) is the same as the text of § 1.752–2T(l)(4) published elsewhere in this issue of the **Federal Register**.]

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2016–25104 Filed 10–13–16; 5:00 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2016–0929]

RIN 1625–AA00

Safety Zone; Willamette River, Portland, OR

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a temporary safety zone for certain waters of the Willamette River. This action is necessary to provide for the safety of life on these navigable waters during a fireworks display on November 13, 2016. This proposed rulemaking would prohibit persons and vessels from being in the safety zone unless authorized by the Captain of the Port Sector Columbia River or a designated representative. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before November 4, 2016.

ADDRESSES: You may submit comments identified by docket number USCG–2016–0929 using the Federal eRulemaking Portal at *http://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email Mr. Kenneth Lawrenson, Waterways Management Division, U.S. Coast Guard; telephone 503–240–9319, email *msupdxwwm@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR—Code of Federal Regulations
DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

On September 22, 2016, Western Display Fireworks, Ltd., notified the Coast Guard that it will be conducting a fireworks display from 7 p.m. to 7:30 p.m. on November 13, 2016, for a celebration of life of recently deceased Donald W. Gardner. The fireworks are to be launched from a barge in the Willamette River between the Burnside and Steel Bridges. Hazards from firework displays include accidental discharge of fireworks, dangerous projectiles, and falling hot embers or other debris. The Captain of the Port Sector Columbia River (COTP) has determined that potential hazards associated with the fireworks to be used in this display would be a safety concern for anyone within a 450-yard radius of the barge.

The purpose of this rulemaking is to ensure the safety of vessels and the navigable waters within a 450-yard radius of the fireworks barge before, during, and after the scheduled event. The Coast Guard proposes this rulemaking under authority in 33 U.S.C. 1231.

III. Discussion of Proposed Rule

The COTP proposes to establish a safety zone from 6 p.m. to 8:30 p.m. on November 13, 2016. The safety zone would cover all navigable waters within 450 yards of the barge being used to launch the fireworks display in the Willamette River located between the Burnside and Steel Bridges in Portland, OR. The safety zone would be in effect for the duration of the event, which is scheduled to take place from 7 p.m. to 7:30 p.m., and one hour prior to and one hour after the event concludes, in order to ensure the safety of vessels and these navigable waters. No vessel or person would be permitted to enter the safety zone without obtaining permission from the COTP or his designated representative. The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget.

This regulatory action determination is based on the size, location, duration, and time-of-day of the safety zone. Vessel traffic would be able to safely transit around this safety zone which would impact a small designated area of the Willamette River for two and a half hours during the evening when vessel traffic is normally low. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone, and the rule would allow vessels to seek permission to enter the zone.

B. Impact on Small Entities

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

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section IV.A above this proposed rule would not have a significant economic impact on any vessel owner or operator.

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a safety zone lasting two and one half hours that would prohibit entry within 450 yards of a fireworks barge. Normally such actions are categorically excluded from further review under paragraph 34(g) of Figure 2–1 of Commandant Instruction M16475.lD. A preliminary environmental analysis checklist and Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

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

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. If we issue a final rule in this rulemaking, because of the closeness of the event, we would made it effective less than 30 days after publication in the **Federal Register**, and we would explain our good cause for doing so in the final rule, as required by 5 U.S.C. 553(d)(3).

We encourage you to submit comments through the Federal eRulemaking Portal at *http://www.regulations.gov.* If your material cannot be submitted using *http://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided. For more about privacy and the docket, you may review a Privacy Act notice regarding the Federal Docket Management System in the March 24, 2005, issue of the **Federal Register** (70 FR 15086).

Documents mentioned in this NPRM as being available in the docket, and all public comments, will be in our online docket at *http://www.regulations.gov* and can be viewed by following that Web site's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T13–0929 to read as follows:

§ 165.T13–0929 Safety Zone; Willamette River, Portland, OR.

(a) *Safety zone.* The following area is designated a safety zone: Waters of the Willamette River, within a 450-yard radius of the fireworks barge located between the Burnside and Steel Bridges in Portland, OR.

(b) *Regulations.* In accordance with § 165.23, no person may enter or remain in this safety zone unless authorized by the Captain of the Port Columbia River or his designated representative. Also in accordance with § 165.23, no person may bring into, or allow to remain in this safety zone any vehicle, vessel, or object unless authorized by the Captain of the Port Columbia River or his designated representative.

(c) *Enforcement period.* This section will be enforced from 6 p.m. to 8:30 p.m. on November 13, 2016.

Dated: October 17, 2016.

D. F. Berliner,

Captain, U.S. Coast Guard, Alternate Captain of the Port, Sector Columbia River.

[FR Doc. 2016–25511 Filed 10–20–16; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2016–0526; FRL–9954–34–Region 4]

Air Plan Approval; KY; RACM Determination for the KY Portion of the Louisville Area 1997 Annual $PM_{2.5}$

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a State Implementation Plan (SIP) revision submitted by the Commonwealth of Kentucky, through the Kentucky Division for Air Quality (KDAQ) on August 9, 2016, that addresses reasonably available control measures (RACM) for the Kentucky portion of the Louisville, KY–IN, nonattainment area for the 1997 Annual fine particulate matter ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS) (hereinafter referred to as the ''bi-state Louisville Area'' or ''Area'').

DATES: Comments must be received on or before November 21, 2016.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2016–0526 at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *regulations.gov.* 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. 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: Madolyn Sanchez, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Ms. Sanchez can be reached by telephone at (404) 562–9644 or via electronic mail at *sanchez.madolyn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In 1997, EPA promulgated the first air quality standards for $PM_{2.5}$. EPA promulgated an annual standard at a level of 15 micrograms per cubic meter ($\mu g/m^3$) (based on a 3-year average of annual mean $PM_{2.5}$ concentrations) and a 24-hour standard of 65 $\mu g/m^3$ (based on a 3-year average of the 98th percentile of 24-hour concentrations). *See* 62 FR 38652 (July 18, 1997). On January 5, 2005 (70 FR 944), and supplemented on April 14, 2005 (70 FR 19844), EPA designated the bi-state Louisville Area as nonattainment for the 1997 Annual $PM_{2.5}$ NAAQS. In that

action, EPA defined the bi-state Louisville Area to include Bullitt and Jefferson Counties in Kentucky as well as Clark and Floyd Counties and a portion of Jefferson County (Madison Township) in Indiana. Designation of an area as nonattainment for $PM_{2.5}$ starts the process for a state to develop and submit to EPA a SIP revision under title I, part D of the Clean Air Act (CAA or Act). This SIP revision must include, among other elements, a demonstration of how the NAAQS will be attained in the nonattainment area as expeditiously as practicable, but no later than the attainment date required by the CAA.

Originally, EPA designated all 1997 $PM_{2.5}$ NAAQS areas under title I, part D, subpart 1 (hereinafter ''Subpart 1''). Subpart 1, comprised of CAA sections 171–179B, sets forth the basic nonattainment requirements applicable to all nonattainment areas. Section 172(c) contains the general SIP requirements for these areas, including RACM requirements under section 172(c)(1). On April 25, 2007 (72 FR 20586), EPA promulgated a rule, codified at 40 CFR part 51, subpart Z, to implement the 1997 $PM_{2.5}$ NAAQS under Subpart 1 (hereinafter referred to as the ''1997 $PM_{2.5}$ Implementation Rule'').[1] On December 3, 2008, Kentucky submitted an attainment demonstration SIP revision for the Area that addressed RACM and certain other section 172(c) elements including a reasonable further progress (RFP) plan, base-year and attainment-year emissions inventories, and contingency measures for the Area. This SIP revision included a section 172(c)(1) RACM determination that there were no potential emissions control measures that, if considered collectively, would advance the attainment date by one year or more.

In 2011, EPA determined that the bi-state Louisville Area had attained the 1997 Annual $PM_{2.5}$ NAAQS based upon complete, quality-assured, and certified ambient air monitoring data for the 2007–2009 period. *See* 76 FR 55544 (September 7, 2011); 40 CFR 52.929(b). As a result of this determination and in accordance with 40 CFR 51.1004(c), the requirements for the Area to submit attainment demonstrations and associated RACM, RFP plans, contingency measures, and other planning SIP revisions related to attainment of the 1997 Annual $PM_{2.5}$ NAAQS are suspended for so long as: The area is redesignated to attainment, at which time the requirements no longer apply; or EPA determines that the area has violated the $PM_{2.5}$ NAAQS, at which time the area is again required to submit such plans. Therefore, Kentucky withdrew the aforementioned $PM_{2.5}$ attainment demonstration SIP revision except for the portion addressing emissions inventory requirements under section 172(c)(3). EPA later approved Kentucky's 2002 base-year emissions inventory for the Louisville Area pursuant to section 172(c)(3) on August 2, 2012 (77 FR 45956).

On March 5, 2012, Kentucky submitted a request to redesignate the Kentucky portion of the bi-state Louisville Area to attainment for the 1997 Annual $PM_{2.5}$ NAAQS.[2] As the result of a 2015 decision from the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) in *Sierra Club* v. *EPA,* 793 F.3d 656 (6th Cir. 2015) requiring a SIP-approved Subpart 1 RACM determination prior to the redesignation of a 1997 Annual $PM_{2.5}$ NAAQS nonattainment area, Kentucky submitted a SIP revision on August 9, 2016, to address the section 172(c)(1) RACM requirements and to support the Commonwealth's March 5, 2012, redesignation request. In that SIP revision, the Commonwealth determined that no additional control measures are necessary in the Area to satisfy the CAA section 172(c)(1) RACM requirements. Kentucky's determination and the Sixth Circuit's decision are discussed in further detail below.

II. What action is EPA proposing to take?

EPA is proposing to determine that Kentucky's Subpart 1 RACM determination meets the requirements of section 172(c)(1) of the CAA and is proposing to approve this RACM determination into the SIP for the reasons discussed in Section III below.

III. What is EPA's analysis of the Commonwealth's RACM submittal?

A. Relationship Between Subpart I RACM and Redesignation Criteria

EPA does not believe that Subpart 1 nonattainment planning requirements designed to provide for attainment, including RACM, are ''applicable'' for purposes of CAA section 107(d)(3)(E)(ii) once an area is attaining the NAAQS and, therefore, does not believe that these planning requirements must be approved before EPA can redesignate an area to attainment. *See, e.g.,* 57 FR 13498, 13564 (April 16, 1992); ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division (September 4, 1992). However, the aforementioned Sixth Circuit decision in *Sierra Club* v. *EPA* is inconsistent with this longstanding interpretation regarding section 107(d)(3)(E)(ii). In its decision, the Court vacated EPA's redesignation of the Indiana and Ohio portions of the Cincinnati-Hamilton nonattainment area to attainment for the 1997 $PM_{2.5}$ NAAQS because EPA had not yet approved Subpart 1 RACM for the Cincinnati Area into the Indiana and Ohio SIPs. The Court concluded that ''a State seeking redesignation 'shall provide for the implementation' of RACM/RACT [reasonably available control technology], even if those measures are not strictly necessary to demonstrate attainment with the $PM_{2.5}$ NAAQS. . . . If the State has not done so, EPA cannot 'fully approve' the area's SIP, and redesignation to attainment status is improper.'' *Sierra Club,* 793 F.3d at 670.

EPA is bound by the Sixth Circuit's decision in *Sierra Club* v. *EPA* within the Court's jurisdiction.[3] Although EPA continues to believe that Subpart 1 RACM is not an applicable requirement under section 107(d)(3)(E) for an area that has already attained the 1997 Annual $PM_{2.5}$ NAAQS, EPA is proposing to approve Kentucky's RACM determination into the SIP pursuant to the Court's decision.[4]

[1] On January 4, 2013, in *Natural Resources Defense Council* v. *EPA,* 706 F.3d 428 (D.C. Cir. 2013), the United State Court of Appeals for the District of Columbia Circuit (D.C. Circuit) found that EPA erred in implementing the 1997 $PM_{2.5}$ NAAQS pursuant solely to the general implementation provisions of Subpart 1 rather than the particulate matter-specific provisions in title I, part D, subpart 4. The court remanded both the 1997 $PM_{2.5}$ Implementation Rule and the final rule entitled ''Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers ($PM_{2.5}$)'' (73 FR 28321, May 16, 2008) to EPA to address this error. In 2014, EPA finalized a rule classifying areas previously designated nonattainment for the 1997 and/or 2006 fine particle pollution standards under Subpart 1, including the bi-state Louisville Area, as ''Moderate'' nonattainment areas under subpart 4 and setting deadlines for SIP submissions addressing the requirements of subpart 4. *See* 79 FR 31566 (June 2, 2014) [hereinafter 2014 Rule].

[2] Kentucky submitted its redesignation request prior to the aforementioned ruling in *Natural Resources Defense Council* v. *EPA.* As discussed in the 2014 Rule, EPA's position is that this ruling does not apply retroactively. *See* 79 FR at 31568.

[3] The states of Kentucky, Michigan, Ohio, and Tennessee are located within the Sixth Circuit's jurisdiction.

[4] The EPA Region 4 Regional Administrator signed a memorandum on July 20, 2015, seeking concurrence from the Director of EPA's Air Quality Policy Division (AQPD) in the Office of Air Quality Planning and Standards to act inconsistent with EPA's interpretation of CAA sections 107(d)(3)(E) and 172(c)(1) when taking action on pending and future redesignation requests in Kentucky and Tennessee because the Region is bound by the Sixth Circuit's decision in *Sierra Club* v. *EPA.* The AQPD Director issued her concurrence on July 22, 2015.

B. Subpart 1 RACM Requirements

Subpart 1 requires that each attainment plan ''provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emission from the existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology), and shall provide for attainment of the national primary ambient air quality standards.'' *See* CAA section 172(c)(1). EPA has consistently interpreted this provision to require only implementation of potential RACM measures that could advance attainment.[5] Thus, when an area is already attaining the standard, no additional RACM measures are required. EPA's interpretation that Subpart 1 requires only the implementation of RACM measures that would advance attainment was upheld by the United States Court of Appeals in the Fifth Circuit[6] and by the United States Court of Appeals for the D.C. Circuit.[7]

C. Proposed Action

In its August 9, 2016, SIP submission, the Commonwealth determined that no additional control measures are necessary in the Area to satisfy the CAA section 172(c)(1) RACM requirement because the Area has attained the 1997 Annual $PM_{2.5}$ NAAQS. As noted above, EPA has determined that the Area attained the standard by the April 5, 2010, attainment date and that no additional measures are required to satisfy Subpart 1 RACM when an area is attaining the standard. Therefore, EPA proposes to agree with the Commonwealth's analysis, to approve Kentucky's SIP revision, and to incorporate the section 172(c)(1) RACM determination into the SIP.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a).

This memorandum is not required to satisfy EPA's regional consistency regulations. *See* 40 CFR 56.5(b)(1); 81 FR 51102 (August 3, 2016).

[5] This interpretation was adopted in the General Preamble, see 57 FR 13498 (April 16, 1992), and has been upheld as applied to the Clean Data Policy, as well as to nonattainment SIP submissions. *See NRDC* v. *EPA,* 571 F.3d 1245 (D.C. Cir. 2009); *Sierra Club* v. *EPA,* 294 F.3d 155 (D.C. Cir. 2002).

[6] *Sierra Club* v. *EPA,* 314 F.3d 735, 743–745 (5th Cir. 2002).

[7] *Sierra Club* v. *EPA,* 294 F.3d 155, 162–163 (D.C. Cir. 2002); *NRDC* v. *EPA,* 571 F.3d 1245, 1252 (D.C. Cir. 2009).

Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely proposes to approve state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: October 11, 2016.

Heather McTeer Toney,

Regional Administrator, Region 4.

[FR Doc. 2016–25433 Filed 10–20–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2016–0308; FRL–9954–17–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Removal of Stage II Gasoline Vapor Recovery Requirements for Gasoline Dispensing Facilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) proposes to approve the state implementation plan (SIP) revision submitted by the Commonwealth of Virginia for the purpose of removing the requirement for gasoline vapor recovery equipment on gasoline dispensing pumps (otherwise referred to as Stage II vapor recovery, or simply as Stage II) in Virginia area facilities formerly required to have installed and operated Stage II vapor recovery controls under the prior, approved Virginia SIP. In the Rules and Regulations section of this **Federal Register**, EPA is approving the Commonwealth's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for EPA's approval of Virginia's Stage II-related SIP revision with amended regulations addressing vapor recovery is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by November 21, 2016.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R03–OAR–2016–0308 at *http://www.regulations.gov,* or via email to *pino.maria@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* For either manner of submission, 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, please contact the person identified in the ''For Further Information Contact'' section. For 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: Brian Rehn, (215) 814–2176, or by email at *rehn.brian@epa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, that is located in the Rules and Regulations section of this issue of the **Federal Register**.

Dated: September 29, 2016.

Shawn M. Garvin,

Regional Administrator, Region III.

[FR Doc. 2016–25297 Filed 10–20–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 271 and 272

[EPA–R06–RCRA–2015–0664; FRL–9951–20–Region 6]

Louisiana: Final Authorization of State-Initiated Changes and Incorporation by Reference of State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: During a review of Louisiana's regulations, the Environmental Protection Agency (EPA) identified a variety of State-initiated changes to Louisiana's hazardous waste program under the Resource Conservation and Recovery Act (RCRA), as amended, for which the State had not previously sought authorization. EPA proposes to authorize the State for the program changes. In addition, EPA proposes to codify in the regulations entitled ''Approved State Hazardous Waste Management Programs'', Louisiana's authorized hazardous waste program. The EPA will incorporate by reference into the Code of Federal Regulations (CFR) those provisions of the State regulations that are authorized and that EPA will enforce under RCRA.

DATES: Send written comments by November 21, 2016.

ADDRESSES: Submit any comments identified by Docket ID No. EPA–R06–RCRA–2015–0664, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
2. *Email: patterson.alima@epa.gov or banks.julia@epa.gov.*
3. *Mail:* Alima Patterson, Region 6, Regional Authorization Coordinator, or Julia Banks, Codification Coordinator, Permit Section (RPM), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733.
4. *Hand Delivery or Courier:* Deliver your comments to Alima Patterson, Region 6, Regional Authorization Coordinator, or Julia Banks, Codification Coordinator, Permit Section (RPM), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733.

Instructions: Do not submit information that you consider to be Confidential Business Information (CBI) or otherwise protected through *regulations.gov,* or email. Direct your comments to Docket ID No. EPA–R06–RCRA–2015–0664. The Federal *regulations.gov* Web site is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. You can view and copy the documents that form the basis for this authorization and codification and associated publicly available materials from 8:30 a.m. to 4 p.m. Monday through Friday at the following location: EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, phone number: (214) 665–8533 or (214) 665–8178. Interested persons wanting to examine these documents should make an appointment with the office at least two weeks in advance.

FOR FURTHER INFORMATION CONTACT: Alima Patterson, Region 6, Regional Authorization Coordinator or Julia Banks, Codification Coordinator, Permit Section (RPM), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, Phone number: (214) 665–8533 or (214) 665–8178, and Email address: *patterson.alima@epa.gov or banks.julia@epa.gov.*

SUPPLEMENTARY INFORMATION: For additional information, please see the direct final rule published in the ''Rules and Regulations'' section of this **Federal Register**. 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 to the direct final rule. Unless we get written comments which oppose this authorization during the comment period, the direct final rule will become effective 60 days after publication and we will not take further action on this proposal. If we receive comments that oppose this action, we will withdraw the direct final rule and it will not take effect. We 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.

The purpose of this **Federal Register** document is to codify Louisiana's base hazardous waste management program and its revisions to that program through RCRA Clusters XXI, XXII including RCRA Cluster XXIII Checklist 229 Exclusions for Solvent Contaminated Wipes. (See 80 FR 55032) September 14, 2015. The EPA provided

notices and opportunity for comments on the Agency's decisions to authorize the Louisiana program, and the EPA is not now reopening the decisions, nor requesting comments, on the Louisiana authorizations as published in FR notices specified in Section I.F of the direct final rule FR document.

This document incorporates by reference Louisiana's hazardous waste statutes and regulations and clarifies which of these provisions are included in the authorized and federally enforceable program. By codifying Louisiana's authorized program and by amending the Code of Federal Regulations, the public will be more easily able to discern the status of federally approved requirements of the Louisiana's hazardous waste management program.

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, and 6974(b).

Dated: August 1, 2016.

Ron Curry,

Regional Administrator, Region 6.

[FR Doc. 2016–25313 Filed 10–20–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 720, 721, and 723

[EPA–HQ–OPPT–2014–0650; FRL–9952–69]

Significant New Uses of Chemical Substances; Updates to the Hazard Communication Program and Regulatory Framework; Minor Amendments To Reporting Requirements for Premanufacture Notices; Reopening of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; Reopening of comment period.

SUMMARY: In the **Federal Register** of July 28, 2016, EPA proposed to amend the hazard communication program and aspects of the regulatory framework for significant new uses of chemical substances and reporting requirements for premanufacture notices under the Toxic Substances Control Act. This document reopens the comment period for 30 days. A commenter requested additional time to submit written comments for the proposed rule. EPA believes that the request is reasonable and is therefore reopening the comment period in order to give all interested persons the opportunity to comment fully.

DATES: The comment period for the proposed rule published on July 28, 2016 (81 FR 49598) (FRL–9944–47) is reopened. Comments, identified by docket identification (ID) number EPA–HQ–OPPT–2014–0650 must be received on or before November 21, 2016.

ADDRESSES: As specified in the **Federal Register** document of July 28, 2016 (81 FR 49598) (FRL–9944–47), submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2014–0650, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand deliver or delivery of boxed information, please follow the instructions at: *http://www.epa.gov/dockets/contacts.html.* Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Jim Alwood, Chemical Control Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–8974; email address: *alwood.jim@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

This document reopens the public comment period established in the **Federal Register** document of July 28, 2016 (81 FR 49598) (FRL–9944–47). In that document, EPA proposed amendments to the hazard communication program and regulatory framework for significant new uses of chemical substances and reporting requirements for premanufacture notices. EPA is hereby reopening the comment period for 30 days.

To submit comments, or access the docket, please follow the detailed instructions provided under **ADDRESSES** in the **Federal Register** document of July 28, 2016. If you have questions, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects in 40 CFR Parts 720, 721, and 723

Environmental protection, Chemicals, Hazardous materials, Recordkeeping, and Reporting requirements.

Dated: October 7, 2016.

Jeff Morris,

Acting Director, Office of Pollution Prevention and Toxics.

[FR Doc. 2016–25440 Filed 10–20–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 160809713–6909–01]

RIN 0648–XE804

Revisions to Hatchery Programs Included as Part of Pacific Salmon and Steelhead Species Listed Under the Endangered Species Act

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

ACTION: Proposed rule.

SUMMARY: We, NMFS, announce proposed revisions to the Code of Federal Regulations (CFR) to update the descriptions of Pacific salmon and steelhead (*Oncorhynchus spp.*) species currently listed as threatened or endangered under the Endangered Species Act of 1973 (ESA). Revisions include the addition or removal of specific hatchery programs, as well as clarifying changes to the names of specific hatchery programs included as part of the listings of certain Pacific salmon and steelhead species. These proposed changes are informed by our recently completed 5-year reviews under ESA. We do not propose to change the ESA-listing status of any species under NMFS' jurisdiction, or modify any critical habitat designation.

DATES: Comments and information regarding the proposed revisions must be received by December 20, 2016.

ADDRESSES: You may submit comments, information, or data, identified by the code NOAA–NMFS–2016–0110 by either of the following methods:

- *Electronic Submissions:* Submit all electronic comments via the Federal eRulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-0110.* Click the ''Comment Now'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Send comments, identified with ''Proposed Changes to Listed Salmon and Steelhead Hatchery Programs'' to Chris Yates, Assistant Regional Administrator, Protected Resources Division, NMFS, West Coast Regional Office, Attn: Claire McGrath, 1201 NE. Lloyd Blvd., Suite 1100, Portland, OR 97232.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. We will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT:
Claire McGrath, NMFS, West Coast Region, Protected Resources Division, at the above address, by phone at (503) 230–5433, or by email at *claire.mcgrath@noaa.gov.* You may also contact Maggie Miller, NMFS, Office of Protected Resources, (301) 427–8403. Copies of the documents supporting this proposed rule can be found on our West Coast Region Web site at: *www.westcoast.fisheries.gov.*

SUPPLEMENTARY INFORMATION:

Background

Section 4 of the ESA provides for both NMFS and the U.S. Fish and Wildlife Service (FWS) to make determinations as to the endangered or threatened status of ''species'' in response to petitions or on their own initiative. In accordance with the ESA, we (NMFS) make determinations as to the threatened or endangered status of species by regulation. These regulations provide the text for each species' listing and include the content required by the ESA section 4(c)(1). We enumerate and maintain a list of species under our jurisdiction which we have determined to be threatened or endangered at 50 CFR 223.102 (threatened species) and 50 CFR 224.101 (endangered species) (hereafter referred to as the ''NMFS Lists''). The FWS maintains two master lists of all threatened and endangered species, *i.e.,* both species under NMFS' jurisdiction and species under FWS' jurisdiction (the ''FWS Lists'') at 50 CFR 17.11 (threatened and endangered animals) and 50 CFR 17.12 (threatened and endangered plants). The term ''species'' for listing purposes under the ESA includes the following entities: Species, subspecies, and, for vertebrates only, ''distinct population segments (DPSs).'' Pacific salmon are listed as ''evolutionarily significant units (ESUs),'' which are essentially equivalent to DPSs for the purpose of the ESA. For West Coast salmon and steelhead, many of the ESU and DPS descriptions include fish originating from specific artificial propagation programs (*e.g.,* hatcheries) that, along with their naturally-produced counterparts, are included as part of the listed species.

The ESA requires regular review of listed species to determine whether a species should be delisted, reclassified, or retain its current classification (16 U.S.C. 1533(c)(2)). Recently, we completed a 5-year review of the status of ESA-listed salmon ESUs and steelhead DPSs in California, Oregon, Idaho, and Washington (81 FR 33468, May 26, 2016). As part of the 5-year review, we reviewed the classification of all West Coast salmonid hatchery programs, taking into consideration the origin for each hatchery stock, the location of release of hatchery fish, and the degree of known or inferred genetic divergence between the hatchery stock and the local natural population(s). We used criteria in NMFS' Policy on the Consideration of Hatchery-Origin Fish in Endangered Species Act Listing Determinations for Pacific Salmon and Steelhead (''Hatchery Listing Policy'') (70 FR 37204, June 28, 2005) to guide our review. The Hatchery Listing Policy states that hatchery stocks will be considered part of an ESU/DPS if they exhibit a level of genetic divergence relative to the local natural population(s) that is not more than what occurs within the ESU/DPS.

In a NMFS internal memorandum, Jones (2015) summarizes the results of our most recent hatchery program review. We identified 28 hatchery programs for which we recommend a change in classification, *i.e.,* adding the program to or removing it from an ESU/DPS. We propose to remove 5 hatchery programs because they have been terminated and the last cohort of adult hatchery-origin fish has returned. We propose to add 23 hatchery programs to the relevant listed ESU/DPS because our 5-year review and hatchery program evaluation (Jones 2015) concluded that the program exhibits a level of genetic divergence relative to the local natural population(s) that is not more than what occurs within the ESU/DPS. Consistent with the Hatchery Listing Policy, such programs should be included and listed as part of the ESU/DPS. The reader is referred to the 5-year review reports and Jones (2015) for a more detailed explanation of the proposed changes summarized below.

We identified 26 hatchery programs for which we propose a name change. These name changes reflect an effort to standardize conventions for naming hatchery programs (*e.g.,* we recommend removing Oregon Department of Fish and Wildlife (ODFW) hatchery stock identification numbers from hatchery program names) or otherwise clarify the specific hatchery program that is included in a listing. In addition, we recommend minor changes in terminology used to describe three ESU/DPSs for which there are no other proposed revisions in order to standardize species descriptions. We summarize the proposed revisions below and provide the full text of proposed updates to the listed species' descriptions at 50 CFR parts 223 and 224 in the regulatory text at the end of this **Federal Register** notice. After considering public comments on these proposed revisions, we will finalize this proposed rule and then coordinate with the FWS to ensure that the changes are reflected in the FWS Lists at 50 CFR 17.11.

Endangered Species at 50 CFR 224.101

Revisions to Endangered Species Descriptions

Below we summarize proposed revisions to the descriptions of our endangered species listed in 50 CFR 224.101. Based on our recently completed 5-year reviews of the status of ESA-listed salmon ESUs and steelhead DPSs in California, Oregon, Idaho, and Washington, and our evaluation of West Coast salmon and steelhead hatchery programs in Jones (2015) (see *http://www.westcoast.fisheries.noaa.gov/publications/status_reviews/salmon_steelhead/2016_status_review.html* for these supporting documents), the description of two endangered species must be revised to account for changes in the classification

of specific artificial propagation programs considered part of the respective ESUs. The addition or termination of an artificial propagation program does not constitute a listing or delisting of an ESU, but simply a revision to reflect the actual current composition of the listed ESU. We also propose minor changes in the description terminology of two other endangered species to standardize species descriptions.

Salmon, Chinook (Sacramento River Winter-Run ESU)

We propose to revise this description to read: ''Naturally spawned winter-run Chinook salmon originating from the Sacramento River and its tributaries. Also, winter-run Chinook salmon from the following artificial propagation programs: The Livingston Stone National Fish Hatchery (supplementation and captive broodstock).'' The change proposed for this DPS is to add the captive broodstock component of the Livingston Stone National Fish Hatchery Program, which was restarted in 2015 after being implemented from 1991 to 2007 and then discontinued. The source of fish for both the captive broodstock and supplementation programs is local, natural-origin winter Chinook salmon in the upper Sacramento River.

Salmon, Chinook (Upper Columbia River Spring-Run ESU)

We propose to revise this description to read: ''Naturally spawned spring-run Chinook salmon originating from Columbia River tributaries upstream of the Rock Island Dam and downstream of Chief Joseph Dam (excluding the Okanogan River subbasin). Also, spring-run Chinook salmon from the following artificial propagation programs: The Twisp River Program; Methow Program; Winthrop National Fish Hatchery Program; Chiwawa River Program; White River Program; and the Nason Creek Program.'' The changes proposed for this ESU include: (1) Removing the Chewuch River Program as an artificial propagation program included in this ESU because it is now considered part of the Methow Program; and (2) adding the new Nason Creek Program because the source for these fish is local, natural-origin fish from Nason Creek.

Salmon, Coho (Central California Coast ESU)

We propose to revise this description to read: ''Naturally spawned coho salmon originating from rivers south of Punta Gorda, California, to and including Aptos Creek, as well as such coho salmon originating from tributaries to San Francisco Bay. Also, coho salmon from the following artificial propagation programs: The Don Clausen Fish Hatchery Captive Broodstock Program; the Scott Creek/King Fisher Flats Conservation Program; and the Scott Creek Captive Broodstock Program.'' There are no proposed changes in hatchery programs included in this ESU. We recommend minor changes in terminology to standardize species descriptions.

Salmon, Sockeye (Snake River ESU)

We propose to revise this description to read: ''Naturally spawned anadromous and residual sockeye salmon originating from the Snake River basin. Also, sockeye salmon from the Redfish Lake Captive Broodstock Program.'' There are no proposed changes in hatchery programs included in this ESU. We recommend minor changes in terminology to standardize species descriptions.

Threatened Species at 50 CFR 223.102

Revisions to Threatened Species Descriptions

Below we summarize proposed revisions to the descriptions of threatened species listed in 50 CFR 223.102. Based on our recently completed 5-year reviews of the status of ESA-listed salmon ESUs and steelhead DPSs in California, Oregon, Idaho, and Washington (see *http://www.westcoast.fisheries.noaa.gov/publications/status_reviews/salmon_steelhead/2016_status_review.html* for status review documents), the descriptions of 17 threatened species must be revised to account for changes in the classification or name of specific artificial propagation programs associated with that ESU or DPS. The addition or termination of these artificial propagation programs does not constitute a listing or delisting of an ESU or DPS, but simply a revision to the composition of the listed ESU or DPS. We also propose minor changes in the description terminology of one other threatened species to standardize species descriptions.

Salmon, Chinook (Lower Columbia River ESU)

We propose to revise this description to read: ''Naturally spawned Chinook salmon originating from the Columbia River and its tributaries downstream of a transitional point east of the Hood and White Salmon Rivers, and any such fish originating from the Willamette River and its tributaries below Willamette Falls. Not included in this DPS are: (1) Spring-run Chinook salmon originating from the Clackamas River; (2) fall-run Chinook salmon originating from Upper Columbia River bright hatchery stocks, that spawn in the mainstem Columbia River below Bonneville Dam, and in other tributaries upstream from the Sandy River to the Hood and White Salmon Rivers; (3) spring-run Chinook salmon originating from the Round Butte Hatchery (Deschutes River, Oregon) and spawning in the Hood River; (4) spring-run Chinook salmon originating from the Carson National Fish Hatchery and spawning in the Wind River; and (5) naturally spawned Chinook salmon originating from the Rogue River Fall Chinook Program. This DPS does include Chinook salmon from the following artificial propagation programs: The Big Creek Tule Chinook Program; Astoria High School Salmon-Trout Enhancement Program (STEP) Tule Chinook Program; Warrenton High School STEP Tule Chinook Program; Cowlitz Tule Chinook Program; North Fork Toutle Tule Chinook Program; Kalama Tule Chinook Program; Washougal River Tule Chinook Program; Spring Creek National Fish Hatchery (NFH) Tule Chinook Program; Cowlitz Spring Chinook Program in the Upper Cowlitz River and the Cispus River; Friends of the Cowlitz Spring Chinook Program; Kalama River Spring Chinook Program; Lewis River Spring Chinook Program; Fish First Spring Chinook Program; Sandy River Hatchery Program; Deep River Net Pens-Washougal Program; Klaskanine Hatchery Program; Bonneville Hatchery Program; and the Cathlamet Channel Net Pens Program.'' The changes proposed for this ESU include: (1) Adding the Deep River Net Pens-Washougal Program because these fish are returning hatchery-origin adults from the Washougal River Tule Chinook Program, which is included in the ESU; (2) adding the Klaskanine Hatchery Program because the source for these fish is the Big Creek Tule Chinook Program, which is included in the ESU; (3) adding the Bonneville Hatchery Program because the source for these fish is the Spring Creek NFH Tule Chinook Program, which is included in the ESU; and (4) adding the Cathlamet Channel Net Pens Program, because the source for these fish is the Cowlitz Spring Chinook Program in the Upper Cowlitz River, which is included in the ESU. Jones (2015) concluded that, given the within-ESU source of broodstock for these hatchery programs, they exhibit a level of genetic divergence relative to the local natural population(s) that is not more than what occurs within the ESU/DPS. Consistent with the Hatchery Listing Policy, Jones (2015)

recommended that these hatchery programs be proposed for inclusion as part of the Lower Columbia River Chinook ESU.

Salmon, Chinook (Puget Sound ESU)

We propose to revise this description to read: ''Naturally spawned Chinook salmon originating from rivers flowing into Puget Sound from the Elwha River (inclusive) eastward, including rivers in Hood Canal, South Sound, North Sound and the Strait of Georgia. Also, Chinook salmon from the following artificial propagation programs: the Kendall Creek Hatchery Program; Marblemount Hatchery Program (spring subyearlings and summer-run); Brenner Creek Hatchery Program (summer-run and fall-run); Whitehorse Springs Pond Program; Wallace River Hatchery Program (yearlings and subyearlings); Issaquah Hatchery Program; White River Hatchery Program; White Acclimation Pond Program; Voights Creek Hatchery Program; Diru Creek Program; Clear Creek Program; Kalama Creek Program; George Adams Hatchery Program; Hamma Hatchery Program; Dungeness/Hurd Creek Hatchery Program; Elwha Channel Hatchery Program; Skookum Creek Hatchery Spring-run Program; Bernie Kai-Kai Gobin (Tulalip) Hatchery-Cascade Program; North Fork Skokomish River Spring-run Program; the Soos Creek Hatchery Program (subyearlings and yearlings); the Fish Restoration Facility Program; the Bernie Kai-Kai Gobin (Tulalip) Hatchery-Skykomish Program; and the Hupp Springs Hatchery-Adult Returns to Minter Creek Program.'' The changes proposed for this ESU include: (1) Removing the Icy Creek Hatchery Program as an artificial propagation program included in this ESU because it is now considered part of the Soos Creek Program; (2) adding the Bernie Kai-Kai Gobin (Tulalip) Hatchery-Cascade Program because the source for these fish is the Marblemount Hatchery Program (spring subyearlings), which is included in the ESU; (3) adding the new North Fork Skokomish River Spring-run Program because the source for these fish is the Marblemount Hatchery Program (spring subyearlings), which is included in the ESU; (4) removing the Rick's Pond Hatchery Program, a terminated program for which all hatchery-origin adults have returned; (5) updating the name of the Soos Creek Hatchery Program, which is included in the ESU, to the Soos Creek Hatchery Program (subyearlings and yearlings); (6) updating the name of the Keta Creek Hatchery Program, which is included in the ESU, to the Fish Restoration Facility Program; (7) updating the name of the Tulalip Bay Program, which is included in the ESU, to the Bernie Kai-Kai Gobin (Tulalip) Hatchery-Skykomish Program; (8) updating the name of the Hupp Springs Hatchery Program, which is included in the ESU, to the Hupp Springs Hatchery-Adult Returns to Minter Creek Program; and (9) updating the name of the Harvey Creek Hatchery Program, which is included in the ESU, to the Brenner Creek Hatchery Program.

Salmon, Chinook (Snake River Fall-Run ESU)

We propose to revise this description to read: ''Naturally spawned fall-run Chinook salmon originating from the mainstem Snake River below Hells Canyon Dam and from the Tucannon River, Grande Ronde River, Imnaha River, Salmon River, and Clearwater River subbasins. Also, fall-run Chinook salmon from the following artificial propagation programs: the Lyons Ferry Hatchery Program; Fall Chinook Acclimation Ponds Program; Nez Perce Tribal Hatchery Program; and the Idaho Power Program.'' The change proposed for this ESU is to update the name of the Oxbow Hatchery Program, which is included in the ESU, to the Idaho Power Program.

Salmon, Chinook (Snake River Spring/Summer-Run ESU)

We propose to revise this description to read: ''Naturally spawned spring/summer-run Chinook salmon originating from the mainstem Snake River and the Tucannon River, Grande Ronde River, Imnaha River, and Salmon River subbasins. Also, spring/summer-run Chinook salmon from the following artificial propagation programs: The Tucannon River Program; Lostine River Program; Catherine Creek Program; Lookingglass Hatchery Program; Upper Grande Ronde Program; Imnaha River Program; McCall Hatchery Program; Johnson Creek Artificial Propagation Enhancement Program; Pahsimeroi Hatchery Program; Sawtooth Hatchery Program; Yankee Fork Program; Dollar Creek Program; Panther Creek Program; and the Big Sheep Creek-Adult outplanting from Imnaha Program.'' The changes proposed for this ESU include: (1) Adding the Yankee Fork Program because the source for these fish is the Sawtooth Hatchery Program, which are included in the ESU; (2) adding the Dollar Creek Program because the source for these fish is the McCall Hatchery Program, which is included in the ESU; (3) adding the Panther Creek Program because the source for these fish is the Pahsimeroi Hatchery Program, which is included in the ESU; and (4) updating the name of the Big Sheep Creek Program, which is included in the ESU, to the Big Sheep Creek-Adult outplanting from Imnaha Program.

Salmon, Chinook (Upper Willamette River ESU)

We propose to revise this description to read: ''Naturally spawned spring-run Chinook salmon originating from the Clackamas River and from the Willamette River and its tributaries above Willamette Falls. Also, spring-run Chinook salmon from the following artificial propagation programs: The McKenzie River Hatchery Program; Willamette Hatchery Program; Clackamas Hatchery Program; North Santiam River Program; South Santiam River Program; and the Mollala River Program.'' The changes proposed for this ESU include: (1) Updating the name of the Marion Forks Hatchery/North Fork Santiam Hatchery Program (ODFW Stock #21), which is included in the ESU, to the North Santiam River Program; (2) separating the South Santiam Hatchery Program (ODFW Stock #24) in the South Fork Santiam River and Mollala River, which is included in the ESU, into two programs named the South Santiam River Program and the Mollala River Program; and (3) removing Oregon Department of Fish and Wildlife (ODFW) stock numbers from the names of the McKenzie River Hatchery Program, Willamette Hatchery Program, and Clackamas Hatchery Program.

Salmon, Chum (Columbia River ESU)

We propose to revise this description to read: ''Naturally spawned chum salmon originating from the Columbia River and its tributaries in Washington and Oregon. Also, chum salmon from the following artificial propagation programs: The Grays River Program; Washougal River Hatchery/Duncan Creek Program; and the Big Creek Hatchery Program.'' The change proposed for this ESU is to add the new Big Creek Hatchery Program because the source for these fish is local, natural-origin fish from the Grays River, which is included in the ESU.

Salmon, Chum (Hood Canal Summer-Run ESU)

We propose to revise this description to read: ''Naturally spawned summer-run chum salmon originating from Hood Canal and its tributaries as well as from Olympic Peninsula Rivers between Hood Canal and Dungeness Bay (inclusive). Also, summer-run chum salmon from the following artificial propagation programs: The Lilliwaup Creek Fish Hatchery Program; and the

Tahuya River Program.'' The changes proposed for this ESU include removing two terminated programs for which all hatchery-origin adults have returned: (1) The Hamma Fish Hatchery Program; and (2) the Jimmycomelately Creek Fish Hatchery Program.

Salmon, Coho (Lower Columbia River ESU)

We propose to revise this description to read: ''Naturally spawned coho salmon originating from the Columbia River and its tributaries downstream from the Big White Salmon and Hood Rivers (inclusive) and any such fish originating from the Willamette River and its tributaries below Willamette Falls. Also, coho salmon from the following artificial propagation programs: The Grays River Program; Peterson Coho Project; Big Creek Hatchery Program; Astoria High School Salmon-Trout Enhancement Program (STEP) Coho Program; Warrenton High School STEP Coho Program; Cowlitz Type-N Coho Program in the Upper and Lower Cowlitz Rivers; Cowlitz Game and Anglers Coho Program; Friends of the Cowlitz Coho Program; North Fork Toutle River Hatchery Program; Kalama River Type-N Coho Program; Kalama River Type-S Coho Program; Lewis River Type-N Coho Program; Lewis River Type-S Coho Program; Fish First Wild Coho Program; Fish First Type-N Coho Program; Syverson Project Type-N Coho Program; Washougal River Type-N Coho Program; Eagle Creek National Fish Hatchery Program; Sandy Hatchery Program; Bonneville/Cascade/Oxbow Complex Hatchery Program; Clatsop County Fisheries Net Pen Program; and the Clatsop County Fisheries/Klaskanine Hatchery Program.'' The changes proposed for this ESU include: (1) Adding the Clatsop County Fisheries Net Pen Program because the broodstock origin is Tanner Creek, which is included in the ESU; (2) adding the Clatsop County Fisheries/Klaskanine Hatchery Program because the source for these fish is the Big Creek Hatchery Program, which is included in the ESU; and (3) removing ODFW stock numbers from the names of the Big Creek Hatchery Program, Sandy Hatchery Program, and Bonneville/Cascade/Oxbow Complex Hatchery Program.

Salmon, Coho (Oregon Coast ESU)

We propose to revise this description to read: ''Naturally spawned coho salmon originating from coastal rivers south of the Columbia River and north of Cape Blanco. Also, coho salmon from the Cow Creek Hatchery Program.'' The change proposed for this ESU is to remove the ODFW stock number from the name of the Cow Creek Hatchery Program.

Salmon, Coho (Southern Oregon/Northern California Coast ESU)

We propose to revise this description to read: ''Naturally spawned coho salmon originating from coastal streams and rivers between Cape Blanco, Oregon, and Punta Gorda, California. Also, coho salmon from the following artificial propagation programs: The Cole Rivers Hatchery Program; Trinity River Hatchery Program; and the Iron Gate Hatchery Program.'' The change proposed for this ESU is to remove the ODFW stock number from the name of the Cole Rivers Hatchery Program.

Salmon, Sockeye (Ozette Lake ESU)

We propose to revise this description to read: ''Naturally spawned sockeye salmon originating from the Ozette River and Ozette Lake and its tributaries. Also, sockeye salmon from the Umbrella Creek/Big River Hatchery Program.'' The change proposed for this ESU is to combine the Umbrella Creek Hatchery Program and Big River Hatchery Program, which are included in the ESU, into one program called the Umbrella Creek/Big River Hatchery Program. This integrated program uses broodstock from Umbrella Creek that were derived from natural-origin fish from Ozette Lake, and releases fish into Umbrella Creek and Big River.

Steelhead (California Central Valley DPS)

We propose to revise this description to read: ''Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and manmade impassable barriers from the Sacramento and San Joaquin Rivers and their tributaries; excludes such fish originating from San Francisco and San Pablo Bays and their tributaries. This DPS includes steelhead from the following artificial propagation programs: The Coleman National Fish Hatchery Program; Feather River Fish Hatchery Program; and the Mokelumne River Hatchery Program.'' The change proposed for this DPS is to add the Mokelumne River Hatchery Program because fish in this program are genetically most similar to Feather River Fish Hatchery Program steelhead, which are included in the DPS.

Steelhead (Central California Coast DPS)

We propose to revise this description to read: ''Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and manmade impassable barriers from the Russian River to and including Aptos Creek, and all drainages of San Francisco and San Pablo Bays eastward to Chipps Island at the confluence of the Sacramento and San Joaquin Rivers. Also, steelhead from the following artificial propagation programs: the Don Clausen Fish Hatchery Program and the Kingfisher Flat Hatchery Program (Monterey Bay Salmon and Trout Project).'' There are no proposed changes in hatchery programs included in this ESU. We recommend minor changes in terminology to standardize species descriptions.

Steelhead (Lower Columbia River DPS)

We propose to revise this description to read: ''Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and manmade impassable barriers from rivers between the Cowlitz and Wind Rivers (inclusive) and the Willamette and Hood Rivers (inclusive); excludes such fish originating from the upper Willamette River basin above Willamette Falls. This DPS includes steelhead from the following artificial propagation programs: The Cowlitz Trout Hatchery Late Winter-run Program (Lower Cowlitz); Kalama River Wild Winter-run and Summer-run Programs; Clackamas Hatchery Late Winter-run Program; Sandy Hatchery Late Winter-run Program; Hood River Winter-run Program; Lewis River Wild Late-run Winter Steelhead Program; Upper Cowlitz Wild Program; and the Tilton River Wild Program.'' The changes proposed for this DPS include: (1) Adding the recently initiated Upper Cowlitz Wild Program because the source for these fish is local, natural-origin fish from the Upper Cowlitz River, which is included in the DPS; (2) adding the recently initiated Tilton River Wild Program because the source for these fish is local, natural-origin fish from the Tilton River; and (3) removing ODFW stock numbers from the names of the Clackamas Hatchery Late Winter-run Program, Sandy Hatchery Late Winter-run Program, and Hood River Winter-run Program.

Steelhead (Middle Columbia River DPS)

We propose to revise this description to read: ''Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and manmade impassable barriers from the Columbia River and its tributaries upstream of the Wind and Hood Rivers (exclusive) to and including the Yakima River; excludes such fish originating from the Snake River basin. This DPS includes steelhead from the following artificial propagation programs: The Touchet River Endemic Program; Yakima River

Kelt Reconditioning Program (in Satus Creek, Toppenish Creek, Naches River, and Upper Yakima River); Umatilla River Program; and the Deschutes River Program. This DPS does not include steelhead that are designated as part of an experimental population.'' The change proposed for this DPS is to remove ODFW stock numbers from the names of the Umatilla River Program and the Deschutes River Program.

Steelhead (Puget Sound DPS)

We propose to revise this description to read: ''Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and manmade impassable barriers from rivers flowing into Puget Sound from the Elwha River (inclusive) eastward, including rivers in Hood Canal, South Sound, North Sound, and the Strait of Georgia. Also, steelhead from the following artificial propagation programs: The Green River Natural Program; White River Winter Steelhead Supplementation Program; Hood Canal Steelhead Supplementation Off-station Projects in the Dewatto, Skokomish, and Duckabush Rivers; Lower Elwha Fish Hatchery Wild Steelhead Recovery Program; and the Fish Restoration Facility Program.'' The change proposed for this DPS is to add the new Fish Restoration Facility Program because the source for these fish is the local, natural-origin population within the Duwamish/Green River, which is included in the DPS.

Steelhead (Snake River Basin DPS)

We propose to revise this description to read: ''Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and manmade impassable barriers from the Snake River basin. Also, steelhead from the following artificial propagation programs: The Tucannon River Program; Dworshak National Fish Hatchery Program; Lolo Creek Program; North Fork Clearwater Program; East Fork Salmon River Natural Program; Little Sheep Creek/Imnaha River Hatchery Program; Little Salmon River (B-run) Program; Squaw Creek Program; Yankee Fork Program; Pahsimeroi River Program; and the South Fork Clearwater Hatchery Program.'' The changes proposed for this DPS include: (1) Adding the Little Salmon River (B-run) Program and three Upper Salmon River (B-run) Programs (Squaw Creek Program, Yankee Fork Program, and Pahsimeroi River Program), because these fish are B-run steelhead from the Dworshak National Fish Hatchery Program and North Fork Clearwater Program, which are included in the DPS; (2) adding the South Fork Clearwater Hatchery Program because the source for these fish is the Dworshak National Fish Hatchery Program and North Fork Clearwater Program, which are included in the DPS and, based on the best available scientific information, likely have similar life history and genetics to the local, natural population in the SF Clearwater River; and (3) removing the ODFW stock number from the name of the Little Sheep Creek/Imnaha River Hatchery Program.

Steelhead (Upper Columbia River DPS)

We propose to revise this description to read: ''Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and manmade impassable barriers from the Columbia River and its tributaries upstream of the Yakima River to the U.S.-Canada border. Also, steelhead from the following artificial propagation programs: The Wenatchee River Program; Wells Hatchery Program (in the Methow and Okanogan Rivers); Winthrop National Fish Hatchery Program; Ringold Hatchery Program; and the Okanogan River Program.'' The change proposed for this DPS is to update the name of the Omak Creek Program, which is included in the DPS, to the Okanogan River Program.

References

Copies of previous **Federal Register** notices and related reference materials are available on the Internet at *http://www.westcoast.fisheries.noaa.gov/publications/frn/federal_register_notices.html,* or upon request (see **FOR FURTHER INFORMATION CONTACT** section).

Classification

Executive Order 12866, Regulatory Flexibility Act, and Paperwork Reduction Act

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

Federalism

In accordance with Executive Order 13132, we determined that this proposed rule does not have significant Federalism effects and that a Federalism assessment is not required. In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, this proposed rule will be shared with the relevant state agencies.

National Environmental Policy Act of 1969 (NEPA)

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and the opinion in *Pacific Legal Foundation* v. *Andrus,* 657 F. 2d 829 (6th Cir. 1981), we have concluded that NEPA does not apply to ESA listing actions.

Government-to-Government Relationship With Tribes

Executive Order 13084 requires that if NMFS issues a regulation that significantly or uniquely affects the communities of Indian tribal governments and imposes substantial direct compliance costs on those communities, NMFS must consult with those governments or the Federal government must provide the funds necessary to pay the direct compliance costs incurred by the tribal governments. This proposed rule does not impose substantial direct compliance costs on Indian tribal governments or communities. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this final rule. Nonetheless, during our 5-year review of salmon and steelhead we solicited information from the tribes, met with several tribal governments and associated tribal fisheries commissions, and provided the opportunity for all interested tribes to comment on the proposed changes to the species' status and descriptions and discuss any concerns they may have. We will continue to inform potentially affected tribal governments, solicit their input, and coordinate on future management actions pertaining to the listed species addressed in this proposed rule.

List of Subjects

50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transportation.

50 CFR Part 224

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

Dated: October 17, 2016.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, we propose to amend 50 CFR parts 223 and 224 as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531–1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.;* 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 2. In § 223.102, amend the table in paragraph (e) by revising the entries for ''Salmon, Chinook (Lower Columbia River ESU);'' ''Salmon, Chinook (Puget Sound ESU);'' ''Salmon, Chinook (Snake River fall-run ESU);'' ''Salmon, Chinook (Snake River spring/summer-run ESU);'' ''Salmon, Chinook (Upper Willamette River ESU);'' ''Salmon, chum (Columbia River ESU);'' ''Salmon, chum (Hood Canal summer-run ESU);'' ''Salmon, coho (Lower Columbia River ESU);'' ''Salmon, coho (Oregon Coast ESU);'' ''Salmon, coho (Southern Oregon/Northern California Coast ESU);'' ''Salmon, sockeye (Ozette Lake ESU);'' ''Steelhead (California Central Valley DPS);'' ''Steelhead (Central California Coast DPS);'' ''Steelhead (Lower Columbia River DPS);'' ''Steelhead (Middle Columbia River DPS);'' ''Steelhead (Puget Sound DPS);'' ''Steelhead (Snake River Basin DPS);'' and ''Steelhead (Upper Columbia River DPS)'' to read as follows:

§ 223.102 Enumeration of threatened marine and anadromous species.

* * * * *

(e) * * *

Species [1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
*	*	*	*	*	*
FISHES					
*	*	*	*	*	*
Salmon, Chinook (Lower Columbia River ESU).	*Oncorhynchus tshawytscha*	Naturally spawned Chinook salmon originating from the Columbia River and its tributaries downstream of a transitional point east of the Hood and White Salmon Rivers, and any such fish originating from the Willamette River and its tributaries below Willamette Falls. Not included in this DPS are: (1) Spring-run Chinook salmon originating from the Clackamas River; (2) fall-run Chinook salmon originating from Upper Columbia River bright hatchery stocks, that spawn in the mainstem Columbia River below Bonneville Dam, and in other tributaries upstream from the Sandy River to the Hood and White Salmon Rivers; (3) spring-run Chinook salmon originating from the Round Butte Hatchery (Deschutes River, Oregon) and spawning in the Hood River; (4) spring-run Chinook salmon originating from the Carson National Fish Hatchery and spawning in the Wind River; and (5) naturally spawned Chinook salmon originating from the Rogue River Fall Chinook Program. This DPS does include Chinook salmon from the following artificial propagation programs: The Big Creek Tule Chinook Program; Astoria High School Salmon-Trout Enhancement Program (STEP) Tule Chinook Program; Warrenton High School STEP Tule Chinook Program; Cowlitz Tule Chinook Program; North Fork Toutle Tule Chinook Program; Kalama Tule Chinook Program; Washougal River Tule Chinook Program; Spring Creek National Fish Hatchery (NFH) Tule Chinook Program; Cowlitz Spring Chinook Program in the Upper Cowlitz River and the Cispus River; Friends of the Cowlitz Spring Chinook Program; Kalama River Spring Chinook Program; Lewis River Spring Chinook Program; Fish First Spring Chinook Program; Sandy River Hatchery Program; Deep River Net Pens-Washougal Program; Klaskanine Hatchery Program; Bonneville Hatchery Program; and the Cathlamet Channel Net Pens Program.	70 FR 37160, Jun 28, 2005.	226.212	223.203

Species[1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
Salmon, Chinook (Puget Sound ESU).	*Oncorhynchus tshawytscha*.	Naturally spawned Chinook salmon originating from rivers flowing into Puget Sound from the Elwha River (inclusive) eastward, including rivers in Hood Canal, South Sound, North Sound and the Strait of Georgia. Also, Chinook salmon from the following artificial propagation programs: The Kendall Creek Hatchery Program; Marblemount Hatchery Program (spring subyearlings and summer-run); Brenner Creek Hatchery Program (summer-run and fall-run); Whitehorse Springs Pond Program; Wallace River Hatchery Program (yearlings and subyearlings); Issaquah Hatchery Program; White River Hatchery Program; White Acclimation Pond Program; Voights Creek Hatchery Program; Diru Creek Program; Clear Creek Program; Kalama Creek Program; George Adams Hatchery Program; Hamma Hamma Hatchery Program; Dungeness/Hurd Creek Hatchery Program; Elwha Channel Hatchery Program; Skookum Creek Hatchery Spring-run Program; Bernie Kai-Kai Gobin (Tulalip) Hatchery-Cascade Program; North Fork Skokomish River Spring-run Program; the Soos Creek Hatchery Program (subyearlings and yearlings); the Fish Restoration Facility Program; the Bernie Kai-Kai Gobin (Tulalip) Hatchery-Skykomish Program; and the Hupp Springs Hatchery-Adult Returns to Minter Creek Program.	70 FR 37160, Jun 28, 2005.	226.212	223.203
Salmon, Chinook (Snake River fall-run ESU).	*Oncorhynchus tshawytscha*.	Naturally spawned fall-run Chinook salmon originating from the mainstem Snake River below Hells Canyon Dam and from the Tucannon River, Grande Ronde River, Imnaha River, Salmon River, and Clearwater River subbasins. Also, fall-run Chinook salmon from the following artificial propagation programs: The Lyons Ferry Hatchery Program; Fall Chinook Acclimation Ponds Program; Nez Perce Tribal Hatchery Program; and the Idaho Power Program.	70 FR 37160, Jun 28, 2005.	226.205	223.203
Salmon, Chinook (Snake River spring/summer-run ESU).	*Oncorhynchus tshawytscha*.	Naturally spawned spring/summer-run Chinook salmon originating from the mainstem Snake River and the Tucannon River, Grande Ronde River, Imnaha River, and Salmon River subbasins. Also, spring/summer-run Chinook salmon from the following artificial propagation programs: The Tucannon River Program; Lostine River Program; Catherine Creek Program; Lookingglass Hatchery Program; Upper Grande Ronde Program; Imnaha River Program; McCall Hatchery Program; Johnson Creek Artificial Propagation Enhancement Program; Pahsimeroi Hatchery Program; Sawtooth Hatchery Program; Yankee Fork Program; Dollar Creek Program; Panther Creek Program; and the Big Sheep Creek-Adult outplanting from Imnaha Program.	70 FR 37160, Jun 28, 2005.	226.205	223.203
Salmon, Chinook (Upper Willamette River ESU).	*Oncorhynchus tshawytscha*.	Naturally spawned spring-run Chinook salmon originating from the Clackamas River and from the Willamette River and its tributaries above Willamette Falls. Also, spring-run Chinook salmon from the following artificial propagation programs: The McKenzie River Hatchery Program; Willamette Hatchery Program; Clackamas Hatchery Program; North Santiam River Program; South Santiam River Program; and the Mollala River Program.	70 FR 37160, Jun 28, 2005.	226.212	223.203
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Salmon, chum (Columbia River ESU).	*Oncorhynchus keta*.	Naturally spawned chum salmon originating from the Columbia River and its tributaries in Washington and Oregon. Also, chum salmon from the following artificial propagation programs: The Grays River Program; Washougal River Hatchery/Duncan Creek Program; and the Big Creek Hatchery Program.	70 FR 37160, Jun 28, 2005.	226.212	223.203
Salmon, chum (Hood Canal summer-run ESU).	*Oncorhynchus keta*.	Naturally spawned summer-run chum salmon originating from Hood Canal and its tributaries as well as from Olympic Peninsula rivers between Hood Canal and Dungeness Bay (inclusive). Also, summer-run chum salmon from the following artificial propagation programs: the Lilliwaup Creek Fish Hatchery Program; and the Tahuya River Program.	70 FR 37160, Jun 28, 2005.	226.212	223.203

Species [1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
Salmon, coho (Lower Columbia River ESU).	*Oncorhynchus kisutch*.	Naturally spawned coho salmon originating from the Columbia River and its tributaries downstream from the Big White Salmon and Hood Rivers (inclusive) and any such fish originating from the Willamette River and its tributaries below Willamette Falls. Also, coho salmon from the following artificial propagation programs: The Grays River Program; Peterson Coho Project; Big Creek Hatchery Program; Astoria High School Salmon-Trout Enhancement Program (STEP) Coho Program; Warrenton High School STEP Coho Program; Cowlitz Type-N Coho Program in the Upper and Lower Cowlitz Rivers; Cowlitz Game and Anglers Coho Program; Friends of the Cowlitz Coho Program; North Fork Toutle River Hatchery Program; Kalama River Type-N Coho Program; Kalama River Type-S Coho Program; Lewis River Type-N Coho Program; Lewis River Type-S Coho Program; Fish First Wild Coho Program; Fish First Type-N Coho Program; Syverson Project Type-N Coho Program; Washougal River Type-N Coho Program; Eagle Creek National Fish Hatchery Program; Sandy Hatchery Program; Bonneville/Cascade/Oxbow Complex Hatchery Program; Clatsop County Fisheries Net Pen Program; and the Clatsop County Fisheries/Klaskanine Hatchery Program.	70 FR 37160, Jun 28, 2005.	226.212	223.203
Salmon, coho (Oregon Coast ESU).	*Oncorhynchus kisutch*.	Naturally spawned coho salmon originating from coastal rivers south of the Columbia River and north of Cape Blanco. Also, coho salmon from the Cow Creek Hatchery Program.	76 FR 35755, Jun 20, 2011.	226.212	223.203
Salmon, coho (Southern Oregon/Northern California Coast ESU).	*Oncorhynchus kisutch*.	Naturally spawned coho salmon originating from coastal streams and rivers between Cape Blanco, Oregon, and Punta Gorda, California. Also, coho salmon from the following artificial propagation programs: The Cole Rivers Hatchery Program; Trinity River Hatchery Program; and the Iron Gate Hatchery Program.	70 FR 37160, Jun 28, 2005.	226.210	223.203
Salmon, sockeye (Ozette Lake ESU).	*Oncorhynchus nerka*.	Naturally spawned sockeye salmon originating from the Ozette River and Ozette Lake and its tributaries. Also, sockeye salmon from the Umbrella Creek/Big River Hatchery Program.	70 FR 37160, Jun 28, 2005.	226.212	223.203
*	*	* * *	*	*	
Steelhead (California Central Valley DPS).	*Oncorhynchus mykiss*.	Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and manmade impassable barriers from the Sacramento and San Joaquin Rivers and their tributaries; excludes such fish originating from San Francisco and San Pablo Bays and their tributaries. This DPS includes steelhead from the following artificial propagation programs: The Coleman National Fish Hatchery Program; Feather River Fish Hatchery Program; and the Mokelumne River Hatchery Program.	71 FR 834, Jan 5, 2006.	226.211	223.203
Steelhead (Central California Coast DPS).	*Oncorhynchus mykiss*.	Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and manmade impassable barriers from the Russian River to and including Aptos Creek, and all drainages of San Francisco and San Pablo Bays eastward to Chipps Island at the confluence of the Sacramento and San Joaquin Rivers. Also, steelhead from the following artificial propagation programs: The Don Clausen Fish Hatchery Program and the Kingfisher Flat Hatchery Program (Monterey Bay Salmon and Trout Project).	71 FR 834, Jan 5, 2006.	226.211	223.203
Steelhead (Lower Columbia River DPS).	*Oncorhynchus mykiss*.	Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and manmade impassable barriers from rivers between the Cowlitz and Wind Rivers (inclusive) and the Willamette and Hood Rivers (inclusive); excludes such fish originating from the upper Willamette River basin above Willamette Falls. This DPS includes steelhead from the following artificial propagation programs: The Cowlitz Trout Hatchery Late Winter-run Program (Lower Cowlitz); Kalama River Wild Winter-run and Summer-run Programs; Clackamas Hatchery Late Winter-run Program; Sandy Hatchery Late Winter-run Program; Hood River Winter-run Program; Lewis River Wild Late-run Winter Steelhead Program; Upper Cowlitz Wild Program; and the Tilton River Wild Program.	71 FR 834, Jan 5, 2006.	226.212	223.203

Species [1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
Steelhead (Middle Columbia River DPS).	*Oncorhynchus mykiss*.	Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and manmade impassable barriers from the Columbia River and its tributaries upstream of the Wind and Hood Rivers (exclusive) to and including the Yakima River; excludes such fish originating from the Snake River basin. This DPS includes steelhead from the following artificial propagation programs: The Touchet River Endemic Program; Yakima River Kelt Reconditioning Program (in Satus Creek, Toppenish Creek, Naches River, and Upper Yakima River); Umatilla River Program; and the Deschutes River Program. This DPS does not include steelhead that are designated as part of an experimental population.	71 FR 834, Jan 5, 2006.	226.212	223.203
*	*	* * *	*		*
Steelhead (Puget Sound DPS).	*Oncorhynchus mykiss*.	Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and manmade impassable barriers from rivers flowing into Puget Sound from the Elwha River (inclusive) eastward, including rivers in Hood Canal, South Sound, North Sound and the Strait of Georgia. Also, steelhead from the following artificial propagation programs: The Green River Natural Program; White River Winter Steelhead Supplementation Program; Hood Canal Steelhead Supplementation Off-station Projects in the Dewatto, Skokomish, and Duckabush Rivers; Lower Elwha Fish Hatchery Wild Steelhead Recovery Program; and the Fish Restoration Facility Program.	72 FR 26722, May 11, 2007.	226.212	223.203
Steelhead (Snake River Basin DPS).	*Oncorhynchus mykiss*.	Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and manmade impassable barriers from the Snake River basin. Also, steelhead from the following artificial propagation programs: The Tucannon River Program; Dworshak National Fish Hatchery Program; Lolo Creek Program; North Fork Clearwater Program; East Fork Salmon River Natural Program; Little Sheep Creek/Imnaha River Hatchery Program; Little Salmon River (B-run) Program; Squaw Creek Program; Yankee Fork Program; Pahsimeroi River Program; and the South Fork Clearwater Hatchery Program.	71 FR 834, Jan 5, 2006.	226.212	223.203
*	*	* * *	*		*
Steelhead (Upper Columbia River DPS).	*Oncorhynchus mykiss*.	Naturally spawned anadromous *O. mykiss* (steelhead) originating below natural and manmade impassable barriers from the Columbia River and its tributaries upstream of the Yakima River to the U.S.-Canada border. Also, steelhead from the following artificial propagation programs: The Wenatchee River Program; Wells Hatchery Program (in the Methow and Okanogan Rivers); Winthrop National Fish Hatchery Program; Ringold Hatchery Program; and the Okanogan River Program.	71 FR 834, Jan 5, 2006.	226.212	223.203
*	*	* * *	*		*

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

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PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

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

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

■ 4. In § 224.101, amend the table in paragraph (h) by revising the entries for ''Salmon, Chinook (Sacramento River winter-run ESU)'' and ''Salmon, Chinook (Upper Columbia River spring-run ESU)'' to read as follows:

§ 224.101 Enumeration of endangered marine and anadromous species.

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(h) * * *

Species[1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
*	*	* * *	*		*
FISHES					
*	*	* * *	*		*
Salmon, Chinook (Sacramento River winter-run ESU).	*Oncorhynchus tshawytscha*.	Naturally spawned winter-run Chinook salmon originating from the Sacramento River and its tributaries. Also, winter-run Chinook salmon from the following artificial propagation programs: The Livingston Stone National Fish Hatchery (supplementation and captive broodstock).	70 FR 37160, June 28, 2005.	226.204	NA
Salmon, Chinook (Upper Columbia River spring-run ESU).	*Oncorhynchus tshawytscha*.	Naturally spawned spring-run Chinook salmon originating from Columbia River tributaries upstream of the Rock Island Dam and downstream of Chief Joseph Dam (excluding the Okanogan River subbasin). Also, spring-run Chinook salmon from the following artificial propagation programs: The Twisp River Program; Methow Program; Winthrop National Fish Hatchery Program; Chiwawa River Program; White River Program; and the Nason Creek Program.	70 FR 37160, June 28, 2005.	226.212	NA
Salmon, coho (Central California Coast ESU).	*Oncorhynchus kisutch*.	Naturally spawned coho salmon originating from rivers south of Punta Gorda, California to and including Aptos Creek, as well as such coho salmon originating from tributaries to San Francisco Bay. Also, coho salmon from the following artificial propagation programs: The Don Clausen Fish Hatchery Captive Broodstock Program; the Scott Creek/King Fisher Flats Conservation Program; and the Scott Creek Captive Broodstock Program.	70 FR 37160, June 28, 2005; 77 FR 19552, Apr 2, 2012.	226.210	NA
Salmon, sockeye (Snake River ESU).	*Oncorhynchus nerka*.	Naturally spawned anadromous and residual sockeye salmon originating from the Snake River basin. Also, sockeye salmon from the Redfish Lake Captive Broodstock Program.	70 FR 37160, June 28, 2005.	226.205	NA
*	*	* * *	*		*

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

* * * * *

[FR Doc. 2016–25438 Filed 10–20–16; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 81, No. 204
Friday, October 21, 2016

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[AMS–CN–16–0096]

Cotton Classification and Market News Service: Notice of Request for an Extension and Revision of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this notice announces the Agricultural Marketing Service's (AMS) intention to request approval from the Office of Management and Budget for an extension of and revision to the currently approved information collection Cotton Classification and Market News Service.

DATES: Comments received by December 20, 2016 will be considered.

ADDRESSES: Written comments may be submitted to the addresses specified below. All comments will be made available to the public. Please do not include personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publically disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines. Comments may be submitted anonymously.

Comments, identified by AMS–CN–16–0095, may be submitted electronically through the *Federal eRulemaking Portal at http://www.regulations.gov.* Please follow the instructions for submitting comments. In addition, comments may be submitted by *mail or hand delivery to* Cotton Research and Promotion, Cotton and Tobacco Program, AMS, USDA, 100 Riverside Parkway, Suite 101, Fredericksburg, Virginia 22406. Comments should be submitted in triplicate. All comments received will be made available for public inspection at Cotton and Tobacco Program, AMS, USDA, 100 Riverside Parkway, Suite 101, Fredericksburg, Virginia 22406. A copy of this document may be found at: *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Shethir M. Riva, Director, Research and Promotion, Cotton and Tobacco Program, AMS, USDA, 100 Riverside Parkway, Suite 101, Fredericksburg, Virginia 22406, telephone (540) 361–2726, facsimile (540) 361–1199, or email at *Shethir.Riva@ams.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Cotton Classification and Market News Service.

OMB Number: 0581–0009.

Expiration Date of Approval: February 28, 2017.

Type of Request: Extension and Revision of a Currently Approved Information Collection.

Abstract: The Cotton Classification and Market News Service program provides market information on cotton prices, quality, stocks, demand and supply to growers, ginners, merchandisers, textile mills and the public for their use in making sound business decisions. The Cotton Statistics and Estimates Act (7 U.S.C. 471–476), authorizes and directs the Secretary of Agriculture to: (a) Collect and publish annually, statistics or estimates concerning the grades and staple lengths of stocks of cotton, known as the carryover, on hand on the 1st of August each year in warehouses and other establishments of every character in the continental U.S., and following such publication each year, to publish at intervals, in his/her discretion, his/her estimate of the grades and staple length of cotton of the current crop (7 U.S.C. 471) and (b) Collect, authenticate, publish and distribute by radio, mail, or otherwise, timely information of the market supply, demand, location, and market prices of cotton (7 U.S.C. 473b). The Agricultural Marketing Act of 1946 (7 U.S.C. 1621–1627) authorizes and directs the Secretary of Agriculture to collect and disseminate marketing information, including adequate outlook information on a market-area basis, for the purpose of anticipating and meeting consumer requirements, aiding in the maintenance of farm income, and bringing about a balance between production and utilization of agricultural products.

The information collection requirements in this request are essential to carry out the intent of the Acts and to provide the cotton industry the type of information they need to make sound business decisions. The information collected is the minimum required. Information is requested from growers, cooperatives, merchants, manufacturers, and other government agencies. This includes information on cotton, cottonseed and cotton linters.

The information collected is used only by authorized employees of the USDA, AMS. The cotton industry is the primary user of the compiled information and AMS and other government agencies are secondary users.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.13 hours per response.

Respondents: Cotton Merchandisers, Textile Mills, Ginners.

Estimated Number of Respondents: 752.

Estimated Number of Responses per Respondent: 6.45.

Estimated Number of Responses: 4,854.

Estimated Total Annual Burden on Respondents: 617.75.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information 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) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Shethir M. Riva, Director, Research and Promotion, Cotton and Tobacco Program, AMS, USDA, 100 Riverside Parkway, Suite 101, Fredericksburg, Virginia 22406, telephone (540) 361–2726, facsimile (540) 361–1199, or email at

Shethir.Riva@ams.usda.gov. All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: October 18, 2016.

Elanor Starmer,

Administrator.

[FR Doc. 2016–25499 Filed 10–20–16; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[AMS–CN–16–0098]

Tobacco Inspection and Grading Services: Notice of Request for an Extension of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this notice announces the Agricultural Marketing Service's (AMS) intention to request approval from the Office of Management and Budget, for an extension to the currently approved information collection in support of the Fair and Equitable Tobacco Reform Act of 2004 (U.S.C. Chapter 518), the Rural Development, Food and Drug Administrative, and Related Agencies Appropriations Act for 2002 (Appropriations Act), and the Tobacco Inspection Act and Regulations Governing the Tobacco Standards.

DATES: Comments received by December 20, 2016 will be considered.

ADDRESSES: Written comments may be submitted to the addresses specified below. All comments will be made available to the public. Please do not include personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publically disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines. Comments may be submitted anonymously.

Comments, identified by AMS–CN–16–0098, may be submitted electronically through the *Federal eRulemaking Portal at http://www.regulations.gov.* Please follow the instructions for submitting comments. In addition, comments may be submitted by *mail or hand delivery to* Cotton Research and Promotion, Cotton and Tobacco Program, AMS, USDA, 100 Riverside Parkway, Suite 101, Fredericksburg, Virginia, 22406. Comments should be submitted in triplicate. All comments received will be made available for public inspection at Cotton and Tobacco Program, AMS, USDA, 100 Riverside Parkway, Suite 101, Fredericksburg, Virginia, 22406. A copy of this document may be found at: *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Shethir M. Riva, Director, Research and Promotion, Cotton and Tobacco Program, AMS, USDA, 100 Riverside Parkway, Suite 101, Fredericksburg, Virginia, 22406, telephone (540) 361–2726, facsimile (540) 361–1199, or email at *Shethir.Riva@ams.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Reporting and Recording Requirements for 7 CFR part 29.

OMB Number: 0581–0056.

Expiration Date of Approval: February 28, 2017.

Type of Request: Extension of a currently approved information collection.

Abstract: The Tobacco Inspection Act (7 U.S.C. 511–511s) requires that all tobacco sold at designated auction markets in the U.S. be inspected and graded. The Appropriations Act (7 U.S.C. 511s note) requires that all tobacco eligible for price support in the U.S. be inspected and graded. The Fair and Equitable Tobacco Reform Act of 2004 (7 U.S.C. 518–519a) eliminated price supports and marketing quotas for all tobacco beginning with the 2005 crop year. Mandatory inspection and grading of domestic and imported tobacco was eliminated as well as the mandatory pesticide testing of imported tobacco and the tobacco market news program. The Tobacco Inspection Act also provides for interested parties to request inspection, pesticide testing, and grading services on a permissive basis. The information collection requirements authorized for the programs under the Tobacco Inspection Act and the Appropriations Act include: Application for inspection of tobacco, application and other information used in the approval of new auction markets or the extension of services to designated tobacco markets, and the information required to be provided in connection with auction and nonauction sales.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1.60 hours per response.

Respondents: Primarily tobacco companies, tobacco manufacturers, import inspectors, and small businesses or organizations.

Estimated Number of Respondents: 50.

Estimated Number of Responses per Respondent: 48.

Estimated Number of Responses: 2,415.

Estimated Total Annual Burden on Respondents: 3,851.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information 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) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Shethir M. Riva, Director, Research and Promotion, Cotton and Tobacco Program, AMS, USDA, 100 Riverside Parkway, Suite 101, Fredericksburg, Virginia, 22406, telephone (540) 361–2726, facsimile (540) 361–1199, or email at *Shethir.Riva@ams.usda.gov.* All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record. All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: October 18, 2016.

Elanor Starmer,

Administrator.

[FR Doc. 2016–25502 Filed 10–20–16; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Document No. AMS–ST–16–0099]

Plant Variety Protection Board; Open Meeting

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act (FACA), the Agricultural Marketing Service (AMS) is announcing a meeting of the Plant Variety Protection Board (Board). The meeting is being held to discuss a

variety of topics including, but not limited to, work and outreach plans, subcommittee activities, and proposals for procedure changes. The meeting is open to the public. This notice sets forth the schedule and location for the meeting.

DATES: Monday, December 5, 2016, from 1:00 p.m. to 5:00 p.m. and Tuesday, December 6, 2016, from 8:00 a.m. to 3:00 p.m.

ADDRESSES: The Board meeting will be held at the Hyatt Regency Chicago Hotel at the Randolph 1A and 1B Rooms, at 151 East Wacker Drive, Chicago, IL, 60601.

FOR FURTHER INFORMATION CONTACT: Maria Pratt, Program Analyst, U.S. Department of Agriculture (USDA), AMS, Science and Technology Programs, 1400 Independence Avenue SW., Washington, DC 20250. Telephone number (202) 720–1104, fax (202) 260–8976, or Email: *maria.pratt@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the provisions of section 10(a) of the FACA (5 U.S.C., Appendix 2), this notice informs the public that the Plant Variety Protection Office (PVPO) is having a Board meeting earlier than the 15 day requirement of the FACA. The Plant Variety Protection Act (PVPA) (7 U.S.C. 2321 *et seq.*) provides legal protection in the form of intellectual property rights to developers of new varieties of plants, which are reproduced sexually by seed or are tuber-propagated. A certificate of Plant Variety Protection (PVP) is awarded to an owner of a crop variety after an examination shows that it is new, distinct from other varieties, genetically uniform and stable through successive generations. The term of protection is 20 years for most crops and 25 years for trees, shrubs, and vines. The PVPA also provides for a statutory Board (7 U.S.C. 2327). The PVPA Board is composed of 14 individuals who are experts in various areas of development and represent the private or seed industry sector, academia and government. The duties of the Board are to: (1) Advise the Secretary concerning the adoption of rules and regulations to facilitate the proper administration of the FACA; (2) provide advisory counsel to the Secretary on appeals concerning decisions on applications by the PVP Office and on requests for emergency public-interest compulsory licenses; and (3) advise the Secretary on any other matters under the Regulations and Rules of Practice and on all questions under Section 44 of the FACA, ''Public Interest in Wide Usage'' (7 U.S.C. 2404).

The purpose of the meeting will be to discuss the PVPO 2016 achievements, the electronic application system, report of the molecular techniques subcommittee, PVP cooperation with other countries, and PVP's 2017 business plan.

Agenda Items: The agenda will include, welcome and introductions, discussions on program activities that encourage the development of new plant varieties and also address appeals to the Secretary. There will be presentations on 2016 accomplishments, the electronic PVP application system, PVP outreach activities, the use of molecular markers for PVP applications, PVP cooperation with other countries, and the 2017 business plan. The meeting will be open to the public. Those wishing to participate are encouraged to pre-register by November 28, 2016 by contacting Maria Pratt, Program Analyst; Telephone: (202) 720–1104; Email: *maria.prat@ams.usda.gov.*

Meeting Accommodation: The meeting hotel is ADA compliant, and the USDA provides reasonable accommodations to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in this public meeting, please notify Maria Pratt at: Email: *maria.pratt@ams.usda.gov* or (202) 720–1104. Determinations for reasonable accommodation will be made on a case-by-case basis. Minutes of the meeting will be available for public review 30 days following the meeting at the internet Web site *http://www.ams.usda.gov/PVPO.*

Dated: October 18, 2016.

Elanor Starmer,

Administrator, Agricultural Marketing Service.

[FR Doc. 2016–25501 Filed 10–20–16; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[AMS–CN–16–0095]

Cotton Classing, Testing and Standards: Notice of Request for an Extension and Revision to a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this notice announces the Agricultural Marketing Service's (AMS) intention to request approval from the Office of Management and Budget, for an extension and revision to the currently approved information collection entitled Cotton Classing, Testing, and Standards.

DATES: Comments received by December 20, 2016 will be considered.

ADDRESSES: Written comments may be submitted to the addresses specified below. All comments will be made available to the public. Please do not include personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publically disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines. Comments may be submitted anonymously.

Comments, identified by AMS–CN–16–0095, may be submitted electronically through the *Federal eRulemaking Portal at http://www.regulations.gov.* Please follow the instructions for submitting comments. In addition, comments may be submitted by *mail or hand delivery to* Cotton Research and Promotion, Cotton and Tobacco Program, AMS, USDA, 100 Riverside Parkway, Suite 101, Fredericksburg, Virginia, 22406. Comments should be submitted in triplicate. All comments received will be made available for public inspection at Cotton and Tobacco Program, AMS, USDA, 100 Riverside Parkway, Suite 101, Fredericksburg, Virginia, 22406. A copy of this document may be found at: *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Shethir M. Riva, Director, Research and Promotion, Cotton and Tobacco Program, AMS, USDA, 100 Riverside Parkway, Suite 101, Fredericksburg, Virginia, 22406, telephone (540) 361–2726, facsimile (540) 361–1199, or email at *Shethir.Riva@ams.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Cotton Classing, Testing, and Standards.

OMB Number: 0581–0008.

Expiration Date of Approval: February 28, 2017.

Type of Request: Extension and Revision of a Currently Approved Information Collection.

Abstract: Information solicited is used by the USDA to administer and supervise activities associated with the classification or grading of cotton, cotton linters, and cottonseed based on official USDA Standards. The information requires personal data, such as name, type of business, address, and description of classification services requested. These programs are

conducted under the United States Cotton Standards Act (7 U.S.C. 51b), the Cotton Statistics and Estimates Act of 1927 (7 U.S.C. 473c), and the Agricultural Marketing Act of 1946 (7 U.S.C. 1622h) and regulations appear at 7 CFR part 28.

The information collection requirements in this request are essential to carry out the intent of the Acts and to provide the cotton industry the type of information they need to make sound business decisions. The information collected is the minimum required. Information is requested from growers, cooperatives, merchants, manufacturers, and other government agencies.

The information collected is used only by authorized employees of the USDA, AMS. The cotton industry is the primary user of the compiled information and AMS and other government agencies are secondary users.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.07 hours per response.

Respondents: Cotton merchants, warehouses, and gins.

Estimated Number of Respondents: 993.

Estimated Number of Responses per Respondent: 1.91.

Estimated Number of Responses: 1,893.

Estimated Total Annual Burden on Respondents: 141.30.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information 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) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Shethir M. Riva, Director, Research and Promotion, Cotton and Tobacco Program, AMS, USDA, 100 Riverside Parkway, Suite 101, Fredericksburg, Virginia, 22406, telephone (540) 361–2726, facsimile (540) 361–1199, or email at *Shethir.Riva@ams.usda.gov.* All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: October 18, 2016.

Elanor Starmer,

Administrator.

[FR Doc. 2016–25500 Filed 10–20–16; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of the Advisory Committee on Agriculture Statistics Meeting

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the National Agricultural Statistics Service (NASS) announces a meeting of the Advisory Committee on Agriculture Statistics.

DATES: The Committee meeting will be held from 8 a.m. to 4:30 p.m. on Tuesday, November 8, 2016, and from 8 a.m. to 12:30 p.m. on Wednesday, November 9, 2016. There will be an opportunity for public questions and comments at 3:45 p.m. on Tuesday, November 8, 2016. All times mentioned herein refer to Eastern Standard Time.

ADDRESSES: The Committee meeting will take place at the United States Department of Agriculture, 1400 Independence Ave. SW., Washington, DC 20250. On Tuesday November 8, 2016 the meeting will be held in the Jamie L. Whitten Federal Building, Room 107A. On Wednesday, November 9, 2016 the meeting will be held in the South Building, Room 3109. Written comments may be filed before or up to two weeks after the meeting with the contact person identified herein at: U.S. Department of Agriculture, National Agricultural Statistics Service, 1400 Independence Avenue SW., Room 5029, South Building, Washington, DC 20250–2000.

FOR FURTHER INFORMATION CONTACT: Hubert Hamer, Administrator, National Agricultural Statistics Service, telephone: 202–720–2707, eFax: 855–493–0445, or email: *HQOA@nass.usda.gov.* General information about the committee can also be found at *www.nass.usda.gov/about_nass.*

SUPPLEMENTARY INFORMATION: The Advisory Committee on Agriculture Statistics, which consists of 20 members appointed from 7 categories covering a broad range of agricultural disciplines and interests, has scheduled a meeting on November 8 and 9, 2016. During this time the Advisory Committee will discuss topics including the status of NASS programs, Census of Agriculture Updates, Census of Agriculture Program Plans, Country Estimates and Farm Structure panels, and Respondent Relation Issues.

The Committee meeting is open to the public. The public is asked to pre-register for the meeting at least 10 business days prior to the meeting. Your pre-registration must state the names of each person in your group, organization, or interest represented; the number of people planning to give oral comments, if any; and whether anyone in your group requires special accommodations. Submit registrations to Executive Secretary, Advisory Committee on Agriculture Statistics, via eFax: 855–493–0445, or email: *HQOA@nass.usda.gov.* Members of the public who request to give oral comments to the Committee must arrive at the meeting site by 2:45 p.m. on Tuesday, November 8, 2016. Written comments by attendees or other interested stakeholders will be welcomed for the public record before and up to two weeks following the meeting. The public may file written comments by mail to the Executive Director, Advisory Committee on Agriculture Statistics, U.S. Department of Agriculture, National Agricultural Statistics Service, 1400 Independence Avenue SW., Room 5029 South Building, Washington, DC, 20250–2000. Written comments can also be sent via eFax: 855–493–0445, or email: *HQOA@nass.usda.gov.* All statements will become a part of the official records of the USDA Advisory Committee on Agriculture Statistics and will be kept on file for public review in the office of the Executive Director, Advisory Committee on Agriculture Statistics, U.S. Department of Agriculture, Washington, DC 20250.

Signed at Washington, DC, October 5, 2016.

R. Renee Picanso,

Associate Administrator, National Agricultural Statistics Service.

[FR Doc. 2016–25447 Filed 10–20–16; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

National Institute of Food and Agriculture

Notice of Intent To Revise a Currently Approved Information Collection

AGENCY: National Institute of Food and Agriculture, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and Office of Management and Budget (OMB) regulations, this notice announces the National Institute of Food and Agriculture (NIFA) intention to renew a currently approved information collection entitled, ''4–H Youth Enrollment Report''.

DATES: Written comments on this notice must be received by December 20, 2016, to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Written comments concerning this notice and requests for copies of the information collection may be submitted by any of the following methods: Email: *rmartin@nifa.usda.gov;* Fax: 202–720–0857; Mail: Office of Information Technology (OIT), NIFA, USDA, STOP 2216, 1400 Independence Avenue SW., Washington, DC 20250–2216

FOR FURTHER INFORMATION CONTACT: Robert Martin, eGovernment Program Leader; Email: *rmartin@nifa.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: 4–H Youth Enrollment.

OMB Number: 0524–0045.

Expiration Date of Current Approval: December 31, 2016.

Type of Request: Intent to seek approval for the extension of a currently approved information collection for three years.

Abstract: The mission of 4–H National Headquarters; National Institute of Food and Agriculture; United States Department of Agriculture (USDA); is to advance knowledge for agriculture, the environment, human health and well-being, and communities by creating opportunities for youth. 4–H is a complex national organization, led by 4–H National Headquarters, NIFA, USDA, with hundreds of educational curricula, activities, and events for youth ages 5 to 18. Programs originate at 106 land-grant universities (LGUs), and local programs are conducted and managed by some 3,000 professional Extension staff in 3,150 counties, with nearly 6 million youth enrolled each year. Over 500,000 volunteer leaders work directly with the 4–H youth.

The 1914 Smith-Lever Act created the Cooperative Extension System (CES) of the LGUs and their Federal partner, the Extension Service, now the National Institute of Food and Agriculture (NIFA), USDA. 4–H was already well-established and became the first operating part of the new extension work. The Smith-Lever Act stipulated that ''It shall be the duty of said colleges, annually, on or about the first day of January, to make to the Governor of the State in which it is located a full and detailed report of its operations in extension work as defined in this Act . . . a copy of which report shall be sent to the Secretary of Agriculture.'' As a result of this requirement, annually each county sends their state 4–H office an electronic aggregated summary of their 4–H enrollment.

Information collected in the 4–H Youth Enrollment Report includes youth enrollment totals by delivery mode, youth enrollment totals by type of 4–H activity, youth enrollment totals by school grade, youth enrollment totals by gender, youth enrollment totals by place of residence, adult volunteer totals, youth volunteer totals, and youth enrollment totals by race and ethnicity.

Need and Use of the Information: The Annual 4–H Enrollment Report is the principal means by which the 4–H movement can keep track of its progress, as well as emerging needs, potential problems, and opportunities.

The information from this collection is used to report, as requested by the Congress or the Administration, on rural versus urban outreach, enrollment by race, youth participation in leadership, community service, etc. It also is used to determine market share or percentage of the youth of each state by age and place of residence who are enrolled in the 4–H youth development program. The annual 4–H Youth Enrollment Report also allows oversight of all reasonable efforts by staff and volunteers to reach underserved and minority groups.

Information also is available at *http://frwebgate.access.gpo.gov/cgi-bin/leaving.cgi?from=leavingFR.html&log=linklog&to=http://www.national4-hheadquarters.gov/library/4h_stats.htm.*

Estimate of Burden: The hour burden estimates have not been modified from the previous approval because there have been no significant changes to the collection.

Estimated Number of Respondents: 75.

Estimated Number of Responses per Respondent: 1.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden on Respondents: 75 hours.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on 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.

All responses to this notice will be summarized and included in the request to OMB for approval. All comments will become a matter of public record.

Done at Washington, DC, this day of October 12, 2016.

Jake Caldwell,

Chief of Staff, Research, Education, and Economics.

[FR Doc. 2016–25498 Filed 10–20–16; 8:45 am]

BILLING CODE 3410–22–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration, Commerce.

ACTION: Notice and opportunity for public comment.

Pursuant to Section 251 of the Trade Act 1974, as amended (19 U.S.C. 2341 *et seq.*), the Economic Development Administration (EDA) has received petitions for certification of eligibility to apply for Trade Adjustment Assistance from the firms listed below. Accordingly, EDA has initiated investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each of these firms contributed importantly to the total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

LIST OF PETITIONS RECEIVED BY EDA FOR CERTIFICATION ELIGIBILITY TO APPLY FOR TRADE ADJUSTMENT ASSISTANCE
[10/1/2016 through 10/14/2016]

Firm name	Firm address	Date accepted for investigation	Product(s)
Circle Systems, Inc	479 West Lincoln Avenue, Hinckley, IL 60520	10/3/2016	The firm manufactures magnetic particles utilized in non-destructive product testing.
Micron Optics, Inc	1852 Century Place Northeast, Atlanta, GA 30345.	10/6/2016	The firm designs and manufactures optical instruments and laser-based equipment.
APDC, LLC	100 American Way, Cuba, MO 65453	10/12/2016	The firm manufactures aluminum die castings and parts.

Any party having a substantial interest in these proceedings may request a public hearing on the matter. A written request for a hearing must be submitted to the Trade Adjustment Assistance for Firms Division, Room 71030, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than ten (10) calendar days following publication of this notice.

Please follow the requirements set forth in EDA's regulations at 13 CFR 315.9 for procedures to request a public hearing. The Catalog of Federal Domestic Assistance official number and title for the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance for Firms.

Miriam Kearse,

Lead Program Analyst.

[FR Doc. 2016–25486 Filed 10–20–16; 8:45 am]

BILLING CODE 3510–WH–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–981]

Utility Scale Wind Towers From the People's Republic of China: Notice of Rescission of Antidumping Duty Administrative Review; 2015–2016

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''the Department'') is rescinding its administrative review of utility scale wind towers (''wind towers'') from the People's Republic of China (''PRC'') for the period or review (''POR'') February 1, 2015 through January 31, 2016, based on the withdrawal of request for review.

DATES: Effective October 21, 2016.

FOR FURTHER INFORMATION CONTACT: Trisha Tran, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4852.

SUPPLEMENTARY INFORMATION:

Background

On February 3, 2016, the Department published the notice of opportunity to request an administrative review of the antidumping duty order on wind towers from the PRC for the above POR.[1] On February 23, 2016, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the ''Act''), and 19 CFR 351.213(b), the Department received a timely request from the Wind Tower Trade Coalition (''Petitioner'') to conduct an administrative review.[2]

Pursuant to this request and in accordance with 19 CFR 351.221(c)(1)(i), on April 7, 2016, the Department published a notice of initiation of an administrative review of the antidumping duty order on wind towers from the PRC.[3] On July 6, 2016, Petitioner withdrew its request for an administrative review.[4]

Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), the Department will rescind an administrative review, in whole or in part, if the party that requested a review withdraws the request within 90 days of the publication date of the notice of initiation of the requested review. As noted above, Petitioner withdrew its request for review within 90 days of the publication date of the *Initiation Notice*. No other parties requested an administrative review of the order. Therefore, in accordance with 19 CFR 351.213(d)(1), we are rescinding this review in its entirety.

Assessment

The Department will instruct U.S. Customs and Border Protection (''CBP'') to assess antidumping duties on all appropriate entries of wind towers from the PRC. Antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions to CBP 15 days after the date of publication of this notice of rescission of administrative review.

Notifications

This notice also serves as a final reminder to importers for whom this review is being rescinded 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 the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This notice is published in accordance with section 751(a)(1) and

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[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 81 FR 5712 (February 3, 2016).

[2] *See* Letter from Petitioner, ''Utility Scale Wind Towers from the People's Republic of China: Request for Administrative Review,'' dated February 23, 2016.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 81 FR 20324 (April 7, 2016) (''*Initiation Notice*'').

[4] *See* Letter from Petitioner, ''Utility Scale Wind Towers from the People's Republic of China: Withdrawal of Request for Administrative Review,'' dated July 6, 2016.

777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: October 17, 2016.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2016–25550 Filed 10–20–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–042]

Stainless Steel Sheet and Strip From the People's Republic of China: Postponement of Final Determination of Sales at Less Than Fair Value Investigation

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Department) is postponing the deadline for issuing final determination in the less than fair value (LTFV) investigation of stainless steel sheet and strip from the People's Republic of China (PRC) and is extending the provisional measures from a four-month period to a period not more than six months.

DATES: Effective October 21, 2016.

FOR FURTHER INFORMATION CONTACT: Toni Page at (202) 482–1398 or Lingjun Wang at (202) 482–2316, Antidumping and Countervailing Duty Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On March 10, 2016, the Department published a notice of initiation of the LTFV investigation of the stainless steel sheet and strip from the PRC.[1] The period of investigation is July 1, 2015, through December 31, 2015. On September 9, 2016, the Department issued its affirmative *Preliminary Determination*.[2] On September 14, 2016, Shanxi Taigang Stainless Steel Co., Ltd. (Taigang), a mandatory respondent in this investigation, requested that the Department fully extend the deadline for the final determination, and extend the application of the provisional measures from a four-month period to a period not more than six months.[3] On September 19, 2016, the Department published the *Preliminary Determination*.[4]

Postponement of Final Determination

Section 735(a)(2)(A) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.210(b)(2)(ii), provide that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise. Further, 19 CFR 351.210(e)(2) requires that such postponement requests by exporters be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months, in accordance with section 733(d) of the Act.

In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because (1) our preliminary determination was affirmative; (2) the requesting producer/exporter, Taigang, accounts for a significant proportion of exports of the subject merchandise from the PRC; and (3) no compelling reasons for denial exist, we are postponing the final determination until no later than 135 days after the date of the publication of the *Preliminary Determination* and extending the provisional measures from a four-month period to a period not more than six months. Accordingly, we will issue our final determination no later than February 1, 2017.

This determination is issued and published pursuant to section 735(a)(2)(A) of the Act and 19 CFR 351.210(g).

Dated: October 14, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2016–25552 Filed 10–20–16; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Stainless Steel Sheet and Strip From the People's Republic of China: Initiation of Less Than Fair Value Investigation,* 81 FR 12711 (March 10, 2016).

[2] *See Stainless Steel Sheet and Strip from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value and Preliminary Affirmative Determination of Critical Circumstances,* 81 FR 64135 (September 19, 2016) (*Preliminary Determination*).

[3] *See* Taigang's September 14, 2016 letter.

[4] *See Preliminary Determination.*

DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–814]

Utility Scale Wind Towers From the Socialist Republic of Vietnam: Notice of Rescission of Antidumping Duty Administrative Review; 2015–2016

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''the Department'') is rescinding its administrative review of utility scale wind towers (''wind towers'') from the Socialist Republic of Vietnam (''Vietnam'') for the period or review (''POR'') February 1, 2015 through January 31, 2016, based on the withdrawal of request for review.

DATES: Effective October 21, 2016.

FOR FURTHER INFORMATION CONTACT: Trisha Tran, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4852.

SUPPLEMENTARY INFORMATION:

Background

On February 3, 2016, the Department published the notice of opportunity to request an administrative review of the antidumping duty order on wind towers from Vietnam for the above POR.[1] On February 23, 2016 and February 29, 2016, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the ''Act''), and 19 CFR 351.213(b), the Department received a timely request from the Wind Tower Trade Coalition (''Petitioner'') and CS Wind Vietnam Co., Ltd. (''CS Wind''), respectively, to conduct an administrative review.[2]

Pursuant to these requests and in accordance with 19 CFR 351.221(c)(1)(i), on April 7, 2016, the Department published a notice of initiation of an administrative review of the antidumping duty order on wind towers from Vietnam.[3] On July 6, 2016,

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 81 FR 5712 (February 3, 2016).

[2] *See* Letter from Petitioner, ''Utility Scale Wind Towers from the Socialist Republic of Vietnam: Request for Administrative Review,'' dated February 23, 2016; *see also* Letter from CS Wind, ''Request for Administrative Review of the Antidumping Duty Order on Utility Wind Towers from the Socialist Republic of Vietnam,'' dated February 29, 2016.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 81 FR 20324 (April 7, 2016) (''*Initiation Notice*'').

Petitioner and CS Wind withdrew their requests for an administrative review.[4]

Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), the Department will rescind an administrative review, in whole or in part, if the party that requested the review withdraws the request within 90 days of the publication date of the notice of initiation of review. As noted above, all parties withdrew their requests for review within 90 days of the publication date of the *Initiation Notice.* No other parties requested an administrative review of the order. Therefore, in accordance with 19 CFR 351.213(d)(1), we are rescinding this review in its entirety.

Assessment

The Department will instruct U.S. Customs and Border Protection (''CBP'') to assess antidumping duties on all appropriate entries of wind towers from Vietnam. Antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions to CBP 15 days after the date of publication of this notice of rescission of administrative review.

Notifications

This notice also serves as a final reminder to importers for whom this review is being rescinded 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 the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This notice is published in accordance with section 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: October 17, 2016.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2016–25526 Filed 10–20–16; 8:45 am]

BILLING CODE 3510–DS–P

[4] *See* Letter from Petitioner, ''Utility Scale Wind Towers from the Socialist Republic of Vietnam: Withdrawal of Request for Administrative Review,'' dated July 6, 2016; *see also* Letter from CS Wind, ''Withdrawal of Review Request: Administrative Review of the Antidumping Duty Order on Utility Scale Wind Towers from the Socialist Republic of Vietnam,'' dated July 6, 2016.

DEPARTMENT OF COMMERCE

International Trade Administration

Environmental Technologies Trade Advisory Committee, Notice of Reestablishment

AGENCY: International Trade Administration, Commerce.

ACTION: Notice of reestablishment of the Environmental Technologies Trade Advisory Committee (ETTAC).

SUMMARY: Pursuant to provisions under Title IV of the Jobs Through Trade Expansion Act, 22. U.S.C. 2151, and under the Federal Advisory Committee Act, 5 U.S.C. App. 2, the Department of Commerce announces the reestablishment of the Environmental Technologies Trade Advisory Committee (the Committee). ETTAC was first chartered on May 31, 1994. ETTAC serves as an advisory body to the Environmental Trade Working Group of the Trade Promotion Coordinating Committee (TPCC), reporting directly to the Secretary of Commerce in his/her capacity as Chairman of the TPCC. ETTAC advises on the development and administration of policies and programs to expand U.S. exports of environmental technologies, goods, and services.

FOR FURTHER INFORMATION CONTACT: Ms. Maureen Hinman, Office of Energy & Environmental Industries (OEEI), International Trade Administration, Room 4053, 1401 Constitution Avenue NW., Washington, DC 20230. (Phone: 202–482–0627; Fax: 202–482–5665; email: *maureen.hinman@trade.gov*).

Dated: October 17, 2016.

Edward A. O'Malley,

Director, Office of Energy and Environmental Industries.

[FR Doc. 2016–25524 Filed 10–20–16; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–929]

Small Diameter Graphite Electrodes From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2015–2016

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on small diameter graphite electrodes (graphite electrodes) from the People's Republic of China (PRC), covering the period February 1, 2015, through January 31, 2016. The Department has preliminarily determined that three companies, the Fangda Group, Fushun Jinly Petrochemical Co., Ltd. (Fushun Jinly), and Jilin Carbon Import and Export Company (Jilin Carbon), had no shipments of subject merchandise during the period of review (POR).

DATES: Effective October 21, 2016.

FOR FURTHER INFORMATION CONTACT: Dmitry Vladimirov, AD/CVD Operations Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–0665.

SUPPLEMENTARY INFORMATION:

Background

On February 3, 2016, we published a notice of opportunity to request an administrative review of the antidumping duty order on graphite electrodes from the PRC for the POR February 1, 2015, through January 31, 2016.[1] On April 7, 2016, in response to a timely request from the petitioners,[2] and in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.221(c)(1)(i), we initiated an administrative review of the antidumping duty order on graphite electrodes from the PRC with respect to 196 companies.[3] On August 19, 2016, in response to a timely withdrawal request from the petitioners, we rescinded the

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 81 FR 5712 (February 3, 2016).

[2] SGL Carbon LLC and Superior Graphite Co (collectively, the petitioners).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 81 FR 20324 (April 7, 2016).

administrative review for 193 companies.[4]

Scope of the Order

The merchandise covered by the order includes all small diameter graphite electrodes of any length, whether or not finished, of a kind used in furnaces, with a nominal or actual diameter of 400 millimeters (16 inches) or less, and whether or not attached to a graphite pin joining system or any other type of joining system or hardware. The merchandise covered by the order also includes graphite pin joining systems for small diameter graphite electrodes, of any length, whether or not finished, of a kind used in furnaces, and whether or not the graphite pin joining system is attached to, sold with, or sold separately from, the small diameter graphite electrode. Small diameter graphite electrodes and graphite pin joining systems for small diameter graphite electrodes are most commonly used in primary melting, ladle metallurgy, and specialty furnace applications in industries including foundries, smelters, and steel refining operations. Small diameter graphite electrodes and graphite pin joining systems for small diameter graphite electrodes that are subject to the order are currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 8545.11.0010,[5] 3801.10,[6] and 8545.11.0020.[7] The HTSUS numbers are provided for convenience and customs purposes, but the written description of the scope is dispositive.

Preliminary Determination of No Shipments

On April 11, 2016, we requested the U.S. Customs and Border Protection (CBP) data during the POR for all entries of graphite electrodes produced or exported by the companies for which we initiated the administrative review and released that information to the parties. We received timely submissions from the Fangda Group,[8] Fushun Jinly, and Jilin Carbon reporting that they did not have sales, shipments, or exports of the subject merchandise during the POR.[9] For each of these companies, we transmitted a ''No Shipments Inquiry'' to CBP.[10] Pursuant to these inquiries, we received no notification from CBP of any entries of subject merchandise concerning these companies. Accordingly, based on record evidence, we preliminarily determine that the Fangda Group, Fushun Jinly, and Jilin Carbon had no shipments and, therefore, no reviewable transactions during the POR. Further, consistent with our practice, we find that it is not appropriate to rescind the review with respect to these companies but, rather, to complete the review and issue appropriate instructions to CBP based on the final results of review.[11]

Public Comment

Interested parties may submit case briefs no later than 30 days after the date of publication of this notice.[12] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[13] Parties who submit case 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.[14]

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. All documents must be filed electronically using Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov,* and to all parties in the Central Records Unit, Room B8024 of the main Department of Commerce building. An electronically-filed request must be received successfully in its entirety by ACCESS by 5:00 p.m. Eastern Time, within 30 days after the date of publication of this notice.[15] 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 those issues raised in the respective case briefs. If a request for a hearing is made, parties will be notified of the time and date of the hearing which will be held at the U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington DC 20230.

Unless extended, we intend to issue the final results in this administrative review, including the results of our analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[16] We intend to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. Pursuant to the Department's practice in non-market economy cases, if we continue to determine in the final results that the Fangda Group, Fushun Jinly, and Jilin Carbon had no shipments of subject

[4] *See Small Diameter Graphite Electrodes from the People's Republic of China: Rescission of Antidumping Duty Administrative Review in Part; 2015–2016,* 81 FR 55434 (August 19, 2016).

[5] The scope described in the order refers to the HTSUS subheading 8545.11.0000. We note that, starting in 2010, imports of small diameter graphite electrodes are classified in the HTSUS under subheading 8545.11.0010 and imports of large diameter graphite electrodes are classified under subheading 8545.11.0020.

[6] HTSUS subheading 3801.10 was added to the scope of the graphite electrodes order based on a determination in *Small Diameter Graphite Electrodes From the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order,* 77 FR 47596 (August 9, 2012) (first circumvention determination). The products covered by the first circumvention determination are graphite electrodes (or graphite pin joining system) that were (1) produced by UK Carbon and Graphite Co., Ltd. (UKCG) from PRC-manufactured artificial/synthetic graphite forms, of a size and shape (*e.g.,* blanks, rods, cylinders, billets, blocks, *etc.*), (2) which required additional machining processes (*i.e.,* tooling and shaping) that UKCG performed in the United Kingdom (UK), and (3) were re-exported to the United States as UK-origin merchandise.

[7] HTSUS subheading 8545.11.0020 was added to the scope of the graphite electrodes order based on a determination in *Small Diameter Graphite Electrodes from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order and Rescission of Later-Developed Merchandise Anticircumvention Inquiry,* 78 FR 56864 (September 16, 2013) (second circumvention determination). The products covered by the second circumvention determination are graphite electrodes produced and/or exported by Jilin Carbon Import and Export Company with an actual or nominal diameter of 17 inches.

[8] We refer to the Fangda Group as a single entity pursuant to 19 CFR 351.401(f)(1). *See Small Diameter Graphite Electrodes From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances, in Part,* 73 FR 49408, 49411–12 (August 21, 2008) (where we collapsed the individual members of the Fangda Group: Beijing Fangda Carbon Tech Co., Ltd., Chengdu Rongguang Carbon Co., Ltd., Fangda Carbon New Material Co., Ltd., Fushun Carbon Co., Ltd., and Hefei Carbon Co., Ltd.), unchanged in *Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances: Small Diameter Graphite Electrodes from the People's Republic of China,* 74 FR 2049 (January 14, 2009).

[9] *See* the Fangda Group's Letter dated May 6, 2016, Fushun Jinly's Letter dated May 5, 2016, and Jilin Carbon's Letter dated May 9, 2016.

[10] *See* CBP messages 6197311, 6197312, and 6197313, all dated July 15, 2016.

[11] *See, e.g., Wooden Bedroom Furniture from the People's Republic of China: Final Results and Final Rescission, In Part, of Administrative Review and Final Results of New Shipper Review; 2013,* 80 FR 34619 (June 17, 2015).

[12] *See* 19 CFR 351.309(c)(1)(ii).

[13] *See* 19 CFR 351.309(d).

[14] *See* 19 CFR 351.309(c)(2) and (d)(2).

[15] *See* 19 CFR 351.310(c).

[16] *See* 19 CFR 351.212(b)(1).

merchandise, any suspended entries of subject merchandise during the POR from these companies will be liquidated at the PRC-wide rate.[17]

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of review, as provided by section 751(a)(2)(C) of the Act: (1) For previously investigated or reviewed PRC and non-PRC exporters 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; (2) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of 159.64 percent; and (3) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notifications 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 may result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(4).

Dated: October 14, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2016–25553 Filed 10–20–16; 8:45 am]

BILLING CODE 3510–DS–P

[17] For a full discussion of this practice, *see Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Marine Recreational Fishing Expenditure Survey

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

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

DATES: Written comments must be submitted on or before December 20, 2016.

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

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Sabrina Lovell, (301) 427–8153 or *sabrina.lovell@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for revision and extension of an existing data collection.

The objective of the survey is to collect information on both trip expenditures and annual durable good expenditures made by marine recreational anglers. The survey will be conducted in two parts. One part will ask anglers about the expenses incurred on their most recent marine recreational fishing trip. The other part of the survey will ask anglers about their purchases of durable goods such as fishing gear, boats, vehicles, and second homes. As specified in the Magnuson-Stevenson Fishery Conservation and Management Act of 1996 (and reauthorized in 2007), NMFS is required to enumerate the economic impacts of the policies it implements on fishing participants and coastal communities. The expenditure data collected in this survey will be used to estimate the economic contributions and impacts of marine recreational fishing to each coastal state and nationwide. Slight revisions will be made to the existing trip expenditure questions to clarify certain types of expenditures, and two questions on the trip expenditure instrument will be dropped.

II. Method of Collection

The survey will be conducted using a combination of four modes: Phone, in-person interviews, mail, and electronic (Internet and/or mobile app).

III. Data

OMB Control Number: 0648–0693.

Form Number(s): None.

Type of Review: Regular submission (revision and extension of a currently approved information collection).

Affected Public: Individual anglers or households.

Estimated Number of Respondents: 100,200: 14,200 for durable goods and 86,000 for trip expenditure surveys.

Estimated Time per Response: Durable goods survey, 15 minutes; trip expenditures survey, 5–8 minutes.

Estimated Total Annual Burden Hours: 3,816.

Estimated Total Annual Cost to Public: $0 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: October 17, 2016.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2016–25454 Filed 10–20–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE975

South Atlantic Fishery Management Council—Public Meetings

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

ACTION: Notice of informational Webinars.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold two informational Webinars pertaining to the Council's 2016–2020 Vision Blueprint for the *Snapper Grouper* Fishery.

DATES: The Webinars will be held on November 21, 2016, to view the agenda see **SUPPLEMENTARY INFORMATION.**

ADDRESSES: *Council address:* South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, SAFMC; phone 843/571–4366 or toll free 866/SAFMC–10; FAX 843/769–4520; email: *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION:

Agenda

The Council will hold two Webinars to inform the public on progress to date on implementation of priority items in the 2016–2020 Vision Blueprint for the *Snapper Grouper* Fishery. The Vision Blueprint is a long-term strategic plan for managing the *snapper grouper* fishery, and has been developed with stakeholder input. The Vision Blueprint identifies the goals, objectives, strategies, and actions that support the Vision for the *snapper grouper* fishery and centers around four goal areas: (1) Science; (2) Management; (3) Communication; and (4) Governance. The informal Webinars are being held as part of an annual evaluation of the Vision Blueprint and are designed to let the public know what the Council accomplished during the year in terms of addressing priority items within the Blueprint.

The Webinars will be conducted at 10 a.m. and at 6 p.m. The Webinars will be accessible via the Internet from the ''Other Meetings'' page of Council's Web site, at *www.safmc.ne*t. Registration for the Webinars is required. Register for the 10 a.m. Webinar, at *https://attendee.gotowebinar.com/register/6323613905978491652.* Register for the 6 p.m. Webinar, at *https://attendee.gotowebinar.com/register/5214638781622248964.* Additional information about the Council's Vision Blueprint is available from the ''Vision Project'' page of the Council's Web site, at *www.safmc.net.*

Special Accommodations

These Webinars are physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the SAFMC office (see **ADDRESSES**) at least 5 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: October 18, 2016.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–25488 Filed 10–20–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE841

Notice of Availability of a Final Environmental Impact Statement for Effects of Oil and Gas Activities in the Arctic Ocean

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

ACTION: Notice of availability of a Final Environmental Impact Statement; request for comments.

SUMMARY: NMFS announces the availability of the ''Final Environmental Impact Statement (FEIS) for the Effects of Oil and Gas Activities in the Arctic Ocean.'' The purpose of the FEIS is to evaluate, in compliance with the National Environmental Policy Act (NEPA), the potential direct, indirect, and cumulative impacts of implementing the alternative approaches for authorizing take of marine mammals incidental to oil and gas activities in the Arctic Ocean pursuant to the Marine Mammal Protection Act (MMPA). The U.S. Department of the Interior's Bureau of Ocean Energy Management (BOEM) was a cooperating agency on this FEIS, and as such, this FEIS also evaluates the potential direct, indirect, and cumulative impacts of implementing the alternative approaches for authorizing geological and geophysical (G&G) surveys and concurring on ancillary activities under the Outer Continental Shelf Lands Act (OCSLA) in the Arctic Ocean. The North Slope Borough (NSB) was also a cooperating agency on this FEIS. The Environmental Protection Agency and the U.S. Fish & Wildlife Service were consulting agencies, and NMFS coordinated with the Alaska Eskimo Whaling Commission pursuant to our co-management agreement under the MMPA.

DATES: Federal, State, and local agencies, as well as other interested parties, are invited to review this FEIS. Comments must be received on or before November 21, 2016, to be considered for our Record of Decision. The Record of Decision will include information on the alternatives considered, the preferred alternative and why we chose it, and required mitigation and monitoring.

ADDRESSES: The FEIS is available for review online at: *http://www.nmfs.noaa.gov/pr/permits/eis/arctic.htm.* You may submit comments on this document by:

- *Email: Candace.Nachman@noaa.gov.*
- *Fax:* (301) 713–0376, Attn: Jolie Harrison.
- *Mail:* NOAA, NMFS, Office of Protected Resources, 1315 East-West Highway, Room 13805, Silver Spring, MD 20910, Attn: Jolie Harrison.

FOR FURTHER INFORMATION CONTACT: Candace Nachman, Office of Policy, NMFS at (301) 427–8031, or Jolie Harrison, Office of Protected Resources, NMFS at (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101 (a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of proposed authorization is provided to the public for review. The term ''take'' under the MMPA means ''to harass, hunt, capture or kill, or attempt to harass, hunt, capture, or kill.'' Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a

marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).''

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''. . . an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

NMFS, as the lead federal agency, prepared this FEIS to evaluate a broad range of reasonably foreseeable levels of exploration activities and associated mitigation measures that may occur in the U.S. Beaufort and Chukchi Seas. The FEIS presents the potential impacts associated with the issuance of incidental take authorizations (ITAs) under section 101(a)(5) of the MMPA for seismic surveys, ancillary activities, and exploratory drilling. NMFS recognizes that the current level of oil and gas exploration activities is lower than what previously occurred and what was projected when the scoping process for this EIS began in February 2010. However, NMFS still receives requests for MMPA ITAs in the U.S. Beaufort and Chukchi Seas, and this FEIS provides decision-makers and the public with an evaluation of the environmental, social, and economic effects of the proposed action and alternatives.

On December 30, 2011, NMFS published a Notice of Availability of the Draft EIS in the **Federal Register** (76 FR 82275). The 2011 Draft EIS includes an analysis of the proposed actions identified in the 2010 Notice of Intent (*i.e.,* NMFS' issuance of MMPA ITAs for take of marine mammals incidental to G&G surveys, ancillary activities, and exploratory drilling in the Chukchi and Beaufort Seas and BOEM's issuance of G&G permits and concurrence on ancillary activities in the Chukchi and Beaufort Seas), the anticipated environmental impacts, and measures to minimize the impacts associated with these activities. On March 29, 2013, NMFS published a Notice of Availability of a Supplemental Draft EIS in the **Federal Register** (78 FR 19212). The Supplemental Draft EIS included one new alternative not contained in the 2011 Draft EIS and a few other substantive changes. Please refer to the Notices of Availability for the Draft and Supplemental Draft EISs for that information.

Alternatives

NMFS evaluated a preferred alternative (Alternative 2) and five others in the FEIS. Each alternative includes an analysis of a suite of standard and additional mitigation measures that have been identified to help reduce impacts to marine mammals and to ensure no unmitigable adverse impact on the availability of marine mammals for subsistence uses. Each alternative also considers a reasonable range of oil and gas exploration activities for which MMPA ITAs could be issued. Table 1 outlines the activity levels considered in each alternative. Activity levels noted are a maximum for each alternative.

TABLE 1—LEVELS OF G&G, ANCILLARY, AND EXPLORATORY DRILLING ACTIVITIES PROPOSED FOR CONSIDERATION IN THE ALTERNATIVES IN THE FEIS ON THE EFFECTS OF OIL AND GAS ACTIVITIES IN THE ARCTIC OCEAN. ACTIVITY LEVELS NOTED ARE A MAXIMUM, AND ANY COMBINATION UP TO THAT AMOUNT COULD BE ALLOWED UNDER EACH ALTERNATIVE

	2D/3D Seismic surveys	Site clearance and shallow hazards surveys	On-ice seismic surveys	Exploratory drilling
Alternative 1 (No Action)	0	0	0	0.
Alternative 2—Preferred Alternative (Level 1)	4 in Beaufort	3 in Beaufort	1 in Beaufort	1 in Beaufort
	3 in Chukchi	3 in Chukchi	0 in Chukchi	1 in Chukchi.
Alternative 3 (Level 2)	6 in Beaufort	5 in Beaufort	1 in Beaufort	2 in Beaufort
	5 in Chukchi	5 in Chukchi	0 in Chukchi	2 in Chukchi.
Alternative 4 (Level 3)	6 in Beaufort	5 in Beaufort	1 in Beaufort	4 in Beaufort
	5 in Chukchi	5 in Chukchi	0 in Chukchi	4 in Chukchi.
Alternative 5 (Level 3 with required time/area closures).	6 in Beaufort	5 in Beaufort	1 in Beaufort	4 in Beaufort
	5 in Chukchi	5 in Chukchi	0 in Chukchi	4 in Chukchi.
Alternative 6 (any level with required use of alternative technologies).	6 in Beaufort	5 in Beaufort	1 in Beaufort	Any level up to the maximum, as the technology only relates to seismic surveys.
	5 in Chukchi	5 in Chukchi	0 in Chukchi	

Alternatives 5 and 6 differ from Alternatives 2, 3, and 4 in the fact that each one considers required mitigation measures not contemplated in the other action alternatives. Certain time/area closures considered for mitigation on a case-by-case basis under the other action alternatives would be required under Alternative 5. The time/area closures would be for specific areas important to biological productivity, life history functions for specific species of concern, and subsistence activities. Activities would not be permitted to occur in any of the time/area closures during the specific identified periods. Additionally, buffer zones around these time/area closures could potentially be included.

In addition to contemplating the same suite of standard and additional mitigation measures analyzed in the other action alternatives, Alternative 6 also includes specific additional mitigation measures that focus on the use of alternative technologies that have the potential to augment or replace traditional airgun-based seismic exploration activities in the future.

Dated: October 17, 2016.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016–25475 Filed 10–20–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE859

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to U.S. Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active Sonar

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

ACTION: Notice; receipt of application for letter of authorization; request for comments and information.

SUMMARY: NMFS has received a request from the U.S. Navy (Navy) for authorization to take, by harassment, marine mammals incidental to conducting operations of Surveillance Towed Array Sensor System (SURTASS) Low Frequency Active (LFA) sonar for the period beginning August 2017 and ending August 2022. Pursuant to the implementing regulations of the Marine Mammal Protection Act (MMPA), NMFS is announcing our receipt of the Navy's request for regulations governing the incidental taking of marine mammals and inviting information, suggestions, and comments on the Navy's application and request.

DATES: Comments and information must be received no later than November 21, 2016.

ADDRESSES: Comments on the application should be addressed to Jolie Harrison, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225. The mailbox address for providing email comments is *ITP.Youngkin@noaa.gov.* NMFS is not responsible for email comments sent to addresses other than the one provided here. Comments sent via email, including all attachments, must not exceed a 10-megabyte file size.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Dale Youngkin, Office of Protected Resources, NMFS; phone: (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Availability

An electronic copy of the Navy's application may be obtained online at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* The Navy released a draft Supplemental Environmental Impact Statement (DSEIS) for the employment of SURTASS LFA sonar on August 26, 2016. A copy of the DSEIS, which would also support NMFS' proposed rulemaking under the MMPA, is available at *http://www.surtass-lfa-eis.com.*

Background

Sections 101(a)(5)(A) and (D) of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) if certain findings are made and regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''. . . an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

With respect to military readiness activities, the MMPA defines ''harassment'' as:

> (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

Summary of Request

On August 26, 2016, NMFS received an application from the Navy requesting authorization to take individuals of 104 species of marine mammals (75 cetaceans and 29 pinnipeds), by harassment, incidental to training, testing, and routine military operations (all categorized as military readiness activities) using SURTASS LFA sonar over the course of five years between August 15, 2017 and August 15, 2022.

The Navy states that these training, testing, and routine military activities may expose some of the marine mammals present in the operational areas to sound from low-frequency active sonar sources. Because marine mammals may be harassed due to noise disturbance incidental to the use of SURTASS LFA sonar during training, testing, and routine military operations, the Navy utilized the most recent NMFS acoustic Technical Guidance (NMFS 2016) to analyze potential takes of marine mammals. The Navy requests authorization to take individuals of 104 species of marine mammals by Level B Harassment. Further, the Navy states that the probability of taking marine mammals by Level A Harassment is less than 0.001 percent. However, because the probability is not zero, the Navy has included a small number of Level A harassment in its authorization request as a precautionary measure.

This will be NMFS' fourth rule making for SURTASS LFA sonar operations under the MMPA. NMFS published the first rule effective from August 2002 through August 2007 on July 16, 2002 (67 FR 46712); the second rule effective from August 2007 through August 2012 on August 21, 2007 (72 FR 46846); and the third rule effective from August 2012 through August 2012 (77 FR 50290). For this fourth rule making, the Navy is proposing to conduct the same types of sonar activities in the proposed rulemaking as they have conducted over the past fourteen years in the previous three rule makings with the exceptions of updating the LFA sonar duty cycle from 20 percent to 7.5–10 percent based on historical data. In addition, the Navy is proposing a Preferred Alternative (Alternative 2) in their DSEIS that would transmit a maximum number of 255 hours of LFA sonar per vessel per year, as opposed to the previously authorized 432 hours of LFA sonar per vessel per year.

Description of the Specified Activity

The Navy proposes to deploy the system on a maximum of four U.S. Naval ships: The USNS ABLE, the USNS EFFECTIVE, the USNS

IMPECCABLE and the USNS VICTORIOUS) in certain areas of the Pacific, Atlantic, and Indian Oceans and the Mediterranean Sea. Nominal at-sea missions for each vessel using SURTASS LFA sonar would last up to 294 days, with 240 days of active sonar transmissions and 54 days of transit. The maximum number of actual transmission hours per vessel would not exceed 255 hours annually under the Preferred Alternative. The application describes the activity types, the equipment and platforms involved, and the duration and potential locations of the specified activities.

A suite of proposed mitigation measures for marine mammals that could potentially be affected during SURTASS LFA sonar operations includes restricting the use of SURTASS LFA sonar such that it will not operate in Arctic and Antarctic waters; sound pressure levels (SPL) will not exceed 180 decibels (dB) re 1 μPa (rms) within 12 nautical miles of any emerged features of any coastline, or within designated offshore biologically important areas (OBIAs) for marine mammals; and the Navy will minimize exposure of marine mammals to SURTASS LFA sonar signal received levels of 180 dB re 1 μPa (rms) by monitoring for their presence and suspending transmission when animals enter the mitigation zone.

Information Solicited

Interested persons may submit information, suggestions, and comments concerning the Navy's request (see **ADDRESSES**). NMFS will consider all information, suggestions, and comments related to the Navy's request and NMFS' potential development and implementation of regulations governing the incidental taking of marine mammals by the Navy's SURTASS LFA sonar activities.

Dated: October 4, 2016.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016–25532 Filed 10–20–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE901

International Fisheries; Pacific Tuna Fisheries; Well Volume in the Regional Vessel Register of the Inter-American Tropical Tuna Commission

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

ACTION: Notice to the U.S. purse seine fleet fishing for tuna and tuna-like species in the Eastern Pacific Ocean.

SUMMARY: The intent of this notice is to inform the U.S. purse seine fleet fishing for tuna or tuna-like species in the Eastern Pacific Ocean (EPO) about Inter-American Tropical Tuna Commission (IATTC) Resolution C–15–02 (*Resolution on the Deadline Applicable to Revisions of Well Volume in Paragraph 6 of Resolution C–02–03*).

DATES: IATTC Resolution C–15–02 will become effective January 1, 2017.

FOR FURTHER INFORMATION CONTACT: Chris Fanning, West Coast Region, NMFS, at *Chris.Fanning@noaa.gov,* or at (562) 980–4198.

SUPPLEMENTARY INFORMATION:

Background on the IATTC

The United States is a member of the IATTC, which was established under the 1949 Convention for the Establishment of an Inter-American Tropical Tuna Commission. In 2003, the IATTC adopted the Convention for the Strengthening of the IATTC Established by the 1949 Convention between the United States of America and the Republic of Costa Rica (Antigua Convention), which entered into force in 2010. The United States acceded to the Antigua Convention on February 24, 2016. The full text of the Antigua Convention is available at: *https://www.iattc.org/PDFFiles2/Antigua_Convention_Jun_2003.pdf.*

The IATTC consists of 21 member nations and four cooperating non-member nations and facilitates scientific research into, as well as the conservation and management of, highly migratory species of fish in the IATTC Convention Area. The IATTC Convention Area is defined as the waters of the EPO within the area bounded by the west coast of the Americas and by 50° N. latitude, 150° W. longitude, and 50° S. latitude. The IATTC has maintained a scientific research and fishery monitoring program for many years, which includes a *Regional Vessel Register* (Register) to maintain a record of vessels that are authorized to fish for tuna and tuna-like species in the Convention Area.

International Obligations of the United States Under the Convention

As a member of the IATTC, the United States is legally bound to implement decisions of the IATTC. The Tuna Conventions Act (16 U.S.C. 951–962) provides that the Secretary of Commerce, in consultation with the Secretary of State and, with respect to enforcement measures, the Secretary of the Department of Homeland Security, may promulgate such regulations as may be necessary to carry out the United States' international obligations under the Convention, including recommendations and decisions adopted by the IATTC. The Secretary's authority to promulgate such regulations has been delegated to NMFS.

IATTC Resolution C–15–02

Resolution C–02–03 was agreed to at the 69th meeting of the IATTC in Manzanillo, Mexico in 2002. Among other things, the Resolution stated that, "the well volume of each purse-seine vessel, once confirmed. . ., shall be reflected in the Register." This Resolution was implemented domestically through regulations at 50 CFR 300.22(b). At the 89th meeting of the IATTC in Guayaquil, Ecuador in 2015, Resolution C–02–03 was amended to Resolution C–15–02. This Resolution required that a deadline be set for all purse seine well volumes (identified as "Fish Hold Volume (m^3)" in the Register) to be confirmed. Resolution C–15–02 states that on January 1, 2017, all purse seine well volumes in the Register will be considered confirmed, and the well volume of any new purse seine vessel added to the Register after that date will be considered confirmed at the time they are added to the Register.

Impact on the U.S. Purse Seine Fleet

For purse seine vessels currently listed on the Register, the well volume listed in the Register on January 1, 2017, will be considered confirmed, even if documentation (*e.g.,* blueprints, marine survey) verifying well volume has never been submitted. Additionally, if a new purse seine vessel is added to the Register, the well volume submitted at the time it is added will be considered confirmed whether or not it is accompanied by documentation.

If the owner of a vessel currently listed on the Register would like to submit documentation to verify the

vessel's well volume and update it before January 1, 2017, please submit any such documentation no later than December 15, 2016 (See **FOR FURTHER INFORMATION CONTACT**).

Authority: 16 U.S.C. 951 *et seq.*

Dated: October 18, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–25540 Filed 10–20–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Alaska Region Gear Identification

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

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

DATES: Written comments must be submitted on or before December 20, 2016.

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

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Patsy A. Bearden, telephone 907–586–7008, or *Patsy.Bearden@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

Regulations specify that all hook-and-line, longline pot, and pot-and-line marker buoys carried on board or used by any vessel must be marked with Federal Fisheries Permit number or State of Alaska Department of Fish and Game vessel registration number. Regulations that marker buoys be marked with identification information are essential to facilitate fisheries enforcement and actions concerning damage, loss, and civil proceedings. The ability to link fishing gear to the vessel owner or operator is crucial to enforcement of regulations.

This collection also provides a voluntary opportunity for Gulf of Alaska (GOA) individual fishing quota (IFQ) sablefish fishermen to use a gear that physically protects caught sablefish from depredation by whales. That option, the use of pot longline gear, currently exists in sablefish IFQ fisheries in the Bering Sea and Aleutian Islands management areas. Potential benefits of pot longline gear for sablefish fishing include: Mitigation of whale interaction with fishing gear, reduced mortality of seabirds, reduced bycatch of non-target fish species, reduced overall halibut mortality when targeting sablefish, and better accounting of total sablefish fishing mortality.

Whales are able to strip hooked fish from hook-and-line gear, which reduces the amount of sablefish caught by fishermen. As such, whale depredation represents undocumented fishing mortality.

Many seabird species are attracted to fishing vessels in order to forage on bait, offal, discards, and other prey made available by fishing operations. These interactions can result in direct mortality for seabirds if they become entangled in fishing gear or strike the vessel or fishing gear while flying.

Each vessel must use mandatory logbooks (see OMB Control No. 0648–0213 and 0648–0515) when participating in a longline pot fishery. When the number of pots deployed by a vessel is self-reported through logbooks, the use of pot tags provides an additional enforcement tool to ensure that the pot limits are not exceeded. The use of pot tags requires a uniquely identified tag to be securely affixed to each pot. This allows at-sea enforcement and post-trip verification of the number of pots fished.

II. Method of Collection

Information will be collected using paper or electronic logbooks. Marker buoys are marked with identification information.

III. Data

OMB Control Number: 0648–0353.

Form Number(s): None.

Type of Review: Extension of a current information collection.

Affected Public: Individuals or households; Business or other for-profit organizations.

Estimated Number of Respondents: 990.

Estimated Time per Response: 15 minutes each for Request for IFQ Sablefish Pot Gear Tags, Request for Replacement of IFQ Sablefish Pot Gear Tags or Lost Gear, Marking of longline pot gear; and Groundfish Hook-and-line marker buoys.

Estimated Total Annual Burden Hours: 1800 hr.

Estimated Total Annual Cost to Public: $ 11,310.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: October 17, 2016.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2016–25452 Filed 10–20–16; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed deletions from the Procurement List.

SUMMARY: The Committee is proposing to delete products previously furnished by the nonprofit agency employing persons who are blind or have other severe disabilities.

DATES: *Comments must be received on or before:* November 20, 2016.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia, 22202–4149.

FOR FURTHER INFORMATION CONTACT: *For further information or to submit comments contact:* Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703)

603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Deletions

The following products are proposed for deletion from the Procurement List:

Products

NSN(s)—Product Name(s):
MR 764—Pillow, Fiber Fill
MR 765—Pillow, Fiber Fill
Mandatory Source(s) of Supply: Georgia Industries for the Blind, Bainbridge, GA
Contracting Activity: Defense Commissary Agency

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2016–25530 Filed 10–20–16; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Deletions from the procurement list.

SUMMARY: This action deletes products and services from the Procurement List previously furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: Effective November 20, 2016

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia, 22202–4149.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Deletions

On 9/2/2016 (81 FR 60681–60683), 9/9/2016 (81 FR 62481–62482), and 9/16/2016 (81 FR 63744–63745), the Committee for Purchase From People Who Are Blind or Severely Disabled published notices of proposed deletions from the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the products and services listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the products and services deleted from the Procurement List.

End of Certification

Accordingly, the following products and services are deleted from the Procurement List:

Products

Product Name(s)—NSN(s):
8415–01–519–7867—Jacket, Level 3, PCU, Marine Corps, Brown, L
8415–01–519–7868—Jacket, Level 3, PCU, Marine Corps, Brown, M
8415–01–519–8079—Jacket, Level 3, PCU, Marine Corps, Brown, L–L
8415–01–519–8083—Jacket, Level 3, PCU, Marine Corps, Brown, S
8415–01–519–8084—Jacket, Level 3, PCU, Marine Corps, Brown, XL–L
8415–01–519–8087—Jacket, Level 3, PCU, Marine Corps, Brown, XL
Contracting Activities: Commander, Quantico, VA, Army Contracting Command—Aberdeen Proving Ground, Natick Contracting Division.
8415–01–535–7954—Shirt, Level 3, PCU, Army, Brown, XXL
8415–01–542–8541—Jacket, Lightweight Extreme Cold Weather Insulating Level 3, PCU, Army, Brown, XXLL
8415–01–542–8544—Jacket, Lightweight Extreme Cold Weather Insulating, Level 3, PCU, Army, Brown, S
8415–01–542–8548—Jacket, Lightweight Extreme Cold Weather Insulating, Level 3, PCU, Army, Brown, M
8415–01–542–8551—Jacket, Lightweight Extreme Cold Weather Insulating, Level 3, PCU, Army, Brown, L
8415–01–542–8554—Jacket, Lightweight Extreme Cold Weather Insulating, Level 3, PCU, Army, Brown, L–L
8415–01–542–8557—Jacket, Lightweight Extreme Cold Weather Insulating, Level 3, PCU, Army, Brown, XL–L
8415–01–542–8558—Jacket, Lightweight Extreme Cold Weather Insulating, Level 3, PCU, Army, Brown, XL
8415–01–542–8560—Jacket, Lightweight Extreme Cold Weather Insulating, Level 3, PCU, Army, Brown, XXL
8415–01–542–8561—Jacket, Lightweight Extreme Cold Weather Insulating, Level 3, PCU, Army, Brown, XS
8415–01–543–7040—Jacket, Extreme Cold Weather Level 3, PCU, Army, Brown, M–L
8415–01–544–6756—Jacket, Extreme Cold Weather Level 3, PCU, Army, Brown, XXXL
8415–01–544–6759—Jacket, Extreme Cold Weather Level 3, PCU, Army, Brown, XXXLL
Contracting Activity: Army Contracting Command—Aberdeen Proving Ground, Natick Contracting Division
Mandatory Source(s) of Supply: Unknown
Product Name(s)—NSN(s):
7530–01–354–2327—Envelope, Translucent, 4½ x 11″
7530–01–354–3982—Envelope, Translucent, 4 x 7″
7530–01–354–3983—Envelope, Translucent, 9½ x 11″
Mandatory Source(s) of Supply: Industries for the Blind, Inc., West Allis, WI
Contracting Activity: General Services Administration, New York, NY
Product Name(s)—NSN(s): 6530–01–163–3704—Cup, Specimen
Contracting Activity: Department of Veterans Affairs
Product Name(s)—NSN(s):
6532–00–914–3069—Shirt, Operating, Surgical
6532–00–914–3070—Shirt, Operating, Surgical
6532–00–914–3071—Shirt, Operating, Surgical
Contracting Activity: Defense Logistics Agency Troop Support
Product Name(s)—NSN(s): 7350–01–138–0022—Pitcher, Water
Contracting Activity: Department of Veterans Affairs
NSN(s)—Product Name(s): 7510–00–NIB–0432—Business Card Case, Fold-Up, Rosewood
Mandatory Source(s) of Supply: Tarrant County Association for the Blind, Fort Worth, TX
Contracting Activity: General Services Administration, New York, NY
NSN(s)—Product Name(s):
MR 10468—Set, Saver, Salad
MR 10674—Funnel, Collapsible
MR 10635—Serving Platter, Heavy Duty, Raised Surface, Fall Themed, White
MR 10627—Garden Seed Packets, Assorted, 4PK
MR 10623—Container, Frozen Waffle, Expandable
MR 10618—Stickers, Easter Themed, Assorted, 200ct
MR 10626—Poster Book, Coloring, Assorted, 36 × 42
MR 10609—Bowl, Insulated Thermal, Toddler, 8oz
MR 380—Set, Baking Cups and Picks, Holiday, 24PC
MR 382—Duct Tape, Holiday Themed, Assorted Colors
Mandatory Source(s) of Supply: Winston-Salem Industries for the Blind, Inc., Winston-Salem, NC
Contracting Activity: Defense Commissary Agency

NSN(s)—Product Name(s):
MR 1120—Bag, Storage, Vacuum Sealed, 6PG
MR 365—Serving Set, Stand and Bowl, Halloween Themed, 16oz
MR 371—Serving Set, Stand and Bowl, Holiday Themed, 16oz
MR 1146—Serving Set, Stand and Bowl, 16oz
MR 349—Containers, Storage, 6PG
MR 370—Serving Bowl, Holiday, Plastic 7Qt
MR 373—Chip and Dip Bowl, Holiday, Plastic
MR 301—Silicone Spatula
MR 355—Set, Serving Set, Party Travelling
MR 1183—Set, Mixing Bowl, Melamine, 4PC
MR 1159—Set, Bakeware, Cake Pop
MR 383—Server, Beverage, w Spout, 1.25G
Mandatory Source(s) of Supply: Industries for the Blind, Inc., West Allis, WI
Contracting Activity: Defense Commissary Agency
NSN(s)—Product Name(s):
6515–00–NIB–0770—Gloves, Surgical, Powder-free, OR Classic, White, Size 8″
6515–00–NIB–0771—Gloves, Surgical, Powder-free, OR Classic, White, Size 8.5″
6515–00–NIB–0772—Gloves, Surgical, Powder-free, OR Classic, White, Size 9″
6515–00–NIB–0773—Gloves, Surgical, Powder free, Sensicare Ortho, White, Size 5.5″
6515–00–NIB–0765—Gloves, Surgical, Powder-free, OR Classic, White, Size 5.5″
6515–00–NIB–0766—Gloves, Surgical, Powder-free, OR Classic, White, Size 6″
6515–00–NIB–0767—Gloves, Surgical, Powder-free, OR Classic, White, Size 6.5″
6515–00–NIB–0768—Gloves, Surgical, Powder-free, OR Classic, White, Size 7″
6515–00–NIB–0769—Gloves, Surgical, Powder-free, OR Classic, White, Size 7.5″
6515–00–NIB–0680—Gloves, Surgical, Powder-free, Derma Prene, Isotouch Hydrasoft, Green, Size 8.5″
6515–00–NIB–0681—Gloves, Surgical, Powder-free, Derma Prene, Isotouch Hydrasoft, Green, Size 9″
6515–00–NIB–0674—Gloves, Surgical, Powder-free, Derma Prene, Isotouch Hydrasoft, Green, Size 5.5″
6515–00–NIB–0675—Gloves, Surgical, Powder-free, Derma Prene, Isotouch Hydrasoft, Green, Size 6″
6515–00–NIB–0676—Gloves, Surgical, Powder-free, Derma Prene, Isotouch Hydrasoft, Green, Size 6.5″
6515–00–NIB–0677—Gloves, Surgical, Powder-free, Derma Prene, Isotouch Hydrasoft, Green, Size 7″
6515–00–NIB–0678—Gloves, Surgical, Powder-free, Derma Prene, Isotouch Hydrasoft, Green, Size 7.5″
6515–00–NIB–0679—Gloves, Surgical, Powder-free, Derma Prene, Isotouch Hydrasoft, Green, Size 8″
Mandatory Source(s) of Supply: Bosma Industries for the Blind, Inc., Indianapolis, IN
Contracting Activity: Strategic Acquisition Center, Fredericksburg, VA
NSN(s)—Product Name(s):
6515–00–NIB–8015—Gloves, Exam, Nitrile, Latex-Free, Powder-Free, W/ Inner Aloe coating, 5.5 mil (palm), Green, x-Small
Mandatory Source(s) of Supply: Bosma Industries for the Blind, Inc., Indianapolis, IN
Contracting Activity: Department of Veterans Affairs
NSN(s)—Product Name(s):
6515–00–NIB–0531—Glove Powder Free, aloetouch micro
6515–00–NIB–0532—Glove Powder Free, aloetouch micro
6515–00–NIB–0533—Glove Powder Free, aloetouch micro
6515–00–NIB–0534—Glove Powder Free, aloetouch micro
6515–00–NIB–0535—Glove Powder Free, aloetouch micro
6515–00–NIB–0536—Glove Powder Free, aloetouch micro
6515–00–NIB–0537—Glove Powder Free, aloetouch micro
6515–00–NIB–0538—Glove Powder Free, aloetouch micro
6515–00–NIB–0481—Glove Powdered, Perry Orthopaedic
6515–00–NIB–0482—Glove Powdered, Perry Orthopaedic
6515–00–NIB–0483—Glove Powdered, Perry Orthopaedic
6515–00–NIB–0477—Glove Powdered, Perry Orthopaedic
6515–00–NIB–0478—Glove Powdered, Perry Orthopaedic
6515–00–NIB–0479—Glove Powdered, Perry Orthopaedic
6515–00–NIB–0461—Glove Powdered, Original Perry Style 42
6515–00–NIB–0462—Glove Powdered, Original Perry Style 42
6515–00–NIB–0463—Glove Powdered, Original Perry Style 42
6515–00–NIB–0464—Glove Powdered, Original Perry Style 42
6515–00–NIB–0465—Glove Powdered, Original Perry Style 42
6515–00–NIB–0466—Glove Powdered, Original Perry Style 42
6515–00–NIB–0467—Glove Powdered, Original Perry Style 42
6515–00–NIB–0468—Glove Powdered, Original Perry Style 42
6515–00–NIB–0208—Glove, Surgeon, Biogel Neotech, Size 5.5
6515–00–NIB–0209—Glove, Surgeon, Biogel Neotech, Size 6.0
6515–00–NIB–0210—Glove, Surgeon, Biogel Neotech, Size 6.5
6515–00–NIB–0211—Glove, Surgeon, Biogel Neotech, Size 7.0
6515–00–NIB–0212—Glove, Surgeon, Biogel Neotech, Size 7.5
6515–00–NIB–0213—Glove, Surgeon, Biogel Neotech, Size 8.0
6515–00–NIB–0214—Glove, Surgeon, Biogel Neotech, Size 8.5
6515–00–NIB–0215—Glove, Surgeon, Biogel Neotech, Size 9.0
6515–00–NIB–0192—Glove, Surgeon, Biogel Orthopaedic, Size 5.5
Mandatory Source(s) of Supply: Bosma Industries for the Blind, Inc., Indianapolis, IN
Contracting Activity: Department of Veterans Affairs
NSN(s)—Product Name(s):
7220–00–NIB–0143—Safety-Walk, Tapes & Treads—310 Black Medium Resilient
Mandatory Source(s) of Supply: Louisiana Association for the Blind, Shreveport, LA
Contracting Activity: General Services Administration, New York, NY
NSN(s)—Product Name(s):
8030–01–596–4258—Lubricant, 5-in-1 Penetrating Multipurpose oil, Biobased, Aerosol, 11 oz. net.
Mandatory Source(s) of Supply: The Lighthouse for the Blind, St. Louis, MO
Contracting Activity: Defense Logistics Agency Troop Support

Services

Service Type: Administrative/General Support Service
Mandatory for: GSA, Southwest Supply Center, 819 Taylor Street, Fort Worth, TX
Mandatory Source(s) of Supply: Lighthouse for the Blind of Houston, Houston, TX, West Texas Lighthouse for the Blind, San Angelo, TX, South Texas Lighthouse for the Blind, Corpus Christi, TX
Contracting Activity: General Services Administration, FPDS Agency Coordinator
Service Type: Administrative/General Support Service
Mandatory for: GSA, Northeast Distribution Center, Federal Supply Service (3FS), Burlington, NJ
Mandatory Source(s) of Supply: Bestwork Industries for the Blind, Inc., Cherry Hill, NJ
Contracting Activity: General Services Administration, FPDS Agency Coordinator
Service Type: Administrative/General Support Service
Mandatory for: GSA, Southwest Supply Center, 819 Taylor Street, Fort Worth, TX
Mandatory Source(s) of Supply: Travis Association for the Blind, Austin, TX
Contracting Activity: General Services Administration, FPDS Agency Coordinator
Service Type: Medical Transcription Service
Mandatory for: Veterans Affairs Medical Center, 150 S. Huntington Avenue, Boston, MA
Mandatory Source(s) of Supply: Massachusetts Commission for the Blind Ferguson Industries for the Blind (Deleted), Malden, MA
Contracting Activity: Department of Veterans Affairs
Service Type: Electronic Service Customer Representative Service
Mandatory for: Securities & Exchange Commission Library, 2100 2nd St. SW., Rm. 110, Washington, DC
Mandatory Source(s) of Supply: Columbia Lighthouse for the Blind, Washington, DC
Contracting Activity: Securities and Exchange Commission
Service Type: Fulfillment Service
Mandatory for: Veterans Affairs Blind Rehabilitation Center, 1 Freedom Way, Augusta, GA
Mandatory Source(s) of Supply: Columbia Lighthouse for the Blind, Washington, DC

Contracting Activity: Department of Veterans Affairs
Service Type: Administrative/General Support Service
Mandatory for: Office of Personnel Management: Inspector General Office, 1900 E Street NW., Washington, DC
Mandatory Source(s) of Supply: Columbia Lighthouse for the Blind, Washington, DC
Contracting Activity: Office of Personnel Management
Service Type: Employment Placement Service
Mandatory for: Defense Logistics Agency: National Human Resource Offices, 8725 John J Kingman Rd #2545, Fort Belvoir, VA
Mandatory Source(s) of Supply: Columbia Lighthouse for the Blind, Washington, DC
Contracting Activity: Defense Logistics Agency Aviation
Service Type: Duplicating Service
Mandatory for: U.S. Army Corps of Engineers, 10 S Howard St, Baltimore, MD
Mandatory Source(s) of Supply: North Central Sight Services, Inc., Williamsport, PA
Contracting Activity: Dept of the Army, W40M NORTHEREGION Contract Ofc
Service Type: Administrative Service
Mandatory for: General Services Administration, 100 Penn Square East, Philadelphia, PA
Mandatory Source(s) of Supply: Center for the Blind and Visually Impaired, Chester, PA
Contracting Activity: General Services Administration, FPDS Agency Coordinator
Service Type: Administrative/General Support Service
Mandatory for: GSA, Southwest Supply Center, 819 Taylor Street, Fort Worth, TX
Mandatory Source(s) of Supply: NewView Oklahoma, Inc., Oklahoma City, OK
Contracting Activity: General Services Administration, FPDS Agency Coordinator
Service Type: Customer Service Representatives
Mandatory for: GSA, Philadelphia Region 3: Federal Supply Service Bureau, Philadelphia, PA
Mandatory Source(s) of Supply: Center for the Blind and Visually Impaired, Chester, PA
Contracting Activity: General Services Administration, FPDS Agency Coordinator
Service Type: Parts Machining Service
Mandatory for: Mare Island Naval Shipyard, Vallejo, CA
Mandatory Source(s) of Supply: West Texas Lighthouse for the Blind, San Angelo, TX
Contracting Activity: DOD/DEPARTMENT OF THE NAVY
Service Type: Medical Transcription Service
Mandatory for: Patuxent River Naval Air Station: U.S. Naval Hospital, 47149 Buse Road, Unit 1370, Patuxent River, MD
Mandatory Source(s) of Supply: Lighthouse for the Blind of Houston, Houston, TX
Contracting Activity: DOD/DEPARTMENT OF THE NAVY
Service Type: Order Processing Service
Mandatory for: Federal Prison Industries, Lexington, KY
Mandatory Source(s) of Supply: Clovernook Center for the Blind and Visually Impaired, Cincinnati, OH
Contracting Activity: Federal Prison System, Central Office
Service Type: Photocopying Service
Mandatory for: James E. Van Zandt Veterans Affairs Medical Center, 2907 Pleasant Valley Blvd., Altoona, PA
Mandatory Source(s) of Supply: North Central Sight Services, Inc., Williamsport, PA
Contracting Activity: Department of Veterans Affairs
Service Type: HTML Coding of Forest Health Monitoring Service
Mandatory for: USDA, Forest Service, North Central Forest Experiment Station, St. Paul, MN
Mandatory Source(s) of Supply: North Central Sight Services, Inc., Williamsport, PA
Contracting Activity: Dept of Agriculture, Procurement Operations Division
Service Type: Duplicating Service
Mandatory for: U.S. Army Corps of Engineers, 100 Liberty Avenue, Pittsburgh, PA
Mandatory Source(s) of Supply: North Central Sight Services, Inc., Williamsport, PA
Contracting Activity: Dept of the Army, W40M NORTHEREGION Contract Ofc

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2016–25531 Filed 10–20–16; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Intent To Prepare an Environmental Impact Statement for the Jasper Ocean Terminal in Jasper County, South Carolina

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DOD.

ACTION: Notice of intent.

SUMMARY: The U.S. Army Corps of Engineers (Corps), Charleston District intends to prepare an Environmental Impact Statement (EIS) to assess the potential social, economic, and environmental effects of the proposed construction and operation of a marine container terminal by the Jasper Ocean Terminal (JOT) Joint Venture, a partnership between the Georgia Ports Authority (GPA) and the South Carolina Ports Authority (SCPA). In accordance with the National Environmental Policy Act (NEPA), the Corps is the lead Federal agency responsible for the preparation of the EIS. Information included in the EIS will serve as the basis for the Corps' evaluation of the proposed marine container terminal pursuant to Section 10 of the Rivers and Harbors Act (RHA) and Section 404 of the Clean Water Act (CWA). The EIS will assess the potential effects of the proposed project and a range of reasonable project alternatives on impacts to navigable waters and other waters of the United States. The EIS will also provide information for Federal, State, and local agencies having other jurisdictional responsibility.

DATES: *Public Scoping Meeting:* A public scoping meeting has not been scheduled; however, a local public notice will be issued by the Charleston District, and a meeting announcement will be published in local newspapers once the date and location for the scoping meeting has been determined. Individuals and organizations that are interested in the proposed JOT or whose interests may be affected by the proposed work are encouraged to attend the scoping meeting to submit oral and/or written comments to the Charleston District.

FOR FURTHER INFORMATION CONTACT: For further information and/or questions about the proposed project or the NEPA process, please contact Mr. Nat Ball, the Corps Project Manager, by telephone: 843–329–8044 or toll-free 1–866–329–8187, or by mail: Mr. Nat Ball, U.S. Army Corps of Engineers, 69–A Hagood Avenue, Charleston, South Carolina 29403.

SUPPLEMENTARY INFORMATION: The Corps is evaluating a proposal from the JOT Joint Venture in accordance with Section 404 of the CWA, Section 10 of the RHA, and NEPA. Based on the available information, the Corps has determined that the proposed JOT has the potential to significantly affect the quality of the human and natural environment, and therefore warrants the preparation of an EIS. Additional information about the proposed project and the NEPA process is available on the project Web site at: *www.JasperOceanTerminalEIS.com.*

1. *Description of the Proposed Project.* According to the JOT Joint Venture, the Ports of Charleston and Savannah are expected to experience limitations and inefficiencies as a result of the forecasted growth in demand for containerized cargo within the region served by the two existing ports over the next 35 years. As a result, the JOT Joint Venture has proposed to construct and operate a state of the art marine container terminal on an approximately 1,500-acre site in Jasper County, South

Carolina. The proposed JOT would be located across the Savannah River from Elba Island, Georgia, and would increase the region's capacity to efficiently handle the forecasted cargo.

The proposed JOT would include a pile supported wharf designed to accommodate Neo-Panamax containerships, a container storage yard, an intermodal rail yard, gate facilities to process entering and existing over the road truck traffic, administrative buildings, and equipment service facilities. The proposed JOT would also include elements common to other types of industrial sites, such as a water tower, underground utilities, electrical substations, backup generators, high-mast lighting, stormwater management facilities, perimeter fencing, and parking areas for employees and other personal vehicles.

Proposed transportation and utility improvements that would serve the proposed JOT include a 4-lane divided highway to connect the JOT to U.S. Highway 17, a double track rail corridor to connect the JOT's intermodal rail yard to existing CSX Transportation and Norfolk Southern rail lines, a new rail bridge across the Savannah River, and utility lines and intermediary facilities to connect to existing services (water, sewer, electricity, etc). Likewise, navigation improvements associated with the proposed JOT include new work and maintenance dredging of berths, an access channel, and a turning basin to provide vessel access to the terminal, and shoreline stabilization, bulkhead, and wharf construction adjacent to the existing Savannah Harbor federal navigation channel.

According to the JOT Joint Venture, a separate feasibility study will evaluate the costs and benefits of modifications to the existing Savannah Harbor Federal navigation channel. Should this feasibility study or the Corps' analysis of the proposed JOT determine that modifications to the federal navigation channel are required to operate the proposed marine container terminal, potential impacts to the human and natural environment (*e.g.,* aquatic resources) associated with any navigational improvements will be evaluated and included in the EIS for the proposed JOT.

2. Alternatives. A range of reasonable alternatives to the proposed action will be identified, and fully evaluated in the EIS, including: The No-Action Alternative, the applicant's proposed alternative, and alternatives that may result in avoidance and minimization of impacts; however, this list in not exclusive and additional alternatives may be considered for inclusion.

3. Scoping and Public Involvement Process. A scoping meeting will be conducted to gather information on the scope of the project and the alternatives to be addressed in the EIS. Additional public and agency involvement will be sought through the implementation of a public involvement plan and agency coordination.

4. Significant issues. Issues and potential impacts associated with the proposed JOT that are likely to be given detailed analysis in the EIS include, but are not necessarily limited to: Existing and proposed transportation infrastructure (roadways and railways), waters of the United States, air quality, noise, light, Environmental Justice, visual resources/aesthetics, general environmental concerns, cultural resources, fish and wildlife values, protected species, flood hazards, floodplain values, land use, recreation, water quality, hazardous materials and solid waste, socioeconomics, safety, and in general, the needs and welfare of the people.

5. Additional Review and Consultation. Additional review and consultation, which will be incorporated into the preparation of the EIS, will include, but will not necessarily be limited to, Section 14 of the RHA; Section 401 of the CWA; Essential Fish Habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act; the Endangered Species Act; Fish and Wildlife Coordination Act; National Historic Preservation Act; and the South Carolina Coastal Zone Management Act.

6. Availability of the Draft EIS. At this time, the Corps expects the Draft EIS to be made available to the public in late fall/winter 2020. A Public Hearing will be held during the public comment period for the Draft EIS.

Matthew W. Luzzatto,

Lieutenant Colonel, U.S. Army Corps of Engineers, Charleston District.

[FR Doc. 2016–25519 Filed 10–20–16; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army, U.S. Army Corps of Engineers

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Notice of Availability of the Final Environmental Impact Statement for the Lower Yellowstone Intake Diversion Dam Fish Passage Project, Dawson County, Montana

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD; Bureau of Reclamation, Interior.

ACTION: Notice.

SUMMARY: The U.S. Army Corps of Engineers (Corps) and Reclamation, as joint lead agencies, have prepared and made available the Lower Yellowstone Intake Diversion Dam Fish Passage Project Final Environmental Impact Statement (Final EIS). The Final EIS analyzes and discloses potential effects associated with the proposed Federal action to improve passage for endangered pallid sturgeon and other native fish at Intake Diversion Dam in the lower Yellowstone River while continuing the effective and viable operation of the Lower Yellowstone Project.

DATES: The Corps and Reclamation will not issue a final decision on the proposed action until at least 30 days after the date that the Environmental Protection Agency publishes notice of availability of the Final EIS. After the Final EIS has been available for 30 days, the Corps and Reclamation may complete a Record of Decision. The Record of Decision will state the action that the Corps and Reclamation select for implementation and will discuss factors considered in the decision.

ADDRESSES: The Final EIS may be viewed on Reclamation's Web site at *www.usbr.gov/gp/mtao/loweryellowstone.* Send requests for copies of the Final EIS to U.S. Army Corps of Engineers Omaha District, ATTN: CENWO–PM–AA, 1616 Capitol Ave. Omaha, NE 68102; or email to *cenwo-planning@usace.army.mil.* See the **SUPPLEMENTARY INFORMATION** section for locations where copies of the Final EIS are available for public review.

FOR FURTHER INFORMATION CONTACT: Ms. Tiffany Vanosdall, U.S. Army Corps of Engineers, 1616 Capitol Ave. Omaha, NE 68102, or *tiffany.k.vanosdall@usace.army.mil.*

SUPPLEMENTARY INFORMATION: The Corps and Reclamation are issuing this notice

pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. 4321 *et seq.;* the Council on Environmental Quality's (CEQ) regulations for implementing the procedural provisions of NEPA, 43 CFR parts 1500 through 1508; the Department of the Interior's NEPA regulations, 43 CFR part 46.

Background Information

Reclamation's Lower Yellowstone Project is located in eastern Montana and western North Dakota. Intake Diversion Dam is located approximately 70 miles upstream of the confluence of the Yellowstone and Missouri rivers near Glendive, Montana. The Lower Yellowstone Project was authorized by the Secretary of the Interior on May 10, 1904. Construction of the Lower Yellowstone Project began in 1905 and included Intake Diversion Dam (also known as Yellowstone River Diversion Dam)—a wood and stone diversion dam that spans the Yellowstone River and diverts water into the Main Canal for irrigation. The Lower Yellowstone Project was authorized to provide a dependable water supply sufficient to irrigate approximately 54,000 acres of land on the benches above the west bank of the Yellowstone River. Water is also supplied to irrigate approximately 830 acres in the Intake Irrigation Project and 2,200 acres in the Savage Unit. The average annual volume of water diverted for these projects is 327,046 acre-feet.

The U.S. Fish and Wildlife Service (Service) listed the pallid sturgeon as endangered under the Endangered Species Act (ESA) in 1990. Best available science suggests Intake Diversion Dam impedes upstream migration of pallid sturgeon and their access to spawning and larval drift habitats. The lower Yellowstone River is considered by the Service to provide one of the best opportunities for recovery of pallid sturgeon.

Section 7(a)(2) requires each Federal agency to consult on any action authorized, funded, or carried out by the agency to ensure it does not jeopardize the continued existence of any endangered or threatened species. Reclamation has been in formal consultation with the Service to identify potential conservation measures to minimize adverse effects to pallid sturgeon associated with continued operation of the Lower Yellowstone Project. The Pallid Sturgeon Recovery Plan specifically identifies providing passage at Intake Diversion Dam to protect and restore pallid sturgeon populations. By providing passage at Intake Diversion Dam, approximately 165 river miles of spawning and larval drift habitat would become accessible in the Yellowstone River.

Section 3109 of the 2007 Water Resources Development Act authorizes the Corps to use funding from the Missouri River Recovery and Mitigation Program to assist Reclamation in the design and construction of Reclamation's Lower Yellowstone Project at Intake, Montana for the purpose of ecosystem restoration. Planning and construction of the Intake Project is a Reasonable and Prudent Alternative for the Corps in the 2003 Missouri River Amended Biological Opinion as amended by letter exchange in 2009, 2010, and 2013. The Reclamation Act/Newlands Act of 1902 (Pub. L. 161) authorizes Reclamation to construct and maintain the facilities associated with the Lower Yellowstone Project, which includes actions or modifications necessary to comply with Federal law such as the ESA.

Analysis in the Final EIS serves to support a decision on the selection of an alternative. Current and past project information and analyses can be accessed at: *www.usbr.gov/gp/mtao/loweryellowstone.*

The Corps and Reclamation are joint lead Federal agencies for the NEPA analysis process and preparation of the Final EIS. The Corps is the administrative lead for NEPA compliance activities during the preparation of the Final EIS. State, Federal, and local agencies with specialized expertise or jurisdictional responsibilities are participating as cooperating agencies. Cooperating agencies include the U.S. Fish and Wildlife Service; Western Area Power Administration; Montana Fish, Wildlife and Parks; Montana Department of Natural Resources and Conservation; and the Lower Yellowstone Irrigation Project.

The purpose of the Lower Yellowstone Intake Diversion Dam Fish Passage Project is to improve passage for the endangered pallid sturgeon while continuing the effective and viable operation of the Lower Yellowstone Project, and contribute to ecosystem restoration. The Final EIS discloses the analysis of six alternatives, including a No Action Alternative.

The No Action Alternative would continue the ongoing operations, maintenance, and rehabilitation of the Lower Yellowstone Project including diversion up to 1,374 cubic feet per second (cfs) of water through the screened headworks; rocking of the weir as needed to continue diversions during low flow periods; routine maintenance of the headworks, weir, and irrigation distribution facilities and pumps; rehabilitation of the trolley; and associated activities to comply with state and Federal law.

The Rock Ramp Alternative includes abandonment of the existing weir in place; construction of a new concrete weir and shallow sloped rock ramp to improve instream fish passage; maintenance of the new weir and rock ramp, continued diversion up to 1,374 cfs through the screened headworks; and continued operation and maintenance of the irrigation distribution facilities and supplemental pumps.

The Bypass Channel Alternative (Preferred Alternative) includes abandonment of the existing weir in place; construction of a new concrete weir; construction, operation, and maintenance of a two-mile long bypass channel for fish passage around the weir; placement of fill in the upstream portion of existing side channel for stabilization; continued diversion up to 1,374 cfs through the screened headworks; and continued operation and maintenance of the irrigation distribution facilities and supplemental pumps.

The Modified Side Channel Alternative includes operation, maintenance, and rehabilitation of the existing weir and trolley; construction, operation, and maintenance of a 4.5-mile long bypass channel created by modifying the existing high-flow channel for fish passage around the weir; continued diversion up to 1,374 cfs through the screened headworks; construction, operation, and maintenance of an access bridge spanning the high-flow bypass channel; and continued operation and maintenance of the irrigation distribution facilities and supplemental pumps.

The Multiple Pump Alternative includes the construction, operation, and maintenance of 5 screened surface pumping stations; removal of the existing weir; improved power infrastructure to increase capacity; land acquisition as necessary for power infrastructure and pump stations; continued diversion up to 1,374 cfs through the screened headworks and pumps as needed; and continued operation and maintenance of the irrigation distribution facilities and supplemental pumps.

The Multiple Pumps with Conservation Measures Alternative includes the construction, operation, and maintenance of seven pumping stations each with six Ranney Wells (total of 42 Ranney Wells); removal of

the existing weir; construction, operation, and maintenance of wind turbines and infrastructure to provide power to pumping stations; land acquisition as necessary for power infrastructure and pump stations; diversion up to 608 cfs through the screened headworks or by pumping depending upon river flow; reconstruction of the Main Canal; installation of water conservation measures such as conversion of flood irrigation to sprinkler, lining canals, and piping laterals; and continued operation and maintenance of the irrigation distribution facilities and supplemental pumps.

A Notice of Availability for the Draft EIS was published in the **Federal Register** on June 3, 2016 (81 FR 35754). The comment period for the Draft EIS ended on July 28, 2016. Public meetings on the Draft EIS were held on Tuesday, June 28, 2016, from 5:30 to 9 p.m., in Sidney, MT; Wednesday, June 29, 2016, from 5:30 to 9 p.m., in Glendive, MT; and Thursday, June 30, 2016, from 5:30 to 9 p.m., in Billings, MT. The Final EIS contains responses to all comments received and reflects comments and any additional information received during the review period.

Copies of the Final EIS are available for public review at the following locations:

1. U.S. Army Corps of Engineers, 1616 Capitol Ave., Omaha, NE 68102.

2. Bureau of Reclamation, Great Plains Region, 2021 4th Avenue North, Billings, MT 59101.

3. Bureau of Reclamation, Montana Area Office, 2900 4th Avenue North, #303, Billings, MT 59101.

4. Sidney Public Library, 121 3rd Avenue NW., Sidney, MT 59270.

5. Glendive Public Library, 200 S. Kendrick Avenue, Glendive, MT 59330.

6. Billings Public Library, 510 N. Broadway, Billings, MT 59101.

Public Disclosure Statement

Before including your address, phone number, email address, or any other personal identifying information in any communication, you should be aware that your entire communication—including your personal identifying information—may be made publicly available at any time. While you can request in your communication to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

John W. Henderson,

Colonel, Corps of Engineers, District Commander.

Michael J. Ryan,

Regional Director, Great Plains Region, Bureau of Reclamation.

[FR Doc. 2016–25375 Filed 10–20–16; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2016–ICCD–0110]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Application for New Grants Under the Ronald E. McNair Postbaccalaureate Achievement Program (1890–0001)

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing a reinstatement of a previously approved information collection.

DATES: Interested persons are invited to submit comments on or before November 21, 2016.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2016–ICCD–0110. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E–347, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carmen Gordon, 202–453–7311.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Application for New Grants Under the Ronald E. McNair Postbaccalaureate Achievement Program.

OMB Control Number: 1840–0619.

Type of Review: A reinstatement of a previously approved information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 350.

Total Estimated Number of Annual Burden Hours: 13,960.

Abstract: The Department of Education is requesting a reinstatement with change of a previously approved collection of information entitled Application for New Awards under the Ronald E. McNair Postbaccalaureate Achievement (McNair) Program. This application will be used to award new grants and collect data under the McNair program. which provides grants to institutions of higher education and combinations of such institutions to prepare low-income, first-generation college students, and students from groups underrepresented in graduate education, for doctoral study. Two of the three previously used competitive preference priorities have been removed while one remains unchanged in anticipation of the FY 2017 competition. The cost burden to the Federal Government, which was reported as

$1,155,449 in the previously approved collection, has also been updated to better reflect actual costs.

Dated: October 18, 2016.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2016–25483 Filed 10–20–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2016–ICCD–0114]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Fast Response Survey System (FRSS) 108: Career and Technical Education (CTE) Programs in Public School Districts

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing a new generic information collection under an approved generic information collection request clearance.

DATES: Interested persons are invited to submit comments on or before November 21, 2016.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2016–ICCD–0114. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E–347, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact NCES Information Collections at *NCES.Information.Collections@ed.gov.*

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Fast Response Survey System (FRSS) 108: Career and Technical Education (CTE) Programs in Public School Districts.

OMB Control Number: 1850–0733.

Type of Review: A new generic information collection.

Respondents/Affected Public: Individuals.

Total Estimated Number of Annual Responses: 4,785.

Total Estimated Number of Annual Burden Hours: 826.

Abstract: This request is to conduct the Fast Response Survey System (FRSS) survey #108 on career and technical education (CTE) programs in public school districts. The Office of Career, Technical, and Adult Education (OCTAE) requested that NCES conduct this FRSS survey. About 95 percent of 9th grade students in 2009 attended a school that offered CTE instruction, either on campus or at a partnering school; 85 percent of public high school graduates had completed one or more occupational CTE courses; and 19 percent were CTE concentrators who had earned at least three credits in the same CTE field. Effective, high-quality CTE programs are aligned with college- and career-readiness standards as well as the needs of employers, industry, and labor, providing students with a curriculum that combines integrated academic and technical content and strong employability skills, as well as work-based learning opportunities that enable students to connect what they are learning to real-life career scenarios and choices. The students participating in effective CTE programs graduate with industry certifications or licenses and postsecondary certificates or degrees that prepare them for in-demand careers within high-growth industry sectors. The purpose of the FRSS 108 survey is to collect nationally representative data from public school districts about CTE programs offered by the districts, whether offered at district facilities or in a partnering off-site location, such as area CTE facilities or postsecondary institutions. The sample will focus on school districts with high schools because CTE programs are generally designed for high school students. The survey topics will focus on the extent to which districts provide high-quality CTE programs and how these programs are developed, designed, and implemented.

Dated: October 18, 2016.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2016–25508 Filed 10–20–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Minority Science and Engineering Improvement Program

AGENCY: Office of Postsecondary Education, Department of Education

ACTION: Notice.

Overview Information: Minority Science and Engineering Improvement Program Notice inviting applications for new awards for fiscal year (FY) 2017.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.120A.

DATES:

Applications Available: October 21, 2016.

Date of Pre-Application Webinar: The Department of Education (Department) intends to hold a Webinar to provide technical assistance to interested applicants. Detailed information regarding this Webinar will be provided on the Web site for the Minority Science and Engineering Improvement Program (MSEIP) at *http://www2.ed.gov/programs/iduesmsi/index.html.* A recording of this Webinar will be available on the Web site following the session.

Deadline for Transmittal of Applications: December 20, 2016.

Deadline for Intergovernmental Review: February 21, 2017.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The MSEIP is designed to effect long-range improvement in science and engineering education at predominantly minority institutions and to increase the flow of underrepresented ethnic minorities, particularly minority women, into scientific and technological careers.

Priority: This notice contains one competitive preference priority. The competitive preference priority is from the Department's notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 10, 2014 (79 FR 73425) (Supplemental Priorities).

Competitive Preference Priority: For FY 2017 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is a competitive preference priority. Under 34 CFR 75.105(c)(2)(i), we award an additional two points to an application that meets this priority.

The priority is:

Competitive Preference Priority—Promoting Science, Technology, Engineering, and Mathematics (STEM) Education (2 additional points).

Projects that are designed to improve student achievement or other related outcomes by identifying and implementing instructional strategies, systems, and structures that improve postsecondary learning and retention, resulting in completion of a degree in a STEM field.

Note: We recognize that the definition of ''student achievement'' from the Secretary's Supplemental Priorities is not relevant in the context of this competition because that definition pertains to elementary and secondary grades and subjects that are covered by the Elementary and Secondary Education Act of 1965, as amended. In responding to this priority, however, applicants may propose projects that are designed to improve ''other related outcomes,'' which could include, for example, end-of-course grades, or improvement in research or laboratory skills, among other outcomes.

Note: Applicants must indicate in the one-page abstract and on the MSEIP Eligibility Certification Form in the application package whether they intend to address the competitive preference priority.

Program Authority: 20 U.S.C. 1067–1067k.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards as adopted in 2 CFR part 3474. (d) The regulations for this program in 34 CFR part 646. (e) The Supplemental Priorities.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration has requested $9,648,000 for MSEIP for FY 2017, of which we intend to use an estimated $2,597,607 for new awards. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2018 from the list of unfunded applications from this competition.

Estimated Range of Awards

Institutional Project Grants: $150,000-$250,000.

Special Project Grants: $100,000-$250,000.

Cooperative Project Grants: $250,000-$300,000.

Estimated Average Size of Awards

Institutional Project Grants: $230,000.

Special Project Grants: $175,000.

Cooperative Project Grants: $275,000.

Maximum Awards

Institutional Project Grants: $250,000.

Special Project Grants: $250,000.

Cooperative Project Grants: $300,000.

We will reject any application that proposes a budget exceeding the maximum award amount listed for a single budget period of 12 months.

Estimated Number of Awards

Institutional Project Grants: 9.

Special Project Grants: 1.

Cooperative Project Grants: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

III. Eligibility Information

1. *Eligible Applicants:* An applicant's eligibility depends on the type of MSEIP grant the applicant seeks. There are four types of MSEIP grants: institutional project, special project, cooperative project, and design project.

Institutional project grants are grants that support the implementation of a comprehensive science improvement plan, which may include any combination of activities for improving the preparation of minority students for careers in science.

There are two types of special project grants. First, there are special project grants for which only minority institutions are eligible. These special project grants support activities that: (1) Improve quality training in science and engineering at minority institutions; or (2) enhance the minority institutions' general scientific research capabilities. There also are special project grants for which all applicants are eligible. These special project grants support activities that: (1) Provide a needed service to a group of eligible minority institutions; or (2) provide in-service training for project directors, scientists, and engineers from eligible minority institutions.

Cooperative project grants assist groups of nonprofit accredited colleges and universities to work together to conduct a science improvement program.

Design project grants assist minority institutions that do not have their own appropriate resources or personnel to plan and develop long-range science improvement programs. We will not award design project grants in the FY 2017 competition.

(a) For institutional project grants, eligible applicants are limited to:

(1) Public and private nonprofit institutions of higher education that (i) award baccalaureate degrees; and (ii) are minority institutions;

(2) Public or private nonprofit institutions of higher education that (i) award associate degrees; and (ii) are minority institutions that (A) have a curriculum that includes science or engineering subjects; and (B) enter into a partnership with public or private nonprofit institutions of higher education that award baccalaureate degrees in science and engineering.

(b) For special project grants for which only minority institutions are eligible, eligible applicants are described in paragraph (a).

(c) For special project grants for which all applicants are eligible, eligible

applicants include those described in paragraph (a), and—

(1) Nonprofit science-oriented organizations, professional scientific societies, and institutions of higher education that award baccalaureate degrees that: (i) Provide a needed service to a group of minority institutions; or (ii) provide in-service training to project directors, scientists, and engineers from minority institutions; or

(2) A consortium of organizations that provide needed services to one or more minority institutions, the membership of which may include (i) institutions of higher education that have a curriculum in science or engineering; (ii) institutions of higher education that have a graduate or professional program in science or engineering; (iii) research laboratories of, or under contract with, the Department of Energy, the Department of Defense, or the National Institutes of Health; (iv) relevant offices of the National Aeronautics and Space Administration, National Oceanic and Atmospheric Administration, National Science Foundation, and National Institute of Standards and Technology; (v) quasi-governmental entities that have a significant scientific or engineering mission; or (vi) institutions of higher education that have State-sponsored centers for research in science, technology, engineering, and mathematics.

(d) For cooperative project grants, eligible applicants are groups of nonprofit accredited colleges and universities whose primary fiscal agent is an eligible minority institution as defined in 34 CFR 637.4(b).

Note: As defined in 34 CFR 637.4(b), ''minority institution'' means an accredited college or university whose enrollment of a single minority group or a combination of minority groups exceeds 50 percent of the total enrollment.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application via the Internet at *Grants.gov*. If you do not have access to the Internet, please contact Dr. Bernadette Hence, U.S. Department of Education, 400 Maryland Avenue SW., Room 4C115, Washington, DC 20202. Telephone: (202) 453–7913 or by email: *Bernadette.Hence@ed.gov*.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content and form of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We have established a mandatory page limit for the application narrative of each type of MSEIP grant project application as follows:

Institutional project grant: 40 pages.

Special project grant: 35 pages.

Cooperative project grant: 50 pages.

You must limit the application narrative (Part III) to these established page limits, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides. Page numbers and an identifier may be within the 1″ margin.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including charts, tables, figures, and graphs. Titles, headings, footnotes, quotations, references, and captions may be singled spaced.
- Use a font that is either 12 point or larger, or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman and Arial Narrow) will not be accepted.

If you use some but not all of the allowable space on a page, it will be counted as a full page in determining compliance with the page limit.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the budget justification; Part III, the one-page abstract, the table of contents, the MSEIP Eligibility Certification Form, required letter(s) of commitment, evidence of partnerships; and Part IV, the assurances and certifications. If you include any attachments or appendices not specifically requested, these items will be counted as part of the application narrative for purposes of the page limit requirement. You must include your complete responses to the selection criteria in the application narrative.

We will reject your application if you exceed the page limit. We will also reject your application if you fail to provide the MSEIP Eligibility Certification Form.

3. Submission Dates and Times:

Applications Available: October 21, 2016.

Date of Pre-Application Webinar: The Department intends to hold a Webinar to provide technical assistance to interested applicants. Detailed information regarding this Webinar will be provided on the MSEIP Web site at *http://www2.ed.gov/programs/iduesmsi/index.html.* A recording of this Webinar will be available on the Web site following the session.

Deadline for Transmittal of Applications: December 20, 2016.

Applications for grants under this program must be submitted electronically using the *Grants.gov* Apply site (*Grants.gov*). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to *Other Submission Requirements* in section IV of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: February 21, 2017.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and System for Award Management:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the System for Award Management (SAM), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet at the following Web site: *http://fedgov.dnb.com/webform.* A DUNS number can be created within one to two business days.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow two to five weeks for your TIN to become active.

The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and accuracy of the data you enter into the SAM database. Thus, if you think you might want to apply for Federal financial assistance under a program administered by the Department, please allow sufficient time to obtain and register your DUNS number and TIN. We strongly recommend that you register early.

Note: Once your SAM registration is active, it may be 24 to 48 hours before you can access the information in, and submit an application through, *Grants.gov*.

If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days.

Information about SAM is available at *www.SAM.gov.* To further assist you with obtaining and registering your DUNS number and TIN in SAM or updating your existing SAM account, we have prepared a SAM.gov Tip Sheet, which you can find at: *www2.ed.gov/fund/grant/apply/sam-faqs.html.*

In addition, if you are submitting your application via *Grants.gov*, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with *Grants.gov* as an AOR. Details on these steps are outlined at the following *Grants.gov* Web page: *www.grants.gov/web/grants/register.html.*

7. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. Electronic Submission of Applications

Applications for grants under the MSEIP, CFDA number 84.120A, must be submitted electronically using the Governmentwide *Grants.gov* Apply site at *www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the MSEIP at *www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.120, not 84.120A).

Please note the following:

- When you enter the *Grants.gov* site, you will find information about submitting an application electronically through the site, as well as the hours of operation.

Applications received by *Grants.gov* are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the *Grants.gov* system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the *Grants.gov* system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from *Grants.gov*, we will notify you if we are rejecting your application because it was date and time stamped by the *Grants.gov* system after 4:30:00 p.m., Washington, DC time, on the application deadline date.

- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through *Grants.gov*.
- You should review and follow the Education Submission Procedures for submitting an application through *Grants.gov* that are included in the application package for this competition to ensure that you submit your application in a timely manner to the *Grants.gov* system. You can also find the Education Submission Procedures pertaining to *Grants.gov* under News and Events on the Department's G5 system home page at *www.G5.gov.* In addition, for specific guidance and procedures for submitting an application through *Grants.gov*, please refer to the *Grants.gov* Web site at: *www.grants.gov/web/grants/applicants/apply-for-grants.html.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a read-only, non-modifiable Portable Document Format (PDF). Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF (*e.g.,* Word, Excel, WordPerfect, etc.) or submit a password-protected file, we will not review that material. Please note that this could result in your application not being considered for funding because the material in question—for example, the application narrative—is critical to a meaningful review of your proposal. For that reason it is important to allow yourself adequate time to upload all material as PDF files. The Department

will not convert material from other formats to PDF. Additional, detailed information on how to attach files is in the application instructions.

• Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from *Grants.gov* an automatic notification of receipt that contains a *Grants.gov* tracking number. This notification indicates receipt by *Grants.gov* only, not receipt by the Department. *Grants.gov* will also notify you automatically by email if your application met all the *Grants.gov* validation requirements or if there were any errors (such as submission of your application by someone other than a registered Authorized Organization Representative, or inclusion of an attachment with a file name that contains special characters). You will be given an opportunity to correct any errors and resubmit, but you must still meet the deadline for submission of applications.

Once your application is successfully validated by *Grants.gov*, the Department will retrieve your application from *Grants.gov* and send you an email with a unique PR/Award number for your application.

These emails do not mean that your application is without any disqualifying errors. While your application may have been successfully validated by *Grants.gov*, it must also meet the Department's application requirements as specified in this notice and in the application instructions. Disqualifying errors could include, for instance, failure to upload attachments in read-only, non-modifiable PDF; failure to submit a required part of the application; or failure to meet applicant eligibility requirements. It is your responsibility to ensure that your submitted application has met all of the Department's requirements.

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through *Grants.gov*, please contact the *Grants.gov* Support Desk, toll free, at 1–800–518–4726. You must obtain a *Grants.gov* Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the *Grants.gov* system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with *Grants.gov*, along with the *Grants.gov* Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the *Grants.gov* system and that the problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. We will contact you after we determine whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the *Grants.gov* system. We will not grant you an extension if you failed to fully register to submit your application to *Grants.gov* before the application deadline date and time or if the technical problem you experienced is unrelated to the *Grants.gov* system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the *Grants.gov* system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the *Grants.gov* system;

and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Dr. Bernadette Hence, U.S. Department of Education, 400 Maryland Avenue SW., Room 4C115, Washington, DC 20202. Fax: (202) 502–7861.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. Submission of Paper Applications by Mail

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.120A), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

We will not consider applications postmarked after the deadline date.

c. Submission of Paper Applications by Hand Delivery

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.120A), 550 12th Street SW., Room 7039, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time,

except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from 34 CFR 637.32(a) through (j). Applicants should address each of the selection criteria. The total weight of the selection criteria is 100 points; the weight of each criterion is noted in parentheses. Please see the application package for a detailed explanation of these criteria. The selection criteria are as follows:

(a) Identification of need for the project (Total 5 points).

(b) Plan of operation (Total 20 points).

(c) Quality of key personnel (Total 5 points).

(d) Budget and cost effectiveness (Total 10 points).

(e) Evaluation plan (Total 15 points).

(f) Adequacy of resources (Total 5 points).

(g) Potential institutional impact of the project (Total 15 points).

(h) Institutional commitment to the project (Total 5 points).

(i) Expected outcomes (Total 10 points).

(j) Scientific and educational value of the proposed project (Total 10 points).

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

Tiebreaker for Institutional, Special Project, and Cooperative Grants. If there are insufficient funds for all applications with the same total scores, applications will receive preference in the following manner. The Secretary gives priority to applicants that have not previously received funding from the program and to previous grantees with a proven record of success, as well as to applications that contribute to achieving balance among funded projects with respect to: (1) Geographic region; (2) Academic discipline; and (3) Project type.

3. *Risk Assessment and Special Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose special conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $150,000), under 2 CFR 200.205(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through SAM. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection analysis and reporting. In this case the Secretary establishes a data collection period.

4. *Performance Measures:* The Secretary has established the following key performance measures for assessing the effectiveness of the MSEIP: (1) The percentage of change in the number of full-time, degree-seeking minority undergraduate students at the grantee's institution enrolled in the fields of engineering or physical or biological

sciences, compared to the average minority enrollment in the same fields in the three-year period immediately prior to the beginning of the current grant; and (2) the percentage of minority students enrolled at four-year minority institutions in the fields of engineering or physical or biological sciences who graduate within six years of enrollment. Please see the application package for details of data collection and reporting requirements for these measures.

5. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: Whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, the performance targets in the grantee's approved application.

In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contacts

FOR FURTHER INFORMATION CONTACT: Dr. Bernadette Hence, U.S. Department of Education, 400 Maryland Avenue SW., Room 4C115, Washington, DC 20202. Telephone: (202) 453–7913 or by email: *Bernadette.hence@ed.gov.*

If you use a TDD or a TTY, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* Braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format. To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: October 18, 2016.

Lynn B. Mahaffie,

Deputy Assistant Secretary for Policy, Planning, and Innovation, Delegated the Duties of the Assistant Secretary for Postsecondary Education.

[FR Doc. 2016–25539 Filed 10–20–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Nevada

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Nevada. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, November 9, 2016—4:00 p.m.

ADDRESSES: Clark County Government Center, 500 South Grand Central Parkway, Las Vegas, Nevada 89155.

FOR FURTHER INFORMATION CONTACT: Barbara Ulmer, Board Administrator, 232 Energy Way, M/S 167, North Las Vegas, Nevada 89030. Phone: (702) 630–0522; Fax (702) 295–2025 or Email: *NSSAB@nnsa.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

1. Briefing and Recommendation Development for Clean Slate II Path Forward—Work Plan Item #2
2. Election of Vice-Chair

Public Participation: The EM SSAB, Nevada, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Barbara Ulmer at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral presentations pertaining to agenda items should contact Barbara Ulmer at the telephone number listed above. The request must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments can do so during the 15 minutes allotted for public comments.

Minutes: Minutes will be available by writing to Barbara Ulmer at the address listed above or at the following Web site: *http://www.nnss.gov/NSSAB/pages/MM_FY16.htm.*

Authority: Pub. L. 92–463, 86 Stat. 770.

Issued at Washington, DC on October 17, 2016.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2016–25462 Filed 10–20–16; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Proposed Agency Information Collection Extension With Changes

AGENCY: U.S. Energy Information Administration (EIA), U.S. Department of Energy.

ACTION: Notice and request for OMB review and comment.

SUMMARY: EIA has submitted an information collection request to the OMB for extension with changes, under the provisions of the Paperwork Reduction Act of 1995, for the Electric Power and Renewable Electricity Surveys (OMB Control Number 1905–0129) information collection. EIA requests a three-year clearance with changes for the following forms:

- Form EIA–63B, ''Photovoltaic Module Shipments Report''
- Form EIA–411, ''Coordinated Bulk Power Supply Program Report''
- Form EIA–826, ''Monthly Electric Utility Sales and Revenue Report with State Distributions'' (will be replaced by EIA–861M)
- Form EIA–860, ''Annual Electric Generator Report''
- Form EIA–860M, ''Monthly Update to the Annual Electric Generator Report''
- Form EIA–861, ''Annual Electric Power Industry Report''
- Form EIA–861S, ''Annual Electric Power Industry Report (Short Form)''

- Form EIA–861M, ''Monthly Electric Power Industry Report'' (will replace EIA–826)
- Form EIA–923, ''Power Plant Operations Report''
- Form EIA–930, ''Balancing Authority Operations Report''

DATES: Comments regarding this collection must be received on or before November 21, 2016. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, please advise the DOE Desk Officer at OMB of your intention to make a submission as soon as possible. The Desk Officer may be telephoned at 202–395–4718 or contacted by email at *Chad_S_Whiteman@omb.eop.gov.*

ADDRESSES: Written comments should be sent to the:

DOE Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10102, 735 17th Street NW., Washington, DC 20503, *Chad_S_Whiteman@omb.eop.gov*

And to

Rebecca Peterson, *Electricity2017@eia.gov*, U.S. Energy Information Administration, Mail Stop EI–23, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (Email is preferred)

FOR FURTHER INFORMATION CONTACT: Direct any requests for additional information or copies of the information collection instruments and instructions to Rebecca Peterson at *Electricity2017@eia.gov* or at 202–586–4509. The collection instruments and instructions are also available on the Internet at: *http://www.eia.gov/survey/changes/electricity/solar/.*

SUPPLEMENTARY INFORMATION: This information collection request contains:

(1) OMB No.: 1905–0129;

(2) Information Collection Request Title: Electricity and Renewables Power Surveys;

(3) Type of Request: Extension, with changes of a currently approved collection;

(4) Purpose: The electricity and renewables surveys collect data from entities involved in the production, transmission, delivery, and sale of electricity, and in maintaining the reliable operation of the power system. The data collected are the primary source of information on the nation's electric power industry. EIA uses the data collected on the electric power surveys to answer queries from the U.S. Congress, other federal and state agencies, the electric power industry, and the public; and as input to the National Energy Modeling System (NEMS) and to EIA's other forecasting and analytical activities. Other users of the data include policy makers, regulators, energy market analysts, and the energy industries.

Changes to the currently approved forms in this package can be summarized as follows:

- *Form EIA–63B:* Change from a monthly only to an annual and monthly collection and eliminate questions about photovoltaic cells which will result in a significant decrease in burden;
- *Form EIA–411:* Discontinue the collection of historical information associated with demand, capacity, transactions, and reserve margins;
- *Form EIA–826:* Discontinue this form and replace it with Form EIA–861M (see further below);
- *Form EIA–860:* Require plants in Puerto Rico to begin reporting and add questions concerning storage capacity, solar generators, virtual net metering agreements, and planned retirement dates of environmental equipment;
- *Form EIA–860M:* Add questions regarding net metering agreements involving newly operable solar generators;
- *Form EIA–861:* Add questions regarding small scale storage and virtual net metered capacity;
- *Form EIA–861 M (which replaces the Form EIA–826):* Add questions regarding capacity;
- *Form EIA–923:* Reduce the current monthly sample via a more efficient model-based cutoff design; require plants in Puerto Rico to begin reporting, remove data protection for coal and petroleum stocks, collect the mercury removal rate for environmental equipment, collect data from plants that are operating under test conditions;
- *Form EIA–930:* Require respondents to report hourly sub-regional demand, hourly net generation by standard fuel type, and their hourly total actual demand within 30 minutes (instead of the current 60 minutes) of the end of the data hour.

(5) Annual Estimated Number of Respondents: The annual estimated number of respondents on the electric and solar surveys is 16,770;

(6) Annual Estimated Number of Total Responses: The annual estimated number of total responses is 65,716;

(7) Annual Estimated Number of Burden Hours: The annual estimated number of burden hours is 152,120 which represents an increase of 10,975 burden hours from the prior renewal of this collection. Most of the overall change is driven by an overall 17-percent increase in survey respondents due to rapid growth in the electric power industry. To a smaller extent, the increase is due to additional questions that are needed on certain surveys to optimize data coverage while adding only a minimal increase in burden and to the requirement for plants in Puerto Rico to begin reporting on the Forms EIA–860 and EIA–923.

(8) Annual Estimated Reporting and Recordkeeping Cost burden: New respondents will incur a one-time total startup cost of $14,400. This will apply to the 25 power companies in Puerto Rico that will be new respondents (25 companies times 8 hours times $72.02 per hour, the current hourly rate for an EIA employee). EIA estimates that for each of these companies it will take 8 hours to configure their reporting systems, review instructions, search their data systems and receive authentication for EIA's Single Sign-on Internet Data Collection System in order to report electronically. Additional costs to respondents are not anticipated beyond costs associated with response burden. This information is maintained in the normal course of business. The total annual cost of burden hours to the respondents for all nine surveys is estimated to be $10,955,682 (152,120 burden hours times $72.02 per hour). Other than the cost of burden hours, EIA estimates that there are no additional costs for generating, maintaining, and providing the information.

Statutory Authority: Section 13(b) of the Federal Energy Administration Act of 1974, Pub. L. 93–275, codified at 15 U.S.C. 772(b).

Issued in Washington, DC, October 14, 2016.

Nanda Srinivasan,

Director, Office of Survey Development and Statistical Integration, U.S. Energy Information Administration.

[FR Doc. 2016–25504 Filed 10–20–16; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Oak Ridge Reservation

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Oak Ridge Reservation.

DATES: Wednesday, November 9, 2016, 6:00 p.m.

ADDRESSES: Department of Energy Information Center, Office of Science

and Technical Information, 1 Science.gov Way, Oak Ridge, Tennessee 37831.

FOR FURTHER INFORMATION CONTACT: Melyssa P. Noe, Alternate Deputy Designated Federal Officer, U.S. Department of Energy, Oak Ridge Office of Environmental Management, P.O. Box 2001, EM–942, Oak Ridge, TN 37831. Phone (865) 241–3315; Fax (865) 241–6932; E-Mail: *Melyssa.Noe@orem.doe.gov.* Or visit the Web site at *www.energy.gov/orssab.*

SUPPLEMENTARY INFORMATION: The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda:

- Welcome and Announcements
- Comments from the Deputy Designated Federal Officer (DDFO)
- Comments from the DOE, Tennessee Department of Environment and Conservation, and Environmental Protection Agency Liaisons
- Public Comment Period
- Discussion: Excess Contaminated Facilities
- Additions/Approval of Agenda
- Motions/Approval of October 12, 2016 Meeting Minutes
- Status of Recommendations with DOE
- Committee Reports
- Alternate DDFO Report
- Adjourn

Public Participation: The EM SSAB, Oak Ridge, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Melyssa P. Noe at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to the agenda item should contact Melyssa P. Noe at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Melyssa P. Noe at the address and phone number listed above. Minutes will also be available at the following Web site: *www.energy.gov/orssab.*

Issued at Washington, DC, on October 17, 2016.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2016–25463 Filed 10–20–16; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: CP16–503–000.
Applicants: UGI Storage Company and UGI Central Penn Gas, Inc.
Description: Abbreviated Joint Application of UGI Storage Company and UGI Central Penn Gas, Inc. to Abandon Capacity Lease and Amend Certificate.
Filed Date: 9/22/16.
Accession Number: 20160922–5054.
Comments Due: 5 p.m. ET 10/13/16.

Docket Numbers: RP16–1242–000.
Applicants: Kern River Gas Transmission Company.
Description: § 4(d) Rate Filing: 2016 Misc Updates Third Rev Col 1 to be effective 10/24/2016.
Filed Date: 9/22/16.
Accession Number: 20160922–5059.
Comments Due: 5 p.m. ET 10/4/16.

Docket Numbers: RP16–1243–000.
Applicants: ANR Storage Company.
Description: Compliance filing Compliance to RP16–1030–000 to be effective 7/1/2016.
Filed Date: 9/22/16.
Accession Number: 20160922–5074.
Comments Due: 5 p.m. ET 10/4/16.

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.

Filings in Existing Proceedings

Docket Numbers: RP16–1168–001.
Applicants: Midcontinent Express Pipeline LLC.
Description: Compliance filing Buy Out Language Filing Compliance to be effective 9/10/2016.
Filed Date: 9/20/16.
Accession Number: 20160920–5051.
Comments Due: 5 p.m. ET 10/3/16.

Any person desiring to protest in any of the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

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 September 22, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–25456 Filed 10–20–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2179–032.
Applicants: Calvert Cliffs Nuclear Power Plant, LLC.
Description: Notice of Non-Material Change in Status of Calvert Cliffs Nuclear Power Plant, LLC.
Filed Date: 10/17/16.
Accession Number: 20161017–5082.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER10–2756–006; ER10–2757–006.
Applicants: Arlington Valley, LLC, Griffith Energy LLC.
Description: Supplement to June 30, 2016 Triennial Market Power Update for the Southwest Region of Arlington Valley, LLC, et al.
Filed Date: 10/17/16.
Accession Number: 20161017–5109.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER13–1641–003; ER15–1045–003.
Applicants: Chestnut Flats Lessee, LLC, Pilot Hill Wind, LLC.
Description: Notice of Non-Material Change in Status of Chestnut Flats Lessee, LLC, et al.

Filed Date: 10/17/16.
Accession Number: 20161017–5105.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER15–2589–000.
Applicants: CPV Shore, LLC.
Description: Report Filing: Refund Report to be effective N/A.
Filed Date: 10/17/16.
Accession Number: 20161017–5113.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER16–896–001; ER16–899–001.
Applicants: Orange and Rockland Utilities, Inc.
Description: Notification of Completion of Transaction and Effective Date of Cancellation of Orange and Rockland Utilities, Inc., et al.
Filed Date: 9/29/16.
Accession Number: 20160929–5203.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER16–1483–004.
Applicants: California Independent System Operator Corporation.
Description: Compliance filing: 2016–10–17 Compliance Filing with Sept. 16 Order Frequency Response to be effective 8/15/2016.
Filed Date: 10/17/16.
Accession Number: 20161017–5138.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER16–2643–001.
Applicants: Panda Stonewall LLC.
Description: Tariff Amendment: Supplement to Market-Based Rate Application to be effective 11/21/2016.
Filed Date: 10/17/16.
Accession Number: 20161017–5084.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER17–116–000.
Applicants: ISO New England Inc.
Description: § 205(d) Rate Filing: 2017 Capital Budget and Revised Tariff Sheets for Recovery of 2017 Admin. Costs to be effective 1/1/2017.
Filed Date: 10/17/16.
Accession Number: 20161017–5052.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER17–117–000.
Applicants: Wisconsin Electric Power Company.
Description: § 205(d) Rate Filing: Wisconsin Electric—UMERC Formula Rate Service Agreement No 3 to be effective 1/1/2017.
Filed Date: 10/17/16.
Accession Number: 20161017–5070.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER17–118–000.
Applicants: Wisconsin Public Service Corporation.
Description: § 205(d) Rate Filing: WPS Corp Filing of Rate Schedule No. 94 for Wholesale Distribution Service to be effective 1/1/2017.
Filed Date: 10/17/16.
Accession Number: 20161017–5071.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER17–119–000.
Applicants: Wisconsin Public Service Corporation.
Description: § 205(d) Rate Filing: WPS Corp Filing of Service Agreement No. 12 under its Rate Schedule W–1A to be effective 1/1/2017.
Filed Date: 10/17/16.
Accession Number: 20161017–5072.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER17–120–000.
Applicants: Upper Michigan Energy Resources Corporation.
Description: Baseline eTariff Filing: UMERC to Wisconsin Electric Rate Schedule No. 1 to be effective 1/1/2017.
Filed Date: 10/17/16.
Accession Number: 20161017–5080.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER17–121–000.
Applicants: Upper Michigan Energy Resources Corporation.
Description: § 205(d) Rate Filing: UMERC to Wisconsin Public Service Rate Schedule No. 2 to be effective 1/1/2017.
Filed Date: 10/17/16.
Accession Number: 20161017–5081.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER17–122–000.
Applicants: ISO New England Inc.
Description: ISO New England Inc. submits Third Quarter 2016 Capital Budget Report.
Filed Date: 10/17/16.
Accession Number: 20161017–5083.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER17–123–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Queue Position AA1–121, Original Service Agreement No. 4565 to be effective 9/15/2016.
Filed Date: 10/17/16.
Accession Number: 20161017–5086.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER17–124–000.
Applicants: Tucson Electric Power Company.
Description: Compliance filing: Order 819 Compliance Filing to be effective 2/25/2016.
Filed Date: 10/17/16.
Accession Number: 20161017–5107.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER17–125–000.
Applicants: UniSource Energy Development Company.
Description: Compliance filing: Order No. 819 Compliance Filing to be effective 2/25/2016.
Filed Date: 10/17/16.
Accession Number: 20161017–5108.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER17–126–000.
Applicants: UNS Electric, Inc.
Description: Compliance filing: Order No. 819 Compliance Filing to be effective 2/25/2016.
Filed Date: 10/17/16.
Accession Number: 20161017–5110.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER17–127–000.
Applicants: Portal Ridge Solar B, LLC.
Description: § 205(d) Rate Filing: SFA and CTA Agreement to be effective 11/4/2016.
Filed Date: 10/17/16.
Accession Number: 20161017–5121.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER17–128–000.
Applicants: Portal Ridge Solar C, LLC.
Description: § 205(d) Rate Filing: SFA Concurrence filing to be effective 11/4/2016.
Filed Date: 10/17/16.
Accession Number: 20161017–5127.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER17–129–000.
Applicants: Portal Ridge Solar C, LLC.
Description: § 205(d) Rate Filing: CTA Concurrence filing to be effective 11/4/2016.
Filed Date: 10/17/16.
Accession Number: 20161017–5130.
Comments Due: 5 p.m. ET 11/7/16.

Docket Numbers: ER17–130–000.
Applicants: Northampton Generating Company, L.P.
Description: § 205(d) Rate Filing: Northampton Generating Co. Change in Status supplemental filing—Clone to be effective 9/16/2016.
Filed Date: 10/17/16.
Accession Number: 20161017–5140.
Comments Due: 5 p.m. ET 11/7/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 17, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–25515 Filed 10–20–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Number: PR17–2–000.
Applicants: Eagle Ford Midstream, LP.
Description: Tariff filing per 284.123(b)(2) + (g): Petition for NGPA Section 311 Rate Approval to be effective 10/11/2016; Filing Type: 1310.
Filed Date: 10/11/2016.
Accession Number: 20161011–5302.
Comments Due: 5 p.m. ET 11/1/16.
284.123(g) Protests Due: 5 p.m. ET 12/12/16.

Docket Numbers: RP17–20–000.
Applicants: Chesapeake Energy Marketing, L.L.C., Core Appalachia Midstream, LLC.
Description: Joint Petition of Chesapeake Energy Marketing, L.L.C. and Core Appalachia Midstream LLC for Limited Waiver and Request for Expedited Action.
Filed Date: 10/11/16.
Accession Number: 20161011–5327.
Comments Due: 5 p.m. ET 10/18/16.

Docket Numbers: RP17–21–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: § 4(d) Rate Filing: AIM In-Service Compliance Filing CP14–96–000 to be effective 11/1/2016.
Filed Date: 10/12/16.
Accession Number: 20161012–5131.
Comments Due: 5 p.m. ET 10/24/16.

Docket Numbers: RP17–22–000.
Applicants: Viking Gas Transmission Company.
Description: § 4(d) Rate Filing: Update Non-Conforming Agreements—November 2016 to be effective 11/1/2016.
Filed Date: 10/12/16.
Accession Number: 20161012–5154.
Comments Due: 5 p.m. ET 10/24/16.

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 date(s). Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP16–1205–001.
Applicants: Florida Gas Transmission Company, LLC.
Description: Compliance filing Compliance with RP16–1205–000 Order.
Filed Date: 10/12/16.
Accession Number: 20161012–5142.
Comments Due: 5 p.m. ET 10/24/16.

Any person desiring to protest in any of the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

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 October 13, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–25457 Filed 10–20–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC17–13–000.
Applicants: ITC Midwest LLC.
Description: Application of ITC Midwest LLC for Approval of Acquisition of Assets Pursuant to Section 203 of the Federal Power Act.
Filed Date: 10/17/16.
Accession Number: 20161017–5036.
Comments Due: 5 p.m. ET 11/7/16.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG17–13–000.
Applicants: ESS Snook Project, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of ESS Snook Project, LLC.
Filed Date: 10/14/16.
Accession Number: 20161014–5145.
Comments Due: 5 p.m. ET 11/4/16.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER16–1637–001.
Applicants: UIL Distributed Resources, LLC.
Description: Report Filing: Supplement to Refund Report to be effective N/A.
Filed Date: 10/14/16.
Accession Number: 20161014–5165.
Comments Due: 5 p.m. ET 11/4/16.

Docket Numbers: ER17–79–001.
Applicants: Portland General Electric Company.
Description: Compliance filing: Errata to Combined Order 827 and 828 Compliance Filing to be effective 10/14/2016.
Filed Date: 10/14/16.
Accession Number: 20161014–5118.
Comments Due: 5 p.m. ET 11/4/16.

Docket Numbers: ER17–96–001.
Applicants: ISO New England Inc.
Description: Tariff Amendment: Part 2 of Two-Part Filing to Update Eff Date of Accepted Demand Response Changes to be effective 6/1/2018.
Filed Date: 10/14/16.
Accession Number: 20161014–5116.
Comments Due: 5 p.m. ET 11/4/16.

Docket Numbers: ER17–104–000.
Applicants: Broadview Energy KW, LLC.
Description: Baseline eTariff Filing: Application for Market-Based Rate Tariff and Waivers to be effective 12/1/2016.
Filed Date: 10/14/16.
Accession Number: 20161014–5154.
Comments Due: 5 p.m. ET 11/4/16.

Docket Numbers: ER17–105–000.
Applicants: Broadview Energy JN, LLC.
Description: Baseline eTariff Filing: Application for Market-Based Rate Tariff and Waivers to be effective 12/1/2016.
Filed Date: 10/14/16.
Accession Number: 20161014–5157.
Comments Due: 5 p.m. ET 11/4/16.

Docket Numbers: ER17–106–000.
Applicants: Broadview Energy KW, LLC.
Description: § 205(d) Rate Filing: Common Facilities Agreement to be effective 12/1/2016.
Filed Date: 10/14/16.
Accession Number: 20161014–5162.
Comments Due: 5 p.m. ET 11/4/16.

Docket Numbers: ER17–107–000.
Applicants: Southwest Power Pool, Inc.
Description: Compliance filing: Orders 827 and 828 Compliance Filing Revising GIA Proforma to be effective 9/21/2016.
Filed Date: 10/14/16.
Accession Number: 20161014–5175.
Comments Due: 5 p.m. ET 11/4/16.

Docket Numbers: ER17–108–000.
Applicants: PJM Interconnection, L.L.C.

Description: Compliance filing: PJM Submits Compliance Filing re: RM16–1–000 and RM16–8–000 Order 827 and 828 to be effective 11/1/2016.
Filed Date: 10/14/16.
Accession Number: 20161014–5178.
Comments Due: 5 p.m. ET 11/4/16.

Docket Numbers: ER17–109–000.
Applicants: Alcoa Power Generating Inc.
Description: Compliance filing: Yadkin Division Order Nos. 827 and 828 Compliance Filing to be effective 10/14/2016.
Filed Date: 10/14/16.
Accession Number: 20161014–5180.
Comments Due: 5 p.m. ET 11/4/16.

Docket Numbers: ER17–110–000.
Applicants: California Independent System Operator Corporation.
Description: § 205(d) Rate Filing: 2016–10–14 Aliso Canyon Phase 2 Enhancements to be effective 11/30/2016.
Filed Date: 10/14/16.
Accession Number: 20161014–5183.
Comments Due: 5 p.m. ET 10/24/16.

Docket Numbers: ER17–111–000.
Applicants: Black Hills Power, Inc.
Description: Compliance filing: Order Nos. 827 and 828 Compliance Filing to be effective 10/14/2016.
Filed Date: 10/14/16.
Accession Number: 20161014–5188.
Comments Due: 5 p.m. ET 11/4/16.

Docket Numbers: ER17–112–000.
Applicants: Black Hills/Colorado Electric Utility Company, LP.
Description: Compliance filing: Order Nos. 827 and 828 Compliance Filing to be effective 10/14/2016.
Filed Date: 10/14/16.
Accession Number: 20161014–5189.
Comments Due: 5 p.m. ET 11/4/16.

Docket Numbers: ER17–113–000.
Applicants: Cheyenne Light, Fuel and Power Company.
Description: Compliance filing: Order Nos. 827 and 828 Compliance Filing to be effective 10/14/2016.
Filed Date: 10/14/16.
Accession Number: 20161014–5191.
Comments Due: 5 p.m. ET 11/4/16.

Docket Numbers: ER17–114–000.
Applicants: California Independent System Operator Corporation.
Description: Compliance filing: 2016–10–14 Compliance Order No. 827 and 828 to be effective 9/21/2016.
Filed Date: 10/14/16.
Accession Number: 20161014–5193.
Comments Due: 5 p.m. ET 11/4/16.

Docket Numbers: ER17–115–000.
Applicants: Wisconsin Electric Power Company.
Description: § 205(d) Rate Filing: Wisconsin Electric—UMERC Wholesale Distribution Agreement Rate Schedule 136 to be effective 1/1/2017.
Filed Date: 10/17/16.
Accession Number: 20161017–5044.
Comments Due: 5 p.m. ET 11/7/16.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES17–4–000.
Applicants: Mid-Atlantic Interstate Transmission, LLC.
Description: Application of Mid-Atlantic Interstate Transmission, LLC for Authorization Under Section 204 of the Federal Power Act, et al.
Filed Date: 10/14/16.
Accession Number: 20161014–5210.
Comments Due: 5 p.m. ET 11/4/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 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: October 17, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–25514 Filed 10–20–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER16–1518–000]

Supplemental Notice of Agenda and Discussion Topics for Staff Technical Conference; California Independent System Operator Corporation

This notice establishes the agenda and topics for discussion at the technical conference to be held on October 28, 2016 to discuss the technical challenges California Independent System Operator Corporation (CAISO) has described related to the implementation of economic bidding at Energy Imbalance Market (EIM) external interties.[1] The conference will be held on October 28, 2016, at the Commission's offices at 888 First Street NE., Washington, DC 20426 from 10 a.m. to approximately 4 p.m. (Eastern Time). The conference will be led by Commission staff and Commissioners might attend.

The purpose of the technical conference is to provide Commission staff and interested parties an opportunity to discuss impediments to and solutions for implementing economic bidding at the EIM external interties. The topics to be discussed during this conference are attached.

This conference will be transcribed. Transcripts will be available for a fee from Ace Reporting Company (202–347–3700). Advance registration is not required but is encouraged. Attendees may register, indicating attendance in person or via listen-only telephone line, at the following Web page: *https://www.ferc.gov/whats-new/registration/10-28-16-form.asp.* If you require a telephone line, please register no later than October 24, 2016 to be emailed the call-in information one day before the conference. Information on this event will be posted on the Calendar of Events on the Commission's Web site, *www.ferc.gov,* prior to the event.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–502–8659 (TTY), or send a FAX to 202–208–2106 with the required accommodations.

For more information about this conference, please contact:

Sarah McKinley, Office of External Affairs,(202) 502–8368, *sarah.mckinley@ferc.gov*, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Linda Kizuka Office of the General Counsel, 202–502–8773, *linda.kizuka@ferc.gov*, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Jennifer Shipley, Office of Energy Market Regulation, (202) 502–6822, *jennifer.shipley@ferc.gov*, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

[1] *See Cal. Indep. Sys. Operator Corp.*, 155 FERC ¶ 61,329, at P 38 (2016) (June 30 Order).

Dated: October 17, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–25516 Filed 10–20–16; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9029–7]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7146 or *http://www.epa.gov/nepa*.

Weekly receipt of Environmental Impact Statements (EISs)

Filed 10/10/2016 Through 10/14/2016

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *http://www.epa.gov/compliance/nepa/eisdata.html*.

EIS No. 20160237, Final, USFS, FL, Beasley Pond Analysis Area, *Review Period Ends:* 12/05/2016, *Contact:* Branden Tolver 850–926–3561.

EIS No. 20160238, Final, NPS, NY, Fire Island National Seashore General Management Plan, *Review Period Ends:* 11/21/2016, *Contact:* Kaetlyn Jackson 631–687–4770.

EIS No. 20160239, Draft, USFS, OR, Ten Cent Community Wildfire Protection Project, *Comment Period Ends:* 12/05/2016, *Contact:* Andrew Stinchfield 541–427–5397.

EIS No. 20160240, Draft, BR, CA, Long-Term Plan to Protect Adult Salmon in the Lower Klamath River, *Comment Period Ends:* 12/05/2016, *Contact:* Julia Long 530–276–2044.

EIS No. 20160241, Final, BLM, WA, Vantage to Pomona Heights 230kV Transmission Line Project, *Review Period Ends:* 11/21/2016, *Contact:* Robin Estes 541–416–6728.

EIS No. 20160242, Draft, NMFS, NAT, Amendment 5b to the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan, *Comment Period Ends:* 12/22/2016, *Contact:* Margo Schulze-Haugen 301–427–8503.

EIS No. 20160243, Draft, USFWS, CA, Otay River Estuary Restoration Project San Diego Bay National Wildlife Refuge, *Comment Period Ends:* 12/05/2016, *Contact:* Brian Collins 619–575–2704, extension 302.

EIS No. 20160244, Final, NOAA, AK, Effects of Oil and Gas Activities in the Arctic Ocean, *Review Period Ends:* 11/21/2016, *Contact:* Jolie Harrison 301–427–8401.

EIS No. 20160245, Final, BR, MT, Lower Yellowstone Intake Diversion Dam Fish Passage Project, Montana, *Review Period Ends:* 11/21/2016, *Contact:* Tiffany Vanosdall 402–995–2695.

Amended Notices

EIS No. 20160197, Draft, NOAA, HI, Heeia National Estuarine Research Reserve, *Comment Period Ends:* 10/30/2016, *Contact:* Jean Tanimoto 808–725–5253. Revision to the FR Notice Published 09/02/2016; Extending Comment Period from 10/17/2016 to 10/30/2016.

Dated: October 18, 2016.

Dawn Roberts,

Management Analyst, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2016–25533 Filed 10–20–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2013–0119; FRL–9951–58–OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Motor Vehicle and Engine Compliance Program Fees (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), ''Motor Vehicle and Engine Compliance Program Fees (Renewal)'' (EPA ICR No. 2080.06, OMB Control No. 2060–0545) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a proposed extension of the ICR, which is currently approved through October 31, 2016. Public comments were previously requested via the **Federal Register** (81 FR 19604) on April 5, 2016 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before November 21, 2016.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OAR–2013–0019, to (1) EPA online using *www.regulations.gov* (our preferred method), by email to *a-and-r-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB via email to *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Lynn Sohacki, Compliance Division, Office of Transportation and Air Quality, Environmental Protection Agency, 2000 Traverwood, Ann Arbor, Michigan 48105; telephone number: 734–214–4851; email address: *sohacki.lynn@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: As required by the Clean Air Act, EPA has regulations establishing emission standards and other requirements for various classes of vehicles, engines, and evaporative emissions. These regulations require that compliance be demonstrated prior to EPA granting a ''Certificate of Conformity.'' EPA charges fees for administering this certification program. In 2004 the fees program was expanded to include non-road categories of vehicles and engines, such as several categories of marine engines, locomotives, non-road recreational vehicles, and many non-road compression-ignition and spark-ignition engines. Manufacturers and importers of covered vehicles, engines and components are required to pay the applicable certification fees prior to their certification applications being reviewed. Under section 208 of the Clean Air Act (42 U.S.C. 7542(c)) all

information, other than trade secret processes or methods, must be publicly available. Information about fee payments is treated as confidential information prior to certification.

Form Numbers: 3520–29.

Respondents/affected entities: Manufacturers or importers of motor vehicles and engines.

Respondent's obligation to respond: Required to obtain or retain a benefit (40 CFR part 1027).

Estimated number of respondents: 597 (total).

Frequency of response: Annually, On occasion.

Total estimated burden: 927 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $59,683 (per year), includes $9,965 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is a decrease of 586 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This decrease is due to an increase in the number of online fee forms from manufacturers.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2016–25494 Filed 10–20–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OGC–2016–0613; FRL–9954–39–OGC]

Proposed Settlement Agreement, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed settlement agreement; request for public comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended (''CAA'' or the ''Act''), notice is hereby given of a proposed settlement agreement to address a lawsuit filed by the Center for Biological Diversity, Association of Irritated Residents, and Sierra Club (Plaintiffs), in the United States District Court for the Northern District of California: *Center For Biological Diversity et al.* v. *United States Environmental Protection Agency et al.* No. 4:16–cv–01946–SBA (N.D. Cal.). On April 14, 2016, Plaintiffs filed a complaint alleging that Gina McCarthy, in her official capacity as Administrator of the United States Environmental Protection Agency, and Jared Blumenfeld, in his official capacity as Regional Administrator of the United States Environmental Protection Agency (collectively, ''EPA''), failed to perform a nondiscretionary duty to grant or deny within 60 days a petition submitted by Plaintiffs on December 16, 2014, requesting that EPA object to an Authority to Construct/Certificate of Conformity issued by the San Joaquin Valley Air Pollution Control District to the Alon USA—Bakersfield, California Refinery Facility. The proposed settlement agreement would establish two deadlines for EPA to take specified action.

DATES: Written comments on the proposed settlement agreement must be received by *November 21, 2016.*

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2016–0613, online at *www.regulations.gov.* For comments submitted at *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 generally will 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, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For 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: Dan Conrad, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone: (202) 564–0903; email address: *conrad.daniel@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Settlement Agreement

The proposed settlement agreement would resolve a lawsuit filed by the Plaintiffs seeking to compel the Administrator to take actions under CAA section 505(b)(2). Under the terms of the proposed settlement agreement, EPA would agree to sign its response granting or denying one specified section of the petition filed by Plaintiffs regarding the Alon USA—Bakersfield, California Refinery Facility on or before December 30, 2016. Additionally, EPA would agree to sign its response granting or denying two other specified sections of the petition filed by Plaintiffs regarding the Alon USA—Bakersfield, California Refinery Facility on or before July 31, 2016.

Under the terms of the proposed settlement agreement, EPA would expeditiously deliver notice of EPA's responses to the Office of the Federal Register for review and publication following signature of each response. In addition, the proposed settlement agreement sets out a framework for resolving any request for costs of litigation, including attorney fees.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed settlement agreement from persons who are not named as parties or intervenors to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed settlement agreement if the comments disclose facts or considerations that indicate that such agreement is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determines that consent to this settlement agreement should be withdrawn, the terms of the settlement agreement will be affirmed.

II. Additional Information About Commenting on the Proposed Settlement Agreement

A. How can I get a copy of the settlement agreement?

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2016–0613) contains a copy of the proposed settlement agreement. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through

www.regulations.gov. You may use *www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search.''

It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at *www.regulations.gov* without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider such late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment and with any disk or CD–ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *www.regulations.gov* Web site to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (email) system is not an ''anonymous access'' system. If you send an email comment directly to the Docket without going through *www.regulations.gov,* your email address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: October 15, 2016.

Gautam Srinivasan,

Acting Associate General Counsel.

[FR Doc. 2016–25513 Filed 10–20–16; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that at 10:29 a.m. on Wednesday, October 19, 2016, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider matters related to the Corporation's supervision and resolution activities.

In calling the meeting, the Board determined, on motion of Director Thomas J. Curry (Comptroller of the Currency), seconded by Director Richard Cordray (Director, Consumer Financial Protection Bureau), concurred in by Vice Chairman Thomas M. Hoenig and Chairman Martin J. Gruenberg, that Corporation business required its consideration of the matters which were to be the subject of this meeting on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b(c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B).

Dated: October 19, 2016.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2016–25652 Filed 10–19–16; 4:15 pm]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 15, 2016.

A. Federal Reserve Bank of Atlanta (Chapelle Davis, Assistant Vice President) 1000 Peachtree Street NE., Atlanta, Georgia 30309. Comments can also be sent electronically to *Applications.Comments@atl.frb.org:*

1. *Clayton HC, Inc.,* Knoxville, Tennessee; and its subsidiaries, Apex Bancorp and Apex Bank, both in Camden, Tennessee; to acquire American Patriot Bank, Greeneville, Tennessee.

Board of Governors of the Federal Reserve System, October 17, 2016.

Michele Taylor Fennell,

Assistant Secretary of the Board.

[FR Doc. 2016–25439 Filed 10–20–16; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 16, 2016.

A. Federal Reserve Bank of St. Louis (David L. Hubbard, Senior Manager) P.O. Box 442, St. Louis, Missouri 63166–2034. Comments can also be sent electronically to *Comments.applications@stls.frb.org:*

1. *First Community Bancshares,* Inc., Batesville, Arkansas; to merge with Little River Bancshares, Inc., and thereby indirectly acquire Little River Bank, both in Lepanto, Arkansas.

B. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *First York Ban Corp,* York Nebraska; to acquire Swedlund Management Company, and thereby indirectly acquire Murray State Bank, both in Murray, Nebraska; and merge Murray State Bank with Cornerstone Bank, York, Nebraska.

Board of Governors of the Federal Reserve System, October 18, 2016.

Michele Taylor Fennell,

Assistant Secretary of the Board.

[FR Doc. 2016–25510 Filed 10–20–16; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Committee to the Director (ACD), Centers for Disease Control and Prevention (CDC)

Correction: This notice was published in the **Federal Register** on August 30, 2016, Volume 81, Number 168, Page 59626. The meeting location should read as follows:

Place: CDC, Building 24, Conference Room 01103A/B, 1600 Clifton Road NE., Atlanta, Georgia 30329.

Contact Person for More Information: Carmen Villar, MSW, Designated Federal Officer, ACD, CDC, 1600 Clifton Road NE., M/S D–14, Atlanta, Georgia 30329. Telephone (404) 498–6482, Email: *ACDirector@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2016–25453 Filed 10–20–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10635]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates 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.

DATES: Comments must be received by December 20, 2016.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number ____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995.*

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: Reports Clearance Office at (410) 786–1326.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10635 Montana Health and Economic Livelihood Partnership (HELP) Federal Evaluation

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* Montana Health and Economic Livelihood Partnership (HELP) Federal Evaluation; *Use:* CMS approved the Montana Health and Economic Livelihood Partnership (HELP) demonstration in November 2015. The demonstration provides flexibility for the expanded Medicaid population under the Affordable Care Act for individuals in the state of Montana (hereinafter, ''State'' or ''Montana'').

Montana expects to achieve the following: (1) Premiums and copayment liability that will encourage HELP Program enrollees to be discerning health care purchasers, take personal responsibility for their health care decisions and develop health-conscious behaviors as consumers of health care services; (2) 12 month continuous eligibility to improve continuity of care. The State also seeks to demonstrate the following over the life of the demonstration: (1) Premiums will not pose a barrier to accessing care for HELP Program beneficiaries; (2) HELP Program enrollees will exhibit health-conscious health care behaviors without harming beneficiary health; and (3) 12 month continuous eligibility will promote continuity of coverage and reduce churning rates.

The demonstration includes the authority to charge premiums of 2 percent of household income to individuals in the new adult group with incomes between 50 and 133 percent of the FPL. The state will credit such individuals' premium obligation towards copayments due. Non-payment of premiums may result in disenrollment for individuals with incomes above 100 percent of the FPL after notice and a grace period. Individuals at or below 100 percent who stop paying premiums will not be disenrolled.

To adequately inform CMS decision-making regarding Section 1115 Demonstrations, this federal evaluation of Montana's HELP demonstration includes surveys and associated focus groups, and informational interviews conducted during site visits and via phone.

Form Number: CMS–10635 (OMB control number: 0938—New); *Frequency:* Once and on occasion; *Affected Public:* Individuals and Households, Business or other for-profits and Not-for-profits institutions, and State, Local, or Tribal Governments; *Number of Respondents:* 1,458; *Total Annual Responses:* 1,458; *Total Annual Hours:* 497. (For policy questions regarding this collection contact Serge King at 410–786–6052.)

Dated: October 18, 2016.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2016–25547 Filed 10–20–16; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

[CFDA Number: 93.576]

Announcement of the Award of 38 Single-Source Low-Cost Extension Supplement Grants Under the Refugee School Impact Grant Program

AGENCY: Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS).

ACTION: Notice of award of 38 single-source low-cost extension supplement grants under the Refugee School Impact Grant Program.

SUMMARY: ACF, ORR announces the award of 38 single-source low-cost extension supplement grants for a total of 2,500,000 under the Refugee School Impact Grant Program.

State	Grantee	Amount
Alaska	Catholic Social Services	$25,736
Arizona	Arizona Department of Social Security	102,972
California	California Department of Social Services	171,426
Colorado	Colorado Department of Human Services	67,332
Connecticut	Connecticut Department of Social Services	25,736
Florida	Florida Department of Children and Families	171,426
Georgia	Georgia Department of Human Services	108,709
Idaho	Jannus Inc.	32,098
Illinois	Illinois Department of Human Services	77,224
Indiana	Indiana Division of Disability & Rehabilitation	49,713
Iowa	Iowa Department of Human Services	25,736
Kentucky	Catholic Charities of Louisville	67,784
Maine	Maine Department of Health and Human Services	25,736
Maryland	Maryland Department of Human Resources	51,296
Massachusetts	Massachusetts Office for Refugees and Immigrants	69,049
Michigan	Michigan Department of Human Services	116,658
Minnesota	Minnesota Department of Human Services	86,304
Missouri	Missouri Department of Social Services	42,081
Nebraska	Nebraska Dept. of Health and Human Services	30,969
Nevada	Clark County School District	25,736

State	Grantee	Amount
New Hampshire	NH. Dept. of Health & Human Services	25,736
New Jersey	New Jersey Department of Human Services	25,736
New Mexico	New Mexico Human Services Department	25,736
New York	NY Office of Temporary and Disability Assistance	171,426
North Carolina	North Caroline Dept. of Health & Human Services	84,000
North Dakota	North Dakota Department of Public Instruction	25,736
Ohio	Ohio Department of Job and Family Services	73,746
Oregon	Lutheran Community Services Northwest	39,822
Pennsylvania	Commonwealth of Pennsylvania	100,488
Rhode Island	Rhode Island Department of Human Services	25,736
South Dakota	Lutheran Social Services of South Dakota	25,736
Tennessee	Catholic Charities of Tennessee, Inc.	56,671
Texas	Texas Health and Human Services Commission	171,426
Utah	Utah Department of Workforce Services	43,797
Vermont	Vermont Agency of Human Services	25,736
Virginia	Virginia Department of Social Services	66,428
Washington	WA State Department of Social & Health Services	107,083
Wisconsin	Wisconsin Department of Public Instruction	31,240
Total		2,500,000

ORR provides 28 States and ten Wilson-Fish agencies with Refugee School Impact funding to undertake a comprehensive statewide approach supporting local school systems that are impacted by significant numbers of newly arrived refugee children. As currently awarded, the FY14–16 Refugee School Impact funding period concludes on August 14, 2016. Beginning in FFY17, ORR will award Refugee School Impact funding as a formula set-aside within the Refugee Social Services funding awarded to all States and Wilson-Fish programs coordinating refugee resettlement. This change in timing for Refugee School Impact funding will create a gap in Refugee School Impact program services between August 15, 2016 and October 1, 2016. The low-cost extensions will support refugee access to services critical to refugee student success at the beginning of the school year, when such services are greatest and most urgent.

DATES: Low-cost extension supplement grants will support activities from August 15, 2016, through September 30, 2016.

FOR FURTHER INFORMATION CONTACT: Carl Rubenstein, Director, Division of Refugee Assistance, Office of Refugee Resettlement, 330 C Street SW., Washington, DC 20201. Email: *carl.rubenstein@acf.hhs.gov.*

Statutory Authority: This program is authorized by Section 412(c)(1)(A)(iii) of the Immigration and Nationality Act (INA), 8 U.S.C. 1522(c)(1)(A)(iii).

Christopher Beach,

Senior Grants Policy Specialist, Office of Administration, Office of Financial Services, Division of Grants Policy.

[FR Doc. 2016–25496 Filed 10–20–16; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–D–0319]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Guidance for Industry and Food and Drug Administration Staff on Dear Health Care Provider Letters: Improving Communication of Important Safety Information

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA 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 (the PRA).

DATES: Fax written comments on the collection of information by November 21, 2016.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0754. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, Three White Flint North, 10A63, 11601 Landsdown St., North Bethesda, MD 20852, *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.

Guidance for Industry and Food and Drug Administration Staff on Dear Health Care Provider Letters: Improving Communication of Important Safety Information—OMB Control Number 0910–0754—Extension

This final Guidance for Industry and FDA staff entitled ''Dear Health Care Provider Letters: Improving Communication of Important Safety Information'' offers specific guidance to industry and FDA staff on the content and format of Dear Health Care Provider (DHCP) letters. These letters are sent by manufacturers or distributors to health care providers to communicate an important drug warning, a change in prescribing information, or a correction of misinformation in prescription drug promotional labeling or advertising.

This guidance gives specific instruction on what should and should not be included in DHCP letters. To date, some DHCP letters have been too long, have contained promotional material, or otherwise have not met the goals set forth in the applicable regulation (21 CFR 200.5). In some cases, health care providers have not been aware of important new information and have been unable to communicate it to patients because the letters' content and length have made it difficult to find the relevant information. In addition, letters have

sometimes been sent for the wrong reasons.

In addition to content and format recommendations for each type of DHCP letter, the guidance also includes advice on consulting with FDA to develop a DHCP letter, when to send a letter, what type of letter to send, and conducting an assessment of the letter's impact.

Based on a review of FDA's Document Archiving, Reporting and Regulatory Tracking System for 2012 to 2015, we identified DHCP letters that were sent and the identity of each sponsor sending out a DHCP letter for each year. We estimate that we will receive approximately 25 DHCP Letters annually from approximately 18 application holders. FDA professionals familiar with DHCP letters and with the recommendations in the guidance estimate that it should take an application holder approximately 100 hours to prepare and send DHCP letters in accordance with the guidance.

In the **Federal Register** of March 10, 2016 (81 FR 12734), we published a 60-day notice requesting public comment on the proposed extension of this collection of information. No comments were received.

FDA estimates the annual reporting 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 (hours)	Total hours
Annual average	18	1.4	25	100	2,500

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: October 17, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–25481 Filed 10–20–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–N–0001]

Request for Nominations for Voting Members on a Public Advisory Committee; Food Advisory Committee

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting nominations for voting members to serve on the Food Advisory Committee (the Committee), Office of Regulations, Policy, and Social Sciences, Center for Food Safety and Applied Nutrition.

FDA seeks to include the views of women and men, members of all racial and ethnic groups, and individuals with and without disabilities on its advisory committees and, therefore, encourages nominations of appropriately qualified candidates from these groups.

DATES: Nominations received on or before December 20, 2016, will be given first consideration for membership on the Food Advisory Committee. Nominations received after December 20, 2016, will be considered for nomination to the committee as later vacancies occur.

ADDRESSES: All nominations for membership should be sent electronically by logging into the FDA Advisory Committee Membership Nomination Portal: *https://www.accessdata.fda.gov/scripts/FACTRSPortal/FACTRS/index.cfm* or by mail to Advisory Committee Oversight and Management Staff, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5103, Silver Spring, MD 20993–0002.

FOR FURTHER INFORMATION CONTACT: *Regarding all nomination questions for membership, the primary contact is:* Karen Strambler, 5001 Campus Drive, Rm. 1C–008, College Park, MD 20740, email: *karen.strambler@fda.hhs.gov,* 240–402–2589, Fax: 301–436–2367.

Information about becoming a member on an FDA advisory committee can also be obtained by visiting FDA's Web site by using the following link: *http://www.fda.gov/AdvisoryCommittees/default.htm.*

SUPPLEMENTARY INFORMATION: FDA is requesting nomination for voting members on the Committee.

I. General Description of the Committee Duties

The Committee reviews and evaluates emerging food safety, nutrition, and other food- or cosmetic-related health issues that FDA considers of primary importance for its food and cosmetics programs. The Committee may be charged with reviewing and evaluating available data and making recommendations on matters such as those relating to: (1) Broad scientific and technical food- or cosmetic-related issues, (2) the safety of food ingredients and new foods, (3) labeling of foods and cosmetics, (4) nutrient needs and nutritional adequacy, and (5) safe exposure limits for food contaminants. The Committee may also be asked to provide advice and make recommendations on ways of communicating to the public the potential risks associated with these issues and on approaches that might be considered for addressing the issues.

II. Criteria for Voting Members

The Committee consists of a core of 15 voting members including the Chair. Members and the Chair are selected by the Commissioner of Food and Drugs (the Commissioner) designee from among authorities knowledgeable in the fields of physical sciences, biological and life sciences, food science, risk assessment, nutrition, food technology, molecular biology, epidemiology and other relevant scientific and technical disciplines. Members will be invited to serve for overlapping terms of up to 4 years. Almost all non-Federal members of this Committee serve as Special Government Employees. The core of voting members may include two technically qualified member(s), selected by the Commissioner or designee, who are identified with consumer interests and are recommended by either a consortium of consumer-oriented organizations or other interested persons. In addition to the voting members, the Committee may include two non-voting member(s) who are identified with industry interests.

III. Nomination Procedures

Any interested person may nominate one or more qualified individuals for membership on the advisory committee. Self-nominations are also accepted. Nominations must include a current, complete résumé or curriculum vitae for each nominee, including current business address and/or home address, telephone number, and email address if available. Nominations must also

specify the advisory committee for which the nominee recommended. Nominations must also acknowledge that the nominee is aware of the nomination unless self-nominated. FDA will ask potential candidates to provide detailed information concerning such matters related to financial holdings, employment, and research grants and/or contracts to permit evaluation of possible sources of conflicts of interest.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: October 18, 2016.

Janice M. Soreth,

Acting Associate Commissioner, Special Medical Programs.

[FR Doc. 2016–25497 Filed 10–20–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0600]

Agency Information Collection Activities; Proposed Collection; Comment Request; Animal Drug User Fee Cover Sheet

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection requirements of the Animal Drug User Fee cover sheet.

DATES: Submit either electronic or written comments on the collection of information by December 20, 2016.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://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 *http://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):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, 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–2010–N–0600 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; Animal Drug User Fee Cover Sheet.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- 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.'' The Agency 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 *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to 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 this 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: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://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 Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, Three White Flint North, 10A63, 11601 Landsdown St., North Bethesda, MD 20852, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance

of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed 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) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Animal Drug User Fee Cover Sheet—OMB Control Number 0910–0539—Extension

Under section 740 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 379j–12), FDA has the authority to assess and collect application fees from each person who submits certain new animal drug applications or certain supplemental animal drug applications. The Animal Drug User Fee cover sheet (Form FDA 3546) is designed to collect the minimum necessary information to determine whether a fee is required for the review of an application or supplement or whether an application fee waiver was granted, to determine the amount of the fee required, and to assure that each animal drug user fee payment is appropriately linked to the animal drug application for which payment is made. The form, when completed electronically, will result in the generation of a unique payment identification number used by FDA to track the payment. FDA's Center for Veterinary Medicine and FDA's Office of Management will use the information collected to initiate the administrative screening of new animal drug applications and supplements to determine whether the payment has been received.

Description of Respondents: Respondents to this collection of information are new animal drug applicants.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

FD&C Act section; description	FDA form No.	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
740(a)(1); Animal Drug User Fee cover sheet.	FDA 3546	21	1	21	1	21

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The estimates in table 1 are based on our experience with new animal drug applications and supplemental animal drug applications and the average number of Animal Drug User Fee cover sheets submitted during fiscal years 2013–2015. We estimate 21 respondents will each submit a cover sheet (Form FDA 3546), for a total of 21 responses. We calculate a reporting burden of 1 hour per response, for a total of 21 hours.

Dated: October 17, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–25482 Filed 10–20–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Notice of Interest Rate on Overdue Debts

Section 30.18 of the Department of Health and Human Services' claims collection regulations (45 CFR part 30) provides that the Secretary shall charge an annual rate of interest, which is determined and fixed by the Secretary of the Treasury after considering private consumer rates of interest on the date that the Department of Health and Human Services becomes entitled to recovery. The rate cannot be lower than the Department of Treasury's current value of funds rate or the applicable rate determined from the ''Schedule of Certified Interest Rates with Range of Maturities'' unless the Secretary waives interest in whole or part, or a different rate is prescribed by statute, contract, or repayment agreement. The Secretary of the Treasury may revise this rate quarterly. The Department of Health and Human Services publishes this rate in the **Federal Register**.

The current rate of 9⅝%, as fixed by the Secretary of the Treasury, is certified for the quarter ended September 30, 2016. This rate is based on the Interest Rates for Specific Legislation, ''National Health Services Corps Scholarship Program (42 U.S.C. 254o(b)(1)(A))'' and ''National Research Service Award Program (42 U.S.C. 288(c)(4)(B)).'' This interest rate will be applied to overdue debt until the Department of Health and Human Services publishes a revision.

Dated: October 13, 2016.

David C. Horn,

Director, Office of Financial Policy and Reporting.

[FR Doc. 2016–25459 Filed 10–20–16; 8:45 am]

BILLING CODE 4150–04–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting Announcement for the Technical Advisory Panel on Medicare Trustee Reports

AGENCY: Department of Health and Human Services (HHS).

ACTION: Notice of public meeting.

SUMMARY: This notice announces the meeting dates for the Technical Advisory Panel on Medicare Trustee Reports on Monday, October 31, 2016 and Tuesday, November 1, 2016 in Washington, DC.

DATES: The meeting will be held on Monday, October 31, 2016 from 9:30 a.m. to 5:00 p.m. and Tuesday, November 1, 2016, from 9:00 a.m. to 3:30 p.m. Eastern Daylight Time (EDT) and it is open to the public.

ADDRESSES: The meeting will be held at the Hubert Humphrey Building, 200 Independence Ave. SW., Washington, DC, 20201 Room 738G.3.

FOR FURTHER INFORMATION CONTACT: Dr. Donald Oellerich, Designated Federal Officer, at the Office of Human Services Policy, Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, 200 Independence Ave. SW., Washington, DC 20201, (202) 690–8410.

SUPPLEMENTARY INFORMATION:

I. Purpose: The Panel will discuss the long-term rate of change in health spending and may make recommendations to the Secretary on how the Medicare Trustees might more accurately estimate health spending in the short and long run. The Panel's discussion is expected to be very technical in nature and will focus on the actuarial and economic assumptions and methods by which Trustees might more accurately measure health spending. This Committee is governed by the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App. 2, section 10(a)(1) and (a)(2)). The Committee is composed of nine members appointed by the Assistant Secretary for Planning and Evaluation.

II. Agenda. The Panel will likely hear presentations from the HHS Office of the Actuary on issues they wish the panel to address. This may be followed by a presentation by a representative of the Medicare Payment Advisory Commission. Additional presentations regarding long range growth, sustainability of provider payments under Affordable Care Act (ACA) and Medicare Access and Chip Reauthorization Act (MACRA), methods for transitioning from short term (10 year) to long term (75 year) projections and methods and the presentation of uncertainty in the report may follow. After any presentations, the Panel will deliberate openly on the topics. Interested persons may observe the deliberations, but the Panel will not hear public comments during this time. The Panel will also allow an open public session for any attendee to address issues specific to the topic.

III. *Meeting Attendance.* The Monday, October 31, 2016 and Tuesday, November 1, 2016 meetings are open to the public; however, in-person attendance is limited to space available.

Meeting Registration:

The public may attend the meeting in-person. Space is limited and registration is *required* in order to attend in-person. Registration may be completed by emailing or faxing all the following information to Dr. Donald Oellerich at *don.oellerich@hhs.gov* or fax 202–690–6562:

Name.
Company name.
Postal address.
Email address.

If sign language interpretation or other reasonable accommodation for a disability is needed, please contact Dr. Oellerich, no later than October 26, 2016 by sending an email message to *don.oellerich@hhs.gov* or calling 202–690–8410.

Persons wishing to attend this meeting must register by following the instructions in the ''Meeting Registration'' section of this notice. A confirmation email will be sent to the registrants shortly after completing the registration process.

IV. Special Accommodations

Individuals requiring special accommodations must include the request for these services during registration.

V. Copies of the Charter

The Secretary's Charter for the Technical Advisory Panel on Medicare Trustee Reports is available upon request from Dr. Donald Oellerich at *don.oellerich@hhs.gov* or by calling 202–690–8410.

Dated: October 13, 2016.

Kathryn E. Martin,

Acting Assistant Secretary for Planning and Evaluation.

[FR Doc. 2016–25458 Filed 10–20–16; 8:45 am]

BILLING CODE 4150–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke, Interagency Pain Research Coordinating Committee Call for Committee Membership Nominations

SUMMARY: The Department of Health and Human Services (HHS) (Department) has created the Interagency Pain Research Coordinating Committee (IPRCC) and is seeking nominations for this committee.

DATES: Nominations are due by 5 p.m. on November 21, 2016.

ADDRESSES: Nominations must be submitted through the web form on the IPRCC Web site: *http://iprcc.nih.gov/about/IPRCC-Nomination.htm.*

FOR FURTHER INFORMATION CONTACT: Linda Porter, *porterl@ninds.nih.gov.*

SUPPLEMENTARY INFORMATION: As specified in Public Law 111–148 (''Patient Protection and Affordable Care Act'') the Committee will: (a) Develop a summary of advances in pain care research supported or conducted by the Federal agencies relevant to the diagnosis, prevention, and treatment of pain and diseases and disorders associated with pain; (b) identify critical gaps in basic and clinical research on the symptoms and causes of pain; (c) make recommendations to ensure that the activities of the National Institutes of Health and other Federal agencies are free of unnecessary duplication of effort; (d) make recommendations on how best to disseminate information on pain care; and (e) make recommendations on how to expand partnerships between public entities and private entities to expand collaborative, cross-cutting research.

Membership on the committee will include six (6) non-Federal members from among scientists, physicians, and other health professionals and six (6) non-Federal members of the general public who are representatives of leading research, advocacy, and service organizations for individuals with pain-related conditions. Members will serve overlapping three year terms. It is anticipated that the committee will meet at least once a year.

The Department strives to ensure that the membership of HHS Federal advisory committees is fairly balanced in terms of points of view represented and the committee's function. Every effort is made to ensure that the views of diverse ethnic and racial groups and people with disabilities are represented on HHS Federal advisory committees, and the Department therefore, encourages nominations of qualified candidates from these groups. The Department also encourages geographic diversity in the composition of the Committee. Appointment to this Committee shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, disability, and cultural, religious, or socioeconomic status.

The Department is soliciting nominations for three non-federal members from among scientists, physicians, and other health professionals and for three non-federal members of the general public who represent a leading research, advocacy, or service organization for people with pain-related conditions. These candidates will be considered to fill positions opened through completion of current member terms. Nominations are due by 5 p.m. on November 21, 2016, using the IPRCC nomination web form: *http://iprcc.nih.gov/about/IPRCC-Nomination.htm.*

Dated: October 14, 2016.

Walter J. Koroshetz,

Director, National Institute of Neurological Disorders and Stroke, National Institutes of Health.

[FR Doc. 2016–25522 Filed 10–20–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; NIAAA AA–2 & AA–3 Member Conflict Applications.

Date: November 16, 2016.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 5635 Fishers Lane, Conference Room 2098, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Ranga V. Srinivas, Ph.D., Chief Extramural Project Review Branch, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 5635 Fishers Lane, Room 2085 Rockville, MD 20852, (301) 451–2067, *srinivar@mail.nih.gov*.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; NIAAA Member Conflict Applications—Behavioral and Clinical Studies.

Date: November 22, 2016.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 5635 Fishers Lane, Conference Room 2098, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Ranga V. Srinivas, Ph.D., Chief Extramural Project Review Branch, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 5635 Fishers Lane, Room 2085, Rockville, MD 20852, (301) 451–2067, *srinivar@mail.nih.gov*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: October 17, 2016.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–25471 Filed 10–20–16; 8:45 am]

BILLING CODE 4140–01–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 (5 U.S.C. App.), 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: AIDS and Related Research Integrated Review Group; AIDS Molecular and Cellular Biology Study Section.

Date: November 14, 2016.

Time: 8:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Kenneth A. Roebuck, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5214, MSC 7852, Bethesda, MD 20892, (301) 435–1166, *roebuckk@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Implementation Science.

Date: November 15, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton Suites Old Town Alexandria, 801 N. St. Asaph Street, Alexandria, VA 22314.

Contact Person: Jose H. Guerrier, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5218, MSC 7852, Bethesda, MD 20892, 301–435–1137, *guerriej@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: AIDS and AIDS-related Applications.

Date: November 17, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Jingsheng Tuo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3196, Bethesda, MD 20892, 301–451–5953, *tuoj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Respiratory Sciences.

Date: November 17–18, 2016.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ghenima Dirami, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4122, MSC 7814, Bethesda, MD 20892, 240–498–7546, *diramig@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: October 17, 2016.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–25469 Filed 10–20–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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: Arthritis and Musculoskeletal and Skin Diseases Initial Review Group; Arthritis and Musculoskeletal

and Skin Diseases Clinical Trials Review Committee.

Date: October 25–26, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: Kathy Salaita, SCD, Scientific Review Officer, Scientific Review Branch, National Institute of Arthritis, Musculoskeletal and Skin Diseases, NIH, 6701 Democracy Blvd., Building One, Room 818, Bethesda, MD 20892, 301–594–5033, *kathy.salaita@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel; NIAMS Institutional Training Grants (T32) Review Meeting.

Date: October 28, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: 6701 Democracy Boulevard, Building One, Conference Room 807, Bethesda, MD 20892.

Contact Person: Yin Liu, Ph.D., MD, Scientific Review Officer, Scientific Review Branch, National Institute of Arthritis, Musculoskeletal and Skin Diseases, NIH, 6701 Democracy Blvd., Building One, Room 824, Bethesda, MD 20892, 301–594–8919, *liuy@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: October 17, 2016.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–25472 Filed 10–20–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Notice of Availability of License; Mutant IHD1 Inhibitors Useful for Treating Cancer

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The invention Mutant IHD1 Inhibitors Useful for Treating Cancer is owned by an agency of the U.S. Government and is available for licensing and/or co-development in the U.S.

FOR FURTHER INFORMATION CONTACT: Information on licensing and co-development research collaborations, and copies of the U.S. patent applications listed below may be obtained by contacting: Attn: Sury Vepa, Ph.D., J.D., Senior Licensing and Patenting Manager, National Center for Advancing Translational Sciences, NIH, 9800 Medical Center Drive, Rockville, MD 20850, Phone: 301–217–9197, Fax: 301–217–5736, or email *NCATSPartnerships@mail.nih.gov.* A signed Confidential Disclosure Agreement may be required to receive copies of the patent applications.

SUPPLEMENTARY INFORMATION: This notice is made in accordance with 35 U.S.C. 209 and 37 CFR part 404 to achieve expeditious commercialization of results of federally-funded research and development.

Intellectual Property

Description of Technology: Isocitrate dehydrogenase 1 (IDH1) is an enzyme whose normal function is to convert isocitrate to α-ketoglutarate. Mutated forms of this enzyme (mIDH1) are common in a variety of cancers including acute myeloid leukemia (AML), glioma, cholangiocarcinoma, chondrosarcoma and melanoma. The IDH1 mutation at position 132 and similar IDH1 mutations result in the enzyme gaining the ability to catalyze the NADPH-dependent reduction of the wild type enzyme's product, α-ketoglutarate to R–2-hydroxyglutarate (2–HG). 2–HG is an oncometabolite, and its elevated levels have been shown to lead to de-differentiation of cells. Mutant IDH1 is an attractive target for anti-cancer therapeutics as inhibition reduces levels of 2–HG. It is expected that lower 2–HG levels will result in fewer undifferentiated cancer cells. Furthermore, inhibition of mutant IDH1 is expected to have little effect on non-cancerous cells, as these cells do not express the IDH1 mutation resulting in lower toxicity than typical cytotoxic anticancer agents.

In collaboration with the University of North Carolina, the National Center for Advancing Translational Sciences (NCATS) investigators have discovered a series of novel compounds that potently and selectively inhibit mIDH1. These compounds reduce 2–HG levels in cell lines *in vitro* as well as in human cancer cells grown in mouse xenografts *in vivo.* These compounds show greater than 250-fold selectivity for the mutant enzyme over the wild-type, show favorable *in vitro* stability (in mouse, rat, dog and human hepatocyte exposure studies), are AMES negative, and exhibit no significant metabolic CYP liabilities. These compounds possess very favorable *in vivo* rodent pharmacokinetics and bioavailability and are well tolerated in rodents, even when dosed at high levels.

Potential Commercial Applications

- Potential treatment of cancer (AML or other solid tumors listed above).
- Potential treatment of rare diseases including Maffucci Syndrome and Ollier Disease.

Value Proposition

- Novel mutant IDH1 inhibitors are effective at lowering the oncometabolite, 2–HG in *in vivo* mouse proof-of-concept studies and are well suited for IND enabling studies.

Development Stage: Pre-clinical (*in vivo* validation).

Inventor(s): Matt Boxer, Kyle Brimacombe, Mindy Davis, Rajan Pragani, Jason Rohde, Li Liu, Surendra Karavadhi, Daniel Urban, Min Shen, Anton Simeonov, Ajit Jadhav (NCATS) Xiaodong Wang and Andrew McIver (Univ. of North Carolina at Chapel Hill)

Intellectual Property:

1. International Application No. PCT/US15/067406 filed on 12/22/2015 which is entitled ''Mutant IDH1 Inhibitors Useful for Treating Cancer'' (HHS Ref. No: E–243–2014/0–PCT–02), and
2. U.S. Provisional Application No. 62/353298 filed on 06/22/2016 which is entitled ''Mutant IDH1 Inhibitors Useful for Treating Cancer'' (HHS Ref. No. E–189–2016/0–US–01).

Dated: October 5, 2016.

Pamela McInnes,

Deputy Director, Office of the Director, National Center for Advancing Translational Sciences.

[FR Doc. 2016–25468 Filed 10–20–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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: National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel; Ancillary Studies Review Meeting.

Date: November 9, 2016.

Time: 9:30 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Xincheng Zheng, MD, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Arthritis, Musculoskeletal and Skin Diseases, NIH, 6701 Democracy Boulevard, Suite 820, Bethesda, MD 20892, 301–451–4838, *xincheng.zheng@nih.gov.*

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel; AMS Member Conflict Meeting.

Date: November 9, 2016.

Time: 2:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Kan Ma, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Arthritis, Musculoskeletal and Skin Diseases, NIH, 6701 Democracy Boulevard, Suite 814, Bethesda, MD 20892, 301–451–4838,*mak2@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: October 17, 2016.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–25473 Filed 10–20–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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: National Institute of Child Health and Human Development Special Emphasis Panel; Physical Activity and Leukocyte Activation: Harnessing the Molecular Pathways of Exercise Adaptation.

Date: November 28, 2016.

Time: 2:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6710B Rockledge Drive, Bethesda, MD 20817 (Telephone Conference Call).

Contact Person: Rita Anand, Ph.D., Scientific Review Officer, Division of Scientific Review, National Institute of Child Health And Human Development, NIH, 6710B Rockledge Drive, Room 2131C, Bethesda, MD 20892, 301–496–1487, *anandr@mail.nih.gov.*

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel.

Date: December 7, 2016.

Time: 11:00 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge 6700, 6700B Rockledge Drive, Bethesda, MD 20817 (Telephone Conference Call).

Contact Person: Carla T. Walls, Ph.D., Scientific Review Administrator, Scientific Review Branch, National Institute of Child Health and Human Development, NIH, 6710B Rockledge Drive, Room 2131C, Bethesda, MD 20892, (301) 435–6898, *wallsc@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: October 17, 2016.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–25474 Filed 10–20–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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: Center for Scientific Review Special Emphasis Panel; Member Conflict: Autism, Epilepsy, other Neurological Disorders.

Date: November 8, 2016.

Time: 11:00 a.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Samuel C. Edwards, Ph.D., IRG CHIEF, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5210, MSC 7846, Bethesda, MD 20892, (301) 435–1246, *edwardss@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: October 17, 2016.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–25470 Filed 10–20–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2016–0937]

Lower Mississippi River Waterway Safety Advisory Committee

AGENCY: Coast Guard, Department of Homeland Security.

ACTION: Notice of Federal advisory committee meeting.

SUMMARY: The Lower Mississippi River Waterway Safety Advisory Committee will meet on November 8, 2016 in New Orleans, LA to discuss committee matters relating to the safe transit of vessels and cargoes to and from the ports of the Lower Mississippi River. The meeting will be open to the public.

DATES: The Lower Mississippi River Waterway Safety Advisory Committee

will meet on Tuesday, November 8, 2016 from 9 a.m. to 1 p.m. CST. However, on Tuesday, November 8, 2016 from 9 a.m. to 9:30 a.m., administrative items and issues will be discussed with the Committee members only. The public meeting will commence at 9:30 a.m. Please note that the meeting may close early if the Committee has completed its business.

ADDRESSES: The meeting will be held at the US Army Corps of Engineers New Orleans District office, 7400 Leake Avenue, New Orleans, LA.

All visitors to US Army Corps of Engineers New Orleans District office will have to pre-register to be admitted to the building. Please provide your name, telephone number, and citizenship status by close of business on November 1, 2016, to the contact person listed in **FOR FURTHER INFORMATION CONTACT**.

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact the person listed in the **FOR FURTHER INFORMATION CONTACT** as soon as possible.

Instructions: To facilitate public participation, written comments on the issues in the ''Agenda'' section below must be submitted no later than November 1, 2016, if you want Committee members to review your comment prior to the meeting. You must include ''Department of Homeland Security'' and the docket number (USCG–2016–0937). Written comments may also be submitted using Federal eRulemaking Portal: *http://www.regulations.gov.* For technical difficulties, contact the person listed in **FOR FURTHER INFORMATION CONTACT**. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided. You may review a Privacy Act notice regarding the Federal Docket Management System in the March 24, 2005 issue of the **Federal Register** (70 FR 15086). *Docket Search:* For access to the docket to read documents or comments related to this notice, go to *http://www.regulations.gov,* and use ''USCG–2016–0937'' in the ''Search'' box, press Enter, and then click on the item you wish to view.

FOR FURTHER INFORMATION CONTACT: Lieutenant Brian Porter, Alternate Designated Federal Officer, U.S. Coast Guard Sector New Orleans, 200 Hendee Street, New Orleans, LA 70114; telephone 504–365–2375, fax 504–365–2287, or email at *Brian.J.Porter@uscg.mil.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is in compliance with the Federal Advisory Committee Act (Title 5 U.S.C. Appendix). The Lower Mississippi River Waterway Safety Advisory Committee is an advisory committee authorized in Section 19 of the Coast Guard Authorization Act of 1991, (Public Law 102–241), as amended by section 621(d) of the Coast Guard Authorization Act of 2010, (Public Law 111–281) and chartered under the provisions of the Federal Advisory Committee Act. The Lower Mississippi River Waterway Safety Advisory Committee provides advice and recommendations to the Department of Homeland Security on matters relating to communications, surveillance, traffic management, anchorages, development and operation of the New Orleans Vessel Traffic Service, and other related topics dealing with navigation safety on the Lower Mississippi River as required by the U.S. Coast Guard.

Agenda

At 9 a.m., the Lower Mississippi River Waterway Safety Advisory Committee will meet to review, discuss, deliberate, and formulate recommendations, as appropriate, on the topics contained in the agenda, as follows: *9 a.m. to 9:30 a.m.*: (Open to Committee members only). Federal Advisory Committee Act administrative matters to include Lower Mississippi River Waterway Safety Advisory Committee member training.

At 9:30 a.m., the meeting will open to the public.

(1) Introduction and swearing-in of new members.

(2) Status of Action Items from March 2015 meeting.

(a) Mile Marker 73 Memorandum of Understanding.

(b) Anchorage Establishment and Amendments.

(c) Systematic Port Planning.

(d) Lower Mississippi River Waterway Safety

Advisory Committee Vacancy Notice

(3) Further development of systematic port planning principles and procedures.

(4) Public Comment Period.

(5) Adjournment of meeting.

Public comments or questions will be taken throughout the meeting as the Committee discusses the issues and prior to deliberations and voting. There will also be a public comment period at the end of the meeting. Speakers are requested to limit their comments to 3 minutes. Please note that the public comment period may end before the period allotted, following the last call for comments. Contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to register as a speaker.

D.R. Callahan,

Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

[FR Doc. 2016–25477 Filed 10–20–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5907–N–43]

Federal Property Suitable as Facilities to Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7266, Washington, DC 20410; telephone (202) 402–3970; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), call the toll-free Title V information line at 800–927–7588 or send an email to *title5@hud.gov.*

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: October 13, 2016.

Brian P. Fitzmaurice,

Director, Division of Community Assistance, Office of Special Needs Assistance Programs.

[FR Doc. 2016–25149 Filed 10–20–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–R–2016–N117; FF08RSDC00–167–F1611MD–FXRS12610800000]

Otay River Estuary Restoration Project, South San Diego Bay Unit of the San Diego Bay National Wildlife Refuge, California; Draft Environmental Impact Statement

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability, request for public comment.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of a draft environmental impact statement (EIS) for a proposed project to restore coastal wetlands at the south end of San Diego Bay. The Otay River Estuary Restoration Project (ORERP) is located within the South San Diego Bay Unit of the San Diego Bay National Wildlife Refuge (Refuge or NWR), in San Diego County, California. The U.S. Army Corps of Engineers is participating in the process as a cooperating agency. This notice advises the public that the draft EIS is available for public review and comment. The draft EIS, which we prepared in accordance with the National Environmental Policy Act of 1969 (NEPA), describes the alternatives identified to restore two portions of the South San Diego Bay Unit of the San Diego Bay NWR to coastal wetlands to benefit native fish, wildlife, and plant species.

DATES: We will accept comments received or postmarked on or before December 5, 2016.

ADDRESSES: *Document Availability:* You may obtain copies of the documents in the following places:

- *Internet: https://www.fws.gov/refuge/San_Diego_Bay/what_we_do/Resource_Management/Otay_Restoration.html.*
- *In Person:*
  - San Diego Bay National Wildlife Refuge Complex Headquarters, 1080 Gunpowder Point Drive, Chula Vista, CA 91910; telephone: 619–476–9150, extension 103.
  - Chula Vista Public Library, Civic Center Branch, 365 F Street, Chula Vista, CA 91910; telephone: 619–691–5069.
  - San Diego County Library, Imperial Beach Branch Library, 847 Encina Avenue (temporary location), Imperial Beach, CA 91932; telephone: 619–424–6981.
  - Chula Vista Public Library, South Chula Vista Branch, 389 Orange Avenue, Chula Vista, CA 91911; telephone: 619–585–5755.

Submitting Comments: You may submit written comments by one of the following methods:

Email: Otay_EIS@fws.gov. Include ''Otay Estuary EIS'' in the subject line of the message.

Fax: Attn: Brian Collins, 619–476–9149.

U.S. mail: Brian Collins, USFWS, San Diego National Wildlife Refuge Complex, P.O. Box 2358, Chula Vista, CA 91912.

In-Person Drop-off: You may drop off comments at the San Diego National Wildlife Refuge Complex Headquarters between 9 a.m. and 4 p.m.; please call 619–476–9150, extension 103, for directions.

FOR FURTHER INFORMATION CONTACT: Brian Collins, Refuge Manager, San Diego Bay National Wildlife Refuge at 619–575–2704, extension 302 (telephone) or *brian_collins@fws.gov* (email); or Andy Yuen, Project Leader, 619–476–9150, extension 100 (telephone), or *andy_yuen@fws.gov* (email). For any issues specific to the U.S. Army Corps of Engineers, please send comments by one of the methods described in **ADDRESSES**, as the agencies will coordinate comment review.

SUPPLEMENTARY INFORMATION:

Project Location

The proposed action site is located at the south end of San Diego Bay, San Diego County, California, within the South San Diego Bay Unit of the San Diego Bay National Wildlife Refuge. Restoration activities will occur at two separate locations within the Refuge: the Otay River Floodplain Site and the Pond 15 Site. Specifically, the approximately 33.5-acre Otay River Floodplain Site is located west of Interstate 5 (I–5) between Main Street to the north and Palm Avenue to the south in San Diego. The Pond 15 Site consists of an approximately 90.9-acre solar salt pond located in the northeast portion of the Refuge, to the northwest of the intersection of Bay Boulevard and Palomar Street in Chula Vista.

The DEIS, which we prepared in accordance with the NEPA, describes and analyzes the alternatives identified for the Otay River Estuary Restoration Project. In addition to our publication of this notice, the U.S. Environmental Protection Agency (EPA) is publishing a notice announcing the draft EIS, as required under section 309 of the Clean Air Act (CAA) (42 U.S.C. 7401 *et seq.*). The publication date of EPA's notice of availability is the start of the public comment period for the draft EIS. Under the CAA, EPA also must subsequently announce the final EIS via the **Federal Register**.

EPA's Role in the EIS Process

The EPA is charged, under section 309 of the CAA (42 U.S.C. 7401 *et seq.*), to review all Federal agencies' environmental impact statements (EISs) and to comment on the adequacy and the acceptability of the environmental impacts of proposed actions in the EISs.

EPA also serves as the repository (EIS database) for EISs prepared by Federal agencies and provides notice of their availability in the **Federal Register**. The Environmental Impact Statement (EIS) Database provides information about EISs prepared by Federal agencies, as well as EPA's comments concerning the EISs. All EISs are filed with EPA, which publishes a notice of availability on Fridays in the **Federal Register**.

The notice of availability is the start of the public comment period for draft EISs, and the start of the 30-day ''wait period'' for final EISs, during which agencies are generally required to wait 30 days before making a decision on a proposed action. For more information, see *https://www.epa.gov/nepa.* You may search for EPA comments on EISs, along with EISs themselves, at *https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.*

Background

In 2006, we completed a comprehensive conservation plan (CCP) and EIS/Record of Decision (ROD) to guide the management of the San Diego Bay NWR over a 15-year period (71 FR 64552, November 2, 2006). The wildlife and habitat management goal of the selected management alternative in the CCP for the South San Diego Bay Unit is to ''Protect, manage, enhance, and restore . . . coastal wetlands . . . to benefit the native fish, wildlife, and plant species supported within the South San Diego Bay Unit.'' One of the strategies identified to meet this goal is to restore native habitats in the Otay River floodplain and the salt ponds. The proposed restoration project represents step-down restoration planning for the western portion of the Otay River floodplain and one of the salt ponds within the Refuge's solar salt pond complex. This site-specific EIS tiers from the programmatic EIS and ROD prepared for the CCP. Funding for the proposed restoration is being provided by the Poseidon Resources Carlsbad Desalination Project (Poseidon) to fulfill part of their mitigation requirement for the construction of a desalination plant in Carlsbad, California.

On November 15, 2007, the California Coastal Commission (Commission) approved a coastal development permit (CDP No. E–06–013) for Poseidon's proposal to construct and operate a desalination facility in Carlsbad. As part of that approval, the Commission required Poseidon, through special condition 8, to submit for additional Commission review and approval a marine life mitigation plan (MLMP) to address the impacts to be caused by the facility's use of estuarine water and its entrainment of marine organisms. The MLMP was conditionally approved by the Commission on August 6, 2008 (CCC 2008). With the incorporation of the Commission's revisions, the MLMP was finalized on November 21, 2008. The MLMP requires that Poseidon submit a proposed mitigation site and preliminary restoration plan that achieves the following mitigation requirements:

- Create or substantially restore tidal wetland habitat, preferably in the San Diego Region,
- Provide at least 66.4 acres of mitigation at a maximum of two sites,
- The chosen site must be available and protected against future degradation, and
- Fish productivity must be at least 1,717.5 kg/year.

On September 29, 2010, the San Diego National Wildlife Refuge Complex and Poseidon Resources entered into a memorandum of understanding (MOU) to establish a partnership to facilitate the restoration of property within the San Diego Bay Refuge, consistent with the CCP and Poseidon's Commission permit requirements.

Alternatives

We analyzed three alternatives in the draft EIS:

Alternative A: No Action Alternative

Under the No Action Alternative, the disturbed areas within the Otay River Floodplain Site would not be restored or enhanced to coastal wetlands to benefit native species, and the Pond 15 Site would not be restored to tidally influenced subtidal and intertidal habitat. Under this alternative, Pond 15 would remain part of an existing commercial solar salt operation, and periodic maintenance would continue to occur on the Otay River Floodplain Site in conjunction with ongoing management of the Refuge.

Alternative B: Intertidal Alternative (Proposed Action)

The Intertidal Alternative, Alternative B, is the proposed action. The proposed action would involve lowering the elevation and contouring the Otay River Floodplain Site to create approximately 29.7 acres of tidally influenced habitat consisting of approximately 5.1 acres of intertidal mudflat, 24.6 acres of intertidal salt marsh habitat through altering elevations on the site, and 0.05 acres of upland transitional habitat. The proposed action would also involve raising the elevation and contouring the Pond 15 Site to create approximately 10.3 acres of subtidal channel, 18.5 acres of intertidal mudflat, 55.8 acres of intertidal salt marsh habitat, and 0.37 acres of upland transitional habitat. Both sites would be planted with a mix of native wetland vegetation that would mature into low marsh, mid marsh, and high marsh vegetative communities. The intertidal areas and the unvegetated mudflat would provide foraging habitat for adult and juvenile fish, which form the basis of the food chain that would benefit larger fish, birds, and other species on and off the site.

Implementation of the proposed action would involve the excavation of approximately 320,000 cubic yards of material from the Otay River Site and the transport of 258,000 cubic yards of this material to the Pond 15 Site for use in creating tidal elevations that would support the desired intertidal habitats.

The combination of the wetlands created at the Otay River Floodplain Site and Pond 15 Site under the proposed action would provide sufficient mitigation credit to meet the MLMP requirements.

Alternative C: Subtidal Alternative

Alternative C, the Subtidal Alternative, would involve lowering the Otay River Floodplain Site to an elevation lower than that proposed under Alternative B (proposed action) to create a subtidal channel within the Otay River Floodplain Site. Under the Subtidal Alternative, the subtidal zone would be surrounded by mudflats and increasing elevation of salt marsh. Specifically, the Subtidal Alternative would involve lowering the elevation and contouring the Otay River Floodplain Site to create approximately 4.5 acres of subtidal channel, approximately 6.4 acres of intertidal mudflat, 18.5 acres of intertidal salt marsh mudflat, and 0.13 acres of upland transitional habitat. The Subtidal Alternative would also involve raising the elevation and contouring the Pond 15 Site to create tidally influenced habitat that would be similar to that proposed under Alternative B, or approximately 10.2 acres of subtidal channel, 18.3 acres of intertidal mudflat, 54.6 acres of intertidal salt marsh, and 0.64 of upland transitional habitat. Both sites would be planted with a mix of native wetland vegetation that would mature into low marsh, mid marsh, and high marsh vegetative communities. The subtidal areas would provide fish spawning and foraging habitat, and the unvegetated mudflat would provide foraging habitat for adult and juvenile fish during high tides. Combined, the subtidal and mudflat areas would provide habitat for the basis of the food chain that would benefit larger fish, birds, and other species on and off the site.

Implementation of the Subtidal Alternative would involve the excavation of approximately 370,000 cubic yards of material from the Otay River Site and the transport of 312,000 cubic yards of this material to the Pond 15 Site for use in creating tidal elevations that would support the desired intertidal habitats.

The combination of the wetlands created at the Otay River Floodplain Site and Pond 15 Site under the Subtidal Alternative would also provide sufficient mitigation credit to meet the MLMP requirements.

NEPA Compliance

We are conducting environmental review in accordance with the requirements of NEPA, as amended (42 U.S.C. 4321 *et seq.*), its implementing regulations (40 CFR parts 1500–1508), other applicable regulations, and our procedures for compliance with those regulations. The draft EIS discusses the direct, indirect, and cumulative impacts of the alternatives on biological resources, cultural resources, air quality, water quality, traffic circulation, and other environmental resources. Measures to minimize adverse environmental effects are identified and discussed in the draft EIS.

Public Comments

We request that you send comments only by one of the methods described in **ADDRESSES**. Written comments we receive become part of the public record associated with this action. 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.

We will hold one public meeting to solicit comments on the draft EIS. We will mail a separate announcement to

the public with the exact date, time, and location of the public meeting. We will also post the time, date, and location of the public meeting on our refuge Web site at: *http://www.fws.gov/refuge/San_Diego_Bay.* We will accept both oral and written comments at the public meeting.

Michael Fris,

Acting Regional Director, Pacific Southwest Region.

[FR Doc. 2016–25490 Filed 10–20–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX16LR000F60100]

Agency Information Collection Activities: Request for Comments

AGENCY: U.S. Geological Survey (USGS), Interior.

ACTION: Notice of a renewal of a currently approved information collection (1028–0065) Production Estimate.

SUMMARY: We (the U.S. Geological Survey) are asking the Office of Management and Budget (OMB) to approve the information collection (IC) described below. This collection consists of 2 forms. As required by the Paperwork Reduction Act (PRA) of 1995, and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. This collection is scheduled to expire on October 31, 2016.

DATES: To ensure that your comments are considered, OMB must receive them on or before November 21, 2016.

ADDRESSES: Please submit your written comments on this IC directly to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Desk Officer for the Department of the Interior, at *OIRA_SUBMISSION@omb.eop.gov* (email); or (202) 395–5806 (fax). Please also forward a copy of your comments to the Information Collection Clearance Officer, U.S. Geological Survey, 12201 Sunrise Valley Drive, MS 807, Reston, VA 20192 (mail); 703–648–7197 (fax); or *gs-info_collections@usgs.gov* (email). Reference ''Information Collection 1028–0065, Production Estimate'' in all correspondence.

FOR FURTHER INFORMATION CONTACT: Elizabeth S. Sangine, National Minerals Information Center, U.S. Geological Survey, 12201 Sunrise Valley Drive, Mail Stop 989, Reston, VA 20192 (mail); 703–648–7720 (phone); or *escottsangine@usgs.gov* (email). You may also find information about this Information Collection Request (ICR) at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This collection is needed to provide data on mineral production for annual reports published by commodity for use by Government agencies, Congressional offices, educational institutions, research organizations, financial institutions, consulting firms, industry, academia, and the general public. This information will be published in the ''Mineral Commodity Summaries,'' the first preliminary publication to furnish estimates covering the previous year's nonfuel mineral industry.

II. Data

OMB Control Number: 1028–0065.

Form Number: USGS Forms 9–4042–A and 9–4124–A.

Title: Production Estimate, Two Forms: 9–4042–A and 9–4124–A.

Type of Request: Extension without change of a currently approved collection.

Affected Public: Business or Other-For-Profit Institutions: U.S. nonfuel minerals producers.

Respondent Obligation: None. Participation is voluntary.

Frequency of Collection: Annually.

Estimated Number of Annual Responses: 1,761.

Estimated Time per Response: 15 minutes.

Annual Burden Hours: 440 hours.

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: There are no ''non-hour cost'' burdens associated with this IC.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number and current expiration date.

III. Request for Comments

On April 19, 2016, a 60-day **Federal Register** notice (81 FR 23004) was published announcing this information collection. Public comments were solicited for 60 days ending June 20, 2016. We did not receive any public comments in response to that notice. We again invite comments as to: (1) Whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (2) the accuracy of the agency's estimate of the burden time to the proposed collection of information; (3) how to enhance the quality, usefulness, and clarity of the information to be collected; and (4) how to minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Please note that the comments submitted in response to this notice are a matter of public record. Before including your personal mailing address, phone number, email address, or other personally identifiable information in your comment, you should be aware that your entire comment, including your personally identifiable information, may be made publicly available at any time. While you can ask us in your comment to withhold your personally identifiable information from public view, we cannot guarantee that it will be done.

Michael J. Magyar,

Associate Director, National Minerals Information Center, U.S. Geological Survey.

[FR Doc. 2016–25549 Filed 10–20–16; 8:45 am]

BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Bureau of Land Management

[LLNMF01000.L13150000.NB0000.16X]

Amended Notice of Intent To Amend the Resource Management Plan for the Farmington Field Office, New Mexico and Prepare an Associated Environmental Impact Statement

AGENCY: Bureau of Indian Affairs and Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended (FLPMA) (43 U.S.C. 1711–1712), the Bureau of Land Management (BLM) Farmington Field Office, Farmington, New Mexico is preparing a Resource Management Plan Amendment (RMPA) with an associated Environmental Impact Statement (EIS). By this notice, the BLM is announcing the beginning of a scoping process to solicit public comments and to identify issues specifically related to analysis of Bureau of Indian Affairs (BIA) managed mineral leasing and associated activity decisions pursuant to 25 Code of Federal Regulations (CFR) part 200 *et seq.* as part of the EIS for the Farmington RMPA.

DATES: This notice initiates the public scoping process for the RMP amendment specific to the extension of analysis in that EIS to BIA decision-making where BIA manages mineral leasing and associated activities in the RMPA Planning Area. Comments may be submitted in writing until December 20, 2016. The BIA and BLM will host public meetings specific to using this EIS to inform BIA mineral leasing and associated activity decisions. The date(s) and location(s) of the public scoping meeting(s) will be announced at least 15 days in advance through local news media, newspapers, and the BLM Web site at: *http://www.blm.gov/nm/farmington.* To be included in the analysis, all comments must be received prior to the close of the 60-day scoping period or 15 days after the last public meeting, whichever is later. We will provide additional opportunities for public participation, as appropriate.

ADDRESSES: You may submit comments on issues and planning criteria related to applying this EIS to BIA-managed mineral leasing and associated activity decisions in the RMPA Planning Area by any of the following methods:

- *Web site: http://www.blm.gov/nm/farmington.*
- *Email: BLM_NM_FFO_RMP@blm.gov.*
- *Fax:* 505–564–7608.
- *Mail:* 6251 North College Blvd. Suite A, Farmington, NM 87402.

Documents pertinent to this proposal may be examined at the BLM Farmington Field Office/Federal Indian Mineral Office, 6251 N. College Blvd. Suite A, Farmington, NM 87402; BLM New Mexico State Office, 301 Dinosaur Trail, Santa Fe, NM 87508; BIA Eastern Navajo Agency, 222 Chaco Blvd., Crownpoint, NM 87313; and BIA Navajo Regional Office, 301 West Hill Ave., Gallup, NM 87301. Documents may also be viewed on the BLM's Web site: *http://www.blm.gov/nm/farmington.*

FOR FURTHER INFORMATION CONTACT: Mark Ames, BLM Project Manager, telephone 505–564–7611; address 6251 North College Blvd., Suite A, Farmington, New Mexico 87402; email *BLM_NM_FFO_Comments@blm.gov, or* Harrilene Yazzie, BIA Supervisory Environmental Protection Specialist, telephone 505–863–8287; address P.O. Box 1060, Gallup, New Mexico 87301; email *harrilene.yazzie@bia.gov* to have your name added to our mailing list. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 1–800–877–8339 to contact the above individual during normal business hours. The Service is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BLM Farmington Field Office, Farmington, New Mexico initiated preparation of the RMPA/EIS in 2014. The initial scoping period, announced by **Federal Register** Notice of Intent on February 25, 2014, offered the public an opportunity to comment on planning criteria and issues related to the BLM's RMPA/EIS. After the close of the public scoping period on the RMPA/EIS, the BIA formally joined the EIS process as a joint lead agency and intends to use this planning effort to inform its subsequent mineral leasing and associated activity decision-making processes. This notice announces the beginning of a scoping process seeking public input on issues and planning criteria specifically related to analysis of BIA mineral leasing and associated activity decisions to be considered in this EIS process. This notice does not reopen the scoping period related to issues and planning criteria for the BLM decisions to be analyzed in this EIS.

The Planning Area is located in San Juan, Rio Arriba, McKinley, and Sandoval Counties in New Mexico, and encompasses approximately 4,200,000 acres of land, including approximately 1,900,000 acres of Tribal surface land, 1,300,000 acres of BLM-managed land, across 17 Navajo Nation chapters, individual Indian allotments, and numerous Chapter House residents. The purpose of this public scoping process is to determine issues relevant to considering BIA-managed mineral leasing and associated activity decisions in the Planning Area.

The BLM's preliminary planning criteria identified in the February 25, 2014, **Federal Register** Notice are hereby incorporated by reference. Additional preliminary planning criteria specific to BIA's joint lead agency status include:

- The BIA will serve as joint (or co-lead) agency for this EIS.
- The BIA and BLM will prepare the RMPA/EIS in compliance with FLPMA, the Endangered Species Act, the Clean Water Act, the Clean Air Act, NEPA, and all other applicable laws, executive orders, and BIA and BLM management policies.
- The BIA will use the EIS as the analytical basis for decisions pertaining to the leasing of Tribal trust and individual Indian allotted minerals within the Planning Area.
- The BIA will use this EIS to inform decisions on lands where mineral leasing and associated activities are managed by the BIA.
- The BIA and BLM will recognize valid existing rights.
- The BIA and BLM will coordinate with Federal, State, and Tribal governments and local agencies in the RMPA/EIS process to ensure consistency with existing plans and policies, to the extent practicable.
- The BIA and BLM will consult with Indian Tribes on a government-to-government basis in accordance with Executive Order 13175 and other policies.
- The BIA and BLM will coordinate with Tribal governments and provide strategies for the protection of recognized traditional uses and sacred sites.
- The BIA and BLM will apply appropriate protection and management of cultural resources and historic properties, and will engage in all required Tribal consultations.
- The BIA and BLM will consult with the New Mexico Department of Game and Fish and the Navajo Nation Department of Fish and Wildlife as appropriate.

You may submit comments on issues and planning criteria in writing at any public scoping meeting, or by using one of the methods listed in the **ADDRESSES** section above. To be included in the analysis, all comments must be received prior to the close of the 60-day scoping period or 15 days after the last public meeting, whichever is later. The BIA and BLM will utilize and coordinate the NEPA scoping process to help fulfill the public involvement process under the National Historic Preservation Act (54 U.S.C. 306108) as provided in 36 CFR 800.2(d)(3). The information about historic and cultural resources within the area potentially affected by the proposed action will assist the BLM and BIA in identifying and evaluating impacts to such resources.

The BLM and BIA are required to consult with Indian Tribes, as applicable, on a government-to-government basis in accordance with Executive Order 13175 and other policies. Tribal and individual Indian allottee concerns, including impacts on Indian trust assets and potential impacts to cultural resources within the Planning Area, will be given due consideration. Federal, State, and local agencies and individual Indian allottees, tribes, and other stakeholders that may be interested in or affected by the proposed action that the BIA and BLM are evaluating, are invited to participate in the scoping process. These entities may request or be requested by the BIA and BLM to participate in the

development of the environmental analysis as a cooperating agency, if eligible. 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. The minutes and list of attendees for each public scoping meeting will be available to the public and open for 30 days after the meeting to any participant who wishes to clarify the views he or she expressed.

The BLM and BIA will evaluate identified issues to be addressed and will place them into one of three categories; the draft RMPA/EIS will provide an explanation as to why an issue was placed in category two or three, and is therefore beyond the scope of this EIS:

1. Issues to be resolved by the BIA in its subsequent decision-making processes regarding BIA-managed mineral leasing and associated activities in the Planning Area;
2. Issues to be resolved through policy or administrative action; or
3. Issues beyond the scope of this plan amendment.

The public is also encouraged to help identify any management questions and concerns that should be addressed in the plan. The BIA and BLM will work collaboratively with interested parties to identify the management decisions that are best suited to local, regional, and National needs and concerns and trust responsibilities.

The following resource issues were identified in a prior scoping period announced by the February 25, 2014, **Federal Register** Notice of Intent to Prepare a Resource Management Plan Amendment and an Associated Environmental Impact Statement for the Farmington Field Office, New Mexico: lands with wilderness characteristics; areas of critical environmental concern; air, soil, and water resources; vegetative communities; wildlife/habitat management areas; and land use authorizations. These resource issues will not be revisited but embodied in the current scoping process, except as they pertain to BIA-managed mineral leasing and associated activity decisions.

The BIA and BLM will use an interdisciplinary approach to develop the plan amendment in order to consider the variety of resource issues and concerns identified.

Authority: 40 CFR 1501.7 and 43 CFR 1610.2.

Sharon Pinto,

Navajo Regional Director, Bureau of Indian Affairs, U.S. Department of the Interior.

Amy Lueders,

State Director, New Mexico, Bureau of Land Management, U.S. Department of the Interior.

[FR Doc. 2016–25527 Filed 10–20–16; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLORW00000.L51010000.ER0000. LVRWH09H0570.16XL5017AP, HAG 16–0131; WAOR65753]

Notice of Availability of the Final Environmental Impact Statement for the Proposed Vantage to Pomona Heights 230 kV Transmission Line Project in Benton, Grant, Kittitas, and Yakima Counties, Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, the Bureau of Land Management (BLM) has prepared a Final Environmental Impact Statement (EIS) for the Vantage to Pomona Heights 230 kilovolt (kV) Transmission Line Project (Project) and, by this notice, is announcing its availability.

DATES: The BLM will not issue a final decision on the proposed Project for a minimum of 30 days following the date the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**.

ADDRESSES: Copies of the Final EIS have been sent to Federal, State, tribal and local governments, and public libraries in the Project area. The Final EIS and supporting documents are available electronically on the Project Web site at: *http://www.blm.gov/or/districts/spokane/plans/vph230.php*. Copies of the Final EIS are available for public inspection during normal business hours at the BLM office locations listed in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: Robin Estes, Vantage to Pomona Heights Final EIS Project Manager, at (541) 416–6728, by email at *blm_or_vantage_pomona@blm.gov,* or at the following address: BLM Spokane District Office, 1103 North Fancher Road, Spokane Valley, WA 99212–1275. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The project proponent, Pacific Power, filed Federal applications for rights-of-way (ROWs) with the BLM, the U.S. Department of the Army Joint Base Lewis-McChord Yakima Training Center (JBLM YTC), and the U.S. Bureau of Reclamation (Reclamation) for construction, operation, and maintenance of a 230 kV transmission line from Pacific Power's Pomona Heights Substation located east of Selah, Washington, in Yakima County, to the Bonneville Power Administration (BPA) Vantage Substation located just east of the Wanapum Dam in Grant County, Washington. The project proponent's interest in the new line is to reduce the risk of service interruptions and ensure continued reliable, efficient, and coordinated service to the Yakima Valley.

On January 4, 2013, the BLM released a Draft EIS for public review and comment. The Draft EIS analyzed nine alternative routes. As a result of the comments received at public meetings and submitted in writing during the Draft EIS comment period, the BLM, Pacific Power, and JBLM YTC met and identified a new alternative route, the New Northern Route (NNR) Alternative. This alternative, unlike the others analyzed in the Draft EIS is located largely on JBLM YTC land. As a result of the identification of this new alternative, the BLM determined that a Supplemental Draft EIS was required. On January 2, 2015, the BLM released the Supplemental Draft EIS for public review and comment. Both the Draft EIS and Supplemental Draft EIS fully described the alternatives and analyzed their direct, indirect, and cumulative impacts, as well as mitigation measures that could offset those potential impacts.

The BLM as the Lead Federal Agency is responsible for analyzing the effects of granting, granting with conditions, or denying Pacific Power's ROW applications submitted to the Federal agencies to construct, operate, and maintain a 230 kV transmission line, associated access roads, and other ancillary facilities. The JBLM YTC, Reclamation, BPA, Federal Highway Administration, U.S. Fish and Wildlife Service, Washington Department of Archaeology and Historic Preservation,

Washington Department of Fish and Wildlife, Washington Department of Natural Resources (DNR), Washington State Department of Transportation (WSDOT), and Grant, Kittitas, and Yakima counties are Cooperating Agencies that assisted with the preparation of the Final EIS. Each of these Cooperating Agencies will subsequently make decisions related to the proposed Project within their respective jurisdictions.

Pacific Power proposes to use a variety of transmission line structures depending on the terrain. These structures were all analyzed in the Draft EIS, the Supplemental Draft EIS, and the Final EIS. Most of the proposed transmission line would be constructed on H-frame wood pole structures between 65 and 90 feet tall and spaced approximately 650 to 1,000 feet apart depending on terrain. In developed or agricultural areas, single wood or steel monopole structures would be used. The single pole structures would be between 80 and 110 feet tall and spaced approximately 400 to 700 feet apart. The ROW width for the H-frame structures and the single pole structures would be between 125 to 150 feet, and 75 to 100 feet, respectively. Steel lattice structures approximately 200 feet tall would be used to span the 2,800-foot Columbia River crossing.

The Final EIS addresses public comments received on both the Draft EIS and Supplemental Draft EIS, and considers the No Action Alternative and all nine of the action alternatives analyzed in the EIS documents. The nine action alternatives considered in the Final EIS range from 40.5 miles to 66.8 miles in length. The action alternatives cross private lands, Federal land managed by the BLM, JBLM YTC, and Reclamation, and state land managed by WSDOT and DNR. Yakima, Kittitas, Benton, and Grant counties are crossed by the action alternatives considered in the Final EIS. The information presented in the Draft EIS and the Supplemental Draft EIS has been combined in the Final EIS for clarity, and resource data and analyses have been updated as necessary in order to provide full disclosure of anticipated impacts for all action alternatives.

To provide maximum flexibility to the decision makers and incorporate all public review input from Cooperating Agencies and interested parties, all alternatives are available for consideration up to the issuance of decisions by the BLM and Cooperating Agencies. The BLM will document its decision in a Record of Decision (ROD). In the Final EIS, the Agency Preferred Alternative has been changed from Alternative D (presented in the Draft EIS and the Supplemental Draft EIS) to the New Northern Route (NNR) Alternative—Overhead Design Option. The NNR Alternative—Overhead Design Option has also been identified as the Environmentally Preferred Alternative. The change in Agency Preferred Alternative was based on the analysis contained in the Draft EIS and Supplemental Draft EIS, including information regarding economic, environmental, technical, and other factors; the preferences of the Cooperating Agencies and Tribal Representatives; and input received from the public via comments. The NNR Alternative would be 40.5 miles in length, located primarily on Federal land, and would parallel Pacific Power's existing Pomona-Wanapum 230 kV transmission line for the majority of its length. The NNR Alternative would cross JBLM YTC on its north side for over 70 percent of its total length, Reclamation land east of the Columbia River, and BLM-managed land in the Yakima River Canyon Management Area. The NNR Alternative would also cross WSDOT and Grant County PUD-managed lands and private lands, and would be located in Yakima, Kittitas, and Grant counties.

The EIS documents fully describe the alternatives and identify direct, indirect, and cumulative impacts as well as mitigation measures that could avoid, mitigate, or offset potential impacts. To minimize the amount and significance of the Project's impacts to Greater Sage-grouse, a Framework for Development of a Greater Sage-grouse Compensatory Mitigation Plan (Mitigation Framework) was developed to address the residual impacts (*i.e.,* the unavoidable impacts) to the Greater Sage-grouse, which may result from the proposed construction, maintenance, and operation of the Project. The Mitigation Framework will provide the specific direction for Pacific Power's development of a Greater Sage-grouse Compensatory Mitigation Plan (CMP). With the development and implementation of the CMP, Pacific Power would take the necessary steps to compensate for the Project's residual impacts in order to achieve a net conservation gain for the species and its habitat. The Mitigation Framework is included as appendices in the Final EIS.

The BLM has consulted with the Federally recognized Confederated Tribes and Bands of the Yakama Nation and the Colville Confederated Tribes, and with the non-Federally recognized Wanapum Band of Indians. The BLM will continue to consult with Indian tribes on a government-to-government basis in accordance with Executive Order 13175 and other policies. Tribal concerns, including impacts to trust assets and potential impacts to cultural resources, have been given due consideration. The BLM also continues to work with the State and Federal agencies and consulting tribes regarding development of a Programmatic Agreement (PA) that outlines how the Federal agencies will comply with Section 106 of the National Historic Preservation Act for this undertaking. A draft of the PA is included as an appendix to the Final EIS. Federal, state, and local agencies, along with tribes and other stakeholders that may be interested in or affected by the proposed Project were invited to participate in the scoping process and comment on the Draft EIS and Supplemental Draft EIS. Major issues brought forward during the scoping process that were addressed in the Draft EIS and Supplemental Draft EIS and have been carried forward in the Final EIS include:

- Land use conflicts and effects on agricultural operations and property values;
- Effects on wildlife habitat, plants, and animals including threatened, endangered, and sensitive species (especially Greater Sage-grouse);
- Potential effects to JBLM YTC military training operations;
- Effects to visual resources and existing viewsheds;
- Effects to cultural resources and traditional cultural properties;
- Effects to soils and water from surface-disturbing activities;
- Social and economic effects;
- Management and control of invasive plant species; and
- Public health and safety.

Comments received on the Draft EIS and the Supplemental Draft EIS were considered, and document revisions were incorporated as appropriate into the Final EIS.

The BLM decision on the Project: The BLM will consider information contained in the Final EIS when deciding whether to grant, grant with modifications, or deny Pacific Power's Application for ROW across BLM-managed lands. The BLM's decision will be documented in its ROD.

Copies of the Final EIS are available for public inspection during normal business hours at the following BLM offices:

- Bureau of Land Management, Wenatchee Field Office, 915 Walla Walla Ave., Wenatchee, Washington; and
- Bureau of Land Management, Spokane District Office, 1103 N. Fancher Rd., Spokane Valley, Washington.

Authority: 40 CFR 1506.6, 40 CFR 1506.10

Linda Clark,

Spokane District Manager and Authorizing Officer.

[FR Doc. 2016–25404 Filed 10–20–16; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–22063: PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting comments on the significance of properties nominated before September 24, 2016, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted by November 7, 2016.

ADDRESSES: Comments may be sent via U.S. Postal Service to the National Register of Historic Places, National Park Service, 1849 C St. NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St. NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before September 24, 2016. Pursuant to section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

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.

COLORADO

Chaffee County

Head Lettuce Day—Collegiate Peaks Stampede Rodeo Grounds, 2001 Gregg Dr., Buena Vista, 16000758

Pine Hall, 43145 Cty. Rd. 397, Granite, 16000759

CONNECTICUT

Fairfield County

Weir Farm National Historic Site, 735 Nod Hill Rd., Wilton, 16000760

LOUISIANA

Natchitoches Parish

Briarwood, 216 Caroline Dorman Rd., Saline, 16000761

MICHIGAN

Wayne County

Starkweather School, 550 N. Holbrook St., Plymouth, 16000762

MISSOURI

Greene County

Heercleff, (Springfield MPS) 6405 S. Campbell Ave., Springfield, 16000763

Jackson County

Creamery Package Manufacturing Company Building, (Railroad Related Historic Commercial and Industrial Resources in Kansas City, Missouri MPS), 1408–1410 W. 12th St., Kansas City, 16000764

VERMONT

Washington County

Vermont State Hospital Historic District, Horseshoe & State Drs., Park Row, Waterbury, 16000765

WISCONSIN

Forest County

Wywialowski, John and Anna, 8680 WI 101, Armstrong Creek, 16000766

Milwaukee County

27th and Wells Streets Commercial Historic District, 757, 760, 800–810, 801–813, 817–831, 820–826 N. 27th St., 2632, 2711 W. Wells St., Milwaukee, 16000767

Sheboygan County

Lueder, Rudolph, 13 Sided Barn, W. 4651 Cty. Rd. J, Plymouth, 16000768

A request to remove has been received for the following resources:

MINNESOTA

Houston County

Eitzen Stone Barn, S. of Eitzen, Eitzen, 82002965

Olmsted County

Pierce House, 426 2nd Ave. SW., Rochester, 80002101

Rice County

Blind Department Building and Dow Hall, State School for the Blind, 400 6th Ave. SE., Faribault, 90001092

Winona County

Bridge No. L1409, Twp. Rd. 62 over Garvin Brook, Winona, 90000978

Authority: 60.13 of 36 CFR part 60.

Dated: September 27, 2016.

J. Paul Loether,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

[FR Doc. 2016–25460 Filed 10–20–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–22112; PPWOCRAD00, PUC00RP14.R50000]

Notice of the December 7, 2016, Meeting of the Cold War Advisory Committee

AGENCY: National Park Service, Interior.

ACTION: Meeting notice.

SUMMARY: Notice is hereby given in accordance with the Federal Advisory Committee Act (5 U.S.C. Appendix 1–16) for a meeting of the Cold War Advisory Committee.

DATES: The public meeting of the Committee will be held on Wednesday, December 7, 2016, from 10 a.m. to 5 p.m. (Eastern).

ADDRESSES: The meeting will be conducted in Meeting Room 201, 2nd floor of the National Park Service, 1201 Eye Street NW., Washington, DC 20005, to discuss the following:

1. Welcome and Introductions
2. Discussion of Revisions to the Draft Cold War National Historic Landmarks Theme Study
3. Discussion of Planning for Publication of the Cold War National Historic Landmarks Theme Study
4. Discussion of Efforts to Nominate Eligible Properties for National Historic Landmarks Designation

FOR FURTHER INFORMATION CONTACT: For information concerning the Cold War Advisory Committee or to request to address the Committee, contact Robie Lange, Historian, National Historic Landmarks Program, National Park Service, 1849 C Street NW., MS 2280, Washington, DC 20240, telephone (202) 354–2257, or email *robie_lange@nps.gov.*

SUPPLEMENTARY INFORMATION: The Committee meeting will be open to the public. Space and facilities to accommodate the public are limited and attendees will be accommodated on a first-come basis. Opportunities for oral comment will be limited to no more than 3 minutes per speaker and no more than 15 minutes total. The Committee's Chairman will determine how much time for oral comments will be allotted. Anyone may file a written statement

with the Committee concerning matters to be discussed.

Comments should be submitted to Robie Lange, Historian, National Historic Landmarks Program, National Park Service, 1849 C Street NW., MS 2280, Washington, DC 20240, telephone (202) 354–2257, or email *robie_lange@nps.gov.*

Before including your address, telephone 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 may 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.

Draft minutes of the meeting will be available for public inspection about 12 weeks after the meeting from the National Historic Landmarks Program, National Park Service, 1849 C Street NW., Washington, DC 20240.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2016–25542 Filed 10–20–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NCR–WHHO–22097; PPNCWHHO00, PPMPSPD1Z.YM0000]

Notice of Public Meeting and Request for Comments; The National Christmas Tree Lighting

AGENCY: National Park Service, Interior.

ACTION: Notice/request for public meeting and public comments.

SUMMARY: The National Park Service is seeking public comments and suggestions on the planning of the 2016 National Christmas Tree Lighting and the subsequent 31-day event. The general plan and theme for the event is the celebration of the holiday season with the display of the traditional American symbols of Christmas.

DATES: The meeting will be held on Friday, November 4, 2016. Written comments will be accepted until November 4, 2016.

ADDRESSES: The meeting will be held at 9:00 a.m. on November 4, 2016, in Room 234 of the National Capital Region Headquarters Building, at 1100 Ohio Drive SW., Washington, DC (East Potomac Park). Written comments may be sent to Peter Lonsway, Manager, President's Park, National Park Service, 1100 Ohio Drive SW., Washington, DC 20242. Due to delays in mail delivery, it is recommended that comments be provided by telefax at (202) 208–1643 or by email to *Peter_Lonsway@nps.gov.* Comments may also be delivered by messenger to the White House Visitor Center at 1450 Pennsylvania Avenue NW., in Washington, DC.

FOR FURTHER INFORMATION CONTACT: Peter Lonsway, Manager, President's Park, National Park Service, weekdays between 9 a.m., and 4 p.m., at (202) 208–1631.

SUPPLEMENTARY INFORMATION: The National Park Service is seeking public comments and suggestions on the planning of the 2016 National Christmas Tree Lighting and the subsequent 31-day event, which opens on December 1, 2016, on the Ellipse (President's Park), south of the White House. The general plan and theme for the event is the celebration of the holiday season, where the park visitor will have the opportunity to view that lighting of the National Christmas tree, attend musical presentations and visit the yuletide displays of the traditional and familiar American symbols of Christmas, a national holiday. As in the past, these traditional and familiar American symbols will be the National Christmas Tree, the smaller trees representing the various states, District of Columbia and the territories, various seasonal musical presentations, and a traditional crèche which is not owned by the Government.

In order to facilitate this process the National Park Service will hold a meeting at 9 a.m. on November 4, 2016, in Room 234 of the National Capital Region Headquarters Building, at 1100 Ohio Drive SW., Washington, DC (East Potomac Park).

Persons who would like to comment at the meeting should notify the National Park Service by November 4, 2016, by calling the White House Visitor Center weekdays between 9 a.m., and 4 p.m., at (202) 208–1631.

In addition, public comments and suggestions on the planning of the 2016 National Christmas Tree Lighting and the subsequent 31-day event may be submitted in writing. Written comments may be sent to the Manager, President's Park, National Park Service, 1100 Ohio Drive SW., Washington, DC 20242, and will be accepted until November 4, 2016. Before including your address, telephone number, email address, or other personal identifying information in your comment, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2016–25545 Filed 10–20–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–PVE–LWCF–22043, PSSSLAD0016001 (177)]

Information Collection Request Sent to the Office of Management and Budget (OMB) for Approval; Land and Water Conservation Fund State Assistance Program

AGENCY: National Park Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (National Park Service, NPS) have sent an Information Collection Request (ICR) to OMB for review and approval. We summarize the ICR below and describe the nature of the collection and the estimated burden and cost. This information collection is scheduled to expire on October 31, 2016. We 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. However, under OMB regulations, we may continue to conduct or sponsor this information collection while it is pending at OMB.

DATES: You must submit comments on or before November 21, 2016.

ADDRESSES: Send your comments and suggestions on this information collection to the Desk Officer for the Department of the Interior at OMB–OIRA at (202) 395–5806 (fax) or *OIRA_Submission@omb.eop.gov* (email). Please provide a copy of your comments to the Information Collection Clearance Officer, National Park Service, 12201 Sunrise Valley Drive, Mail Stop 242, Reston, VA 20192 (mail); or *madonna_baucum@nps.gov* (email). Please reference OMB Control Number 1024–0031 in the subject line of your comments. You may review the ICR online at *http://www.reginfo.gov.* Follow the instructions to review Department of the Interior collections under review by OMB.

FOR FURTHER INFORMATION CONTACT: To request additional information about this IC, contact Elisabeth Fondriest, Recreation Grants Chief, State and Local Assistance Programs Division at 202–354–6916; or 1849 C Street NW. (2225),

Washington, DC 20240 (mail); or *elisabeth_fondriest@nps.gov* (email).

SUPPLEMENTARY INFORMATION:

I. Abstract

The Land and Water Conservation Fund Act of 1965 (LWCF Act) (54 U.S.C. 200305) was enacted to help preserve, develop, and ensure access for the public to outdoor recreation opportunities. The LWCF Act provides funds for and authorizes Federal assistance to the States for planning, acquisition, and development of needed land and water areas and facilities. In accordance with the LWCF Act, the National Park Service (we, NPS) administers the LWCF State Assistance Program, which provides matching grants to States and through the States to local units of government. As used in this information collection request, the term ''States'' includes the 50 States; the Commonwealths of Puerto Rico and the Northern Mariana Islands; the District of Columbia; and the Territories of Guam, the U.S. Virgin Islands, and American Samoa.

In accordance with the LWCF Act, we administer the LWCF State Assistance Program, which provides matching grants to States, and through the States to local units of government. LWCF grants are provided to States on a matching basis for up to 50 percent of the total project-related allowable costs. Grants to eligible insular areas may be for 100 percent assistance. The LWCF State Assistance Program gives maximum flexibility and responsibility to the States. States establish their own priorities and criteria and award their grant money through a competitive selection process based on a Statewide recreation plan. Payments for all projects are made to the State agency that is authorized to accept and administer funds paid for approved projects. Local units of government participate in the program as subgrantees of the State with the State retaining primary grant compliance responsibility.

The following information is collected to administer the LWCF State Assistance Program:

Application. States may seek financial assistance for acquisition, development, or planning projects to be conducted under the LWCF Act. To receive a grant, States must submit an application to NPS for review and approval. We use the information provided in applications to determine eligibility under the authorizing legislation and to select those projects that will provide the highest return on the Federal investment. Project proposals for LWCF grants comprise the following:

- NPS Form 10–902, ''Project Agreement''. This form documents the agreement between the NPS and the State for accomplishing the project. It binds the Federal Government and the State to certain obligations through its acceptance of Federal assistance, including the rules and regulations applicable to the conduct of a project under the Act and any special terms and conditions to the project established by the NPS and agreed to by the State. It obligates the United States to provide grants up to a designated amount for eligible costs; sets forth methods of costing, accounting, incurrence of costs, and similar matters. The form also establishes the project performance period and briefly describes the scope of the project.
- NPS Form 10–903, ''Description and Notification Form'' (DNF). The State must submit a DNF for each park or other recreation area that will be assisted with grant funds. This form provides data about the assisted project site(s), such as location, acreages and details about improvements, as understood at the beginning of each grant project.
- NPS Form 10–904, ''Proposal Description and Environmental Screening Form'' (PD/ESF). The PD assists the applicant in developing a narrative that provides administrative and descriptive information to help the Federal decision-maker understand the nature of the proposed project. The ESF indicates the resources that could be impacted by the project, enabling States and/or local project sponsors to more accurately follow an appropriate pathway for compliance with the National Environmental Policy Act (NEPA). The analysis serves as part of the Federal administrative record required by NEPA and its implementing regulations.
- Pre-award Onsite Inspection Report. The State must physically inspect proposed project sites prior to the award of grant funds and report on the findings. The inspection must be conducted in accord with the onsite inspection agreement between the State and NPS. See additional information under Reports, below.
- Maps and other supporting documentation. Applicants must develop and submit two maps: One depicting the general location of the park as well as the entrance area; the other delineating the specific boundary of the outdoor recreation area that will be protected for outdoor recreation purposes and subject to the conversion provisions at 54 U.S.C. 200305(f). Applicants should submit other documents that have a significant bearing on the project.

Grant Amendment. After initial award but during the award performance period, a State or project sponsor may seek to modify the agreed-upon terms, such as the award end date, the scope of work, or the budget. NPS must review and approve such changes. States must submit an amendment request on behalf of themselves or the local sponsor, which depending on the nature of the change, could comprise the following elements: NPS Form 10–902A, ''Amendment to Project Agreement:, revised Standard Forms, a letter from the State Liaison Officer (SLO) describing the proposed changes and the impact to the project, the PD/ESF, a revised boundary map, and a revised DNF.

- NPS Form 10–902A, ''Amendment to Project Agreement''. An amendment form is required to alter the signed Project Agreement. When the amendment is signed by the NPS, it becomes part of the agreement and supersedes it in the specified matters.
- NPS Form 10–903, ''Description and Notification Form''. A revised DNF may be required for changes in scope that significantly alter the planned facility development or the acreage of the site or area to be protected under 6(f).

Conversion of Use. In accordance with 54 U.S.C. 200305(f) and implementing regulations found at 36 CFR 59, no lands acquired or developed with LWCF funds can be converted to other than public outdoor recreation uses without the approval of the Secretary of the Interior. States must submit a formal request to the appropriate NPS Regional Office with documentation to substantiate that: (a) All alternatives to the conversion have been evaluated and then rejected on a sound basis; (b) required replacement land being offered as a substitute is of reasonably equivalent location and recreational usefulness as the assisted site proposed for conversion; (c) the property proposed for substitution meets the eligibility requirements for LWCF assistance; and (d) replacement property is of at least equal fair market value as established by an appraisal developed in accordance with Federal appraisal standards. Required documentation is similar to that submitted for grant amendment requests (Forms 10–902A, Amendment to Project Agreement; 10–903, DNF; and/or 10–904, PD/ESF). Additional documents include maps showing the existing protected recreation area and delineating the area to be converted and of the proposed replacement property.

Statewide Comprehensive Outdoor Recreation Plan (SCORP). The LWCF Act requires that to be eligible for LWCF financial assistance, each State must prepare and submit a SCORP to NPS for approval. The NPS requires a new or updated SCORP at least once every 5 years. The SCORP must include:

- The name of the State agency that will have the authority to represent and act for the State.
- An evaluation of the demand for and supply of outdoor recreation resources and facilities in the State.
- A program for the implementation of the plan.
- Certification by the Governor that ample opportunity for public participation has taken place in plan development.

Open Project Selection Process (OPSP). Each State must develop an OPSP that provides objective criteria and standards for grant selection that are explicitly based on each State's priority needs for the acquisition and development of outdoor recreation resources as identified in the SCORP. The OPSP is the connection between the SCORP and the use of LWCF grants to assist State efforts in meeting high priority outdoor recreation resource needs. To ensure continuing close ties between the SCORP and the OPSP, States must review project selection criteria each time that a new or amended SCORP is approved by the NPS. States must submit to the NPS a revised set of OPSP criteria that conform to any changes in SCORP priorities or submit an appropriate certification that no such revisions are necessary.

Proposal for a Public Facility. Except for certain kinds of supporting facilities (*e.g.,* restrooms, visitor information centers), project sponsors must seek NPS approval when constructing an indoor structure on a property that has received LWCF assistance. In most cases, development of an indoor structure would constitute a conversion, but, in certain cases NPS may approve them where it can be shown that they will enhance the outdoor recreation uses of a park and there will be a net gain in benefits to the outdoor recreating public using that park. The request comprises the PD/ESF, which is used to describe the nature of the facility, how it will support and enhance the outdoor recreation use of the site, and ownership and management; as well as a copy of a revised boundary map indicating the location of the proposed facility.

Request for Temporary Non-Conforming Use. Project sponsors must seek NPS approval for the temporary (up to 6 months) use of an LWCF-assisted site for purposes that do not conform to the public outdoor recreation requirements. The State's proposal to NPS must include: (a) Form 10–904, PD/ESF (used to describe the proposed temporary use); (b) SLO recommendations; and (c) an acknowledgement by the SLO that a full conversion will result if the temporary use has not ceased after 6 months.

Request for Significant Change of Use. Project sponsors must seek NPS approval to change the use of an assisted site from one eligible use to another when the proposed use significantly contravenes the plans or intent for the area as they were outlined in the original LWCF application for Federal assistance; *e.g.,* changing a site's use from passive to active recreation. NPS Form 10–904, PD/ESF is used for this request.

Extension of the 3-year Limit for Delayed Outdoor Recreation Development. Project sponsors must seek NPS approval to continue a non-recreation use beyond the 3-year limit for acquisition projects that were previously approved with delayed outdoor recreation development. The State must submit a written request and justification for such an extension to NPS before the end of the initial 3-year period. This request must include: (a) a full description of the property's current public outdoor recreation resources and the public's current ability to use the property; and (b) an update of the project sponsor's plans and schedule for developing outdoor recreation facilities on the property.

Reports. We use this information provided in reports to ensure that the grantee is accomplishing the work on schedule and to identify any problems that the grantee may be experiencing in accomplishing that work.

- Onsite Inspection Reports. States must administer a regular and continuing program of onsite inspections of projects. Onsite inspection reports are prepared for all inspections conducted and are included in the official project files maintained by the State. Progress onsite inspection reports occur during the grant project period and are generally combined with the annual performance report or when grant payments are made. Final onsite inspection reports must be submitted to the NPS within 90 days after the date of completing a project and prior to final reimbursement and administrative closeout. Post-completion onsite inspection reports must be completed within 5 years after the final project reimbursement and every 5 years thereafter. If there are problems, the report should include a description of the discrepancy and the corrective action to be taken. Only reports indicating problems are forwarded to the NPS for review and necessary action; all other reports are maintained in State files.
- Financial and Program Performance Reports. In accordance with 2 CFR 200 (Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards), grantees must monitor grant and subgrant supported activities to ensure compliance with applicable Federal requirements and that performance goals are being achieved. States must submit reports to NPS at least annually that include performance and financial information.

Recordkeeping. To comply with the grant requirements of 2 CFR 200, States must maintain financial records, supporting documents, statistical records, and all other records pertinent to a grant program for a period of 3 years after final payment on a project. The records must be retained beyond the 3-year period if audit findings have not been resolved. However, to comply with the LWCF Act perpetuity requirements, States must maintain sufficient records to allow them to keep track of parks and other recreation areas that have been assisted.

Request for Reimbursement/Record of Electronic Payment. States use the Automated Standard Application for Payments (ASAP) system for drawing funds on approved grants. For planning grants, States must submit to NPS a progress report and request for reimbursement before they may request payments. Acquisition and development projects do not require prior approval, but upon completion of an electronic payment on a given date the State must concurrently (within 24 hours) submit a completed NPS Form 10–905, ''Record of Electronic Payment'' to the LWCF Program offices in Washington, DC and applicable NPS Region.

Proposal to Shelter Facilities. Project sponsors must seek NPS approval to construct new or partially or fully enclose an existing outdoor recreation facility, such as a pool or ice rink, to shelter them from cold climatic conditions and thereby increase the recreational opportunities. This approval is required whether seeking to use LWCF grant funds for this purpose or not. NPS Form 10–904, PD/ESF is used for this request.

II. DATA

OMB Control Number: 1024–0031.

Title: Land and Water Conservation Fund State Assistance Program, 54 U.S.C. 200305.

Service Form Numbers: NPS Forms 10–902, 10–902A, 10–903, 10–904, and 10–905.

Type of Request: Revision of a currently approved collection.

Description of Respondents: States; the Commonwealths of Puerto Rico and the Northern Mariana Islands; the District of Columbia; and the territories of Guam, U.S. Virgin Islands, and American Samoa.

Number of Respondents: 56.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Estimated Annual Nonhour Cost Burden: None.

Activity	Number of annual respondents	Number of responses per respondent	Total annual responses	Completion time per response (hours)	Total annual burden hours
Application	60	5	300	12	3,600
Grant Amendment (not including Conversion of Use)	50	3.6	180	5	900
Conversion of Use	50	1	50	92.5	4,625
Statewide Comprehensive Outdoor Recreation Plan	11	1	11	600	6,600
Open Project Selection Process	11	1	11	30	330
Proposal for Public Facility	8	1	8	16	128
Request for Temporary Non-Conforming Use	5	1	5	16	80
Request for Significant Change of Use	2	1	2	16	32
Extension of 3-Year Limit for Delayed Outdoor Recreation Development	5	1	5	16	80
Onsite Inspection Reports	56	78	4,368	5.75	25,116
Financial and Program Performance Reports (per grant)	56	11.8	661	1	661
Recordkeeping	56	1	56	40	2,240
Requests for Reimbursement/Record of Electronic Payment	56	6	336	1	336
Proposal to Shelter Facilities	1	1	1	16	16
Totals			5,994		44,744

III. COMMENTS

On March 11, 2016, we published in the **Federal Register** (81 FR 12949) a Notice of our intent to request that OMB renew approval for this information collection. In that Notice, we solicited comments for 60 days, ending on May 10, 2016. One comment was received in response the Notice; it objected to the use of federal dollars for support of state projects and did not address the information collection.

We again invite comments concerning this information collection on:

• Whether or not the collection of information is necessary, including whether or not the information will have practical utility;

• The accuracy of our estimate of the burden for this collection of information;

• Ways to enhance the quality, utility, and clarity of the information to be collected; and

• Ways to minimize the burden of the collection of information on respondents.

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 OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: October 18, 2016.

Madonna L. Baucum,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2016–25495 Filed 10–20–16; 8:45 am]

BILLING CODE 4310–EH–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–22033; PPWOCRADN0–PCU00RP16.R50000]

Native American Graves Protection and Repatriation Review Committee; Meetings

AGENCY: National Park Service, Interior.

ACTION: Meeting notice.

SUMMARY: Notice is hereby given in accordance with the Federal Advisory Committee Act, (5 U.S.C. Appendix 1–16), of two meetings of the Native American Graves Protection and Repatriation Review Committee (Review Committee). All meetings will be open to the public.

DATES: The Review Committee will meet on March 15–16, 2017, from 8:30 a.m. until 5 p.m. (Mountain); and July 11, 2017, from 2 p.m. until approximately 6 p.m. (Eastern). Related deadlines for participating in each meeting are detailed in this notice.

ADDRESSES: The Review Committee will meet on March 15–16, 2017, at History Colorado, 1200 Broadway, Denver, CO 80203. Electronic submissions of materials or requests are to be sent to *nagpra_info@nps.gov.* Those who desire to attend the telephonic meeting should register at *http://www.nps.gov/nagpra* to be provided the telephone access number for the meeting.

SUPPLEMENTARY INFORMATION: The Review Committee was established in Section 8 of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), 25 U.S.C. 3006.

March 15–16, 2017

The Review Committee will meet on March 15–16, 2017, from 8:30 a.m. to 5 p.m. (Mountain), at History Colorado, Denver, CO. This meeting will be open to the public. The agenda for this meeting will include a report from the National NAGPRA Program; the discussion of the Review Committee Report to Congress for 2017; subcommittee reports and discussion; and other topics related to the Review Committee's responsibilities under Section 8 of NAGPRA. In addition, the agenda may include requests to the Review Committee for a recommendation to the Secretary of the Interior that an agreed-upon disposition of Native American human remains determined to be culturally unidentifiable proceed; presentations by Indian tribes, Native Hawaiian organizations, museums, Federal

agencies, associations, and individuals; public comment; requests to the Review Committee, pursuant to 25 U.S.C. 3006(c)(3), for review and findings of fact related to the identity or cultural affiliation of human remains or other cultural items, or the return of such items; and facilitation of the resolution of disputes among parties convened by the Review Committee pursuant to 25 U.S.C. 3006(c)(4). Presentation to the Review Committee by telephone may be requested but is not guaranteed. The agenda and materials for this meeting will be posted on or before February 15, 2017, at *http://www.nps.gov/nagpra.*

The Review Committee is soliciting presentations from Indian tribes, Native Hawaiian organizations, museums, and Federal agencies on the following two topics: (1) The progress made, and any barriers encountered, in implementing NAGPRA and (2) the outcomes of disputes reviewed by the Review Committee pursuant to 25 U.S.C. 3006(c)(4). The Review Committee also will consider other presentations from Indian tribes, Native Hawaiian organizations, museums, Federal agencies, associations, and individuals. A presentation request must, at minimum, include an abstract of the presentation and contact information for the presenter(s). Presentation requests and materials must be received by February 1, 2017. Written comments will be accepted from any party and provided to the Review Committee. Written comments received by February 8, 2017, will be provided to the Review Committee before the meeting.

The Review Committee will consider requests for a recommendation to the Secretary of the Interior that an agreed-upon disposition of Native American human remains determined to be culturally unidentifiable (CUI) proceed. A CUI disposition request must include the appropriate, completed form posted on the National NAGPRA Program Web site and, as applicable, the ancillary materials noted on the form. To access and download the appropriate form—either the form for CUI with a ''tribal land'' or ''aboriginal land'' provenience or the form for CUI without a ''tribal land'' or ''aboriginal land'' provenience—go to *http://www.nps.gov/nagpra,* and then click on ''Request for CUI Disposition Forms.'' CUI disposition requests must be received by January 4, 2017.

The Review Committee will consider requests, pursuant to 25 U.S.C. 3006(c)(3), for review and findings of fact related to the identity or cultural affiliation of human remains or other cultural items, or the return of such items, where consensus among affected parties is unclear or uncertain. A request for findings of fact must be accompanied by a statement of the fact(s) at issue and supporting materials, including those exchanged by the parties to consultation concerning the Native American human remains and/or other cultural items. To access procedures for presenting findings of fact, go to *http://www.nps.gov/nagpra/REVIEW/Procedures.htm.* Requests for findings of fact must be received by November 18, 2016.

The Review Committee will consider requests, pursuant to 25 U.S.C. 3006(c)(4), to convene parties and facilitate the resolution of a dispute, where consensus clearly has not been reached among affected parties regarding the identity or cultural affiliation of human remains or other cultural items, or the return of such items. A request to convene parties and facilitate the resolution of a dispute must be accompanied by a statement of the decision of the museum or Federal agency subject to the dispute resolution request, a statement of the issue, and the materials exchanged by the parties concerning the Native American human remains and/or other cultural items. To access procedures for presenting disputes, go to *http://www.nps.gov/nagpra/REVIEW/Procedures.htm.* Requests to convene parties and facilitate resolution of a dispute must be received by November 18, 2016.

Submissions and requests should be sent to *nagpra_info@nps.gov.* Such items are subject to posting on the National NAGPRA Program Web site prior to the meeting.

July 11, 2017

The Review Committee will meet via teleconference on July 11, 2017, from 2 p.m. until approximately 6 p.m. (Eastern). This meeting will be open to the public. The agenda for this meeting will include a report from the National NAGPRA Program; the discussion of the Review Committee Report to Congress for 2017; subcommittee reports and discussion; and other topics related to the Review Committee's responsibilities under Section 8 of NAGPRA. In addition, the agenda may include requests to the Review Committee for a recommendation to the Secretary of the Interior that an agreed-upon disposition of Native American human remains determined to be culturally unidentifiable proceed; presentations by Indian tribes, Native Hawaiian organizations, museums, Federal agencies, associations, and individuals; and public comment. The agenda and materials for this meeting will be posted on or before June 13, 2017, at *http://www.nps.gov/nagpra.*

The Review Committee is soliciting presentations from Indian tribes, Native Hawaiian organizations, museums, and Federal agencies on the following two topics: (1) The progress made, and any barriers encountered, in implementing NAGPRA and (2) the outcomes of disputes reviewed by the Review Committee pursuant to 25 U.S.C. 3006(c)(4). The Review Committee also will consider other presentations from Indian tribes, Native Hawaiian organizations, museums, Federal agencies, associations, and individuals. A presentation request must, at minimum, include an abstract of the presentation and contact information for the presenter(s). Presentation requests and materials must be received by May 30, 2017. Written comments will be accepted from any party and provided to the Review Committee. Written comments received by June 6, 2017, will be provided to the Review Committee before the meeting.

The Review Committee will consider requests for a recommendation to the Secretary of the Interior that an agreed-upon disposition of Native American human remains determined to be CUI proceed. A CUI disposition request must include the appropriate, completed form posted on the National NAGPRA Program Web site and, as applicable, the ancillary materials noted on the form. To access and download the appropriate form—either the form for CUI with a ''tribal land'' or ''aboriginal land'' provenience or the form for CUI without a ''tribal land'' or ''aboriginal land'' provenience—go to *http://www.nps.gov/nagpra,* and then click on ''Request for CUI Disposition Forms.'' CUI disposition requests must be received by May 2, 2017.

Submissions and requests should be sent to *nagpra_info@nps.gov.* Such items are subject to posting on the National NAGPRA Program Web site prior to the meeting. Those who desire to attend the meeting should register at *http://www.nps.gov/nagpra* to be provided the telephone access number for the meeting.

General Information

Information about NAGPRA, the Review Committee, and Review Committee meetings is available on the National NAGPRA Program Web site at *http://www.nps.gov/nagpra.* Approximately fourteen weeks after each Review Committee meeting, the meeting transcript is posted on the National NAGPRA Program Web site.

Review Committee members are appointed by the Secretary of the

Interior. The Review Committee is responsible for monitoring the NAGPRA inventory and identification process; reviewing and making findings related to the identity or cultural affiliation of cultural items, or the return of such items; facilitating the resolution of disputes; compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum, and recommending specific actions for developing a process for disposition of such human remains; consulting with Indian tribes and Native Hawaiian organizations and museums on matters affecting such tribes or organizations lying within the scope of work of the Review Committee; consulting with the Secretary of the Interior on the development of regulations to carry out NAGPRA; and making recommendations regarding future care of repatriated cultural items. The Review Committee's work is carried out during the course of meetings that are open to the public.

Before including your address, telephone number, email address, or other personal identifying information in your submission, you should be aware that your entire submission—including your personal identifying information—may be made publicly available at any time. While you may ask us to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2016–25541 Filed 10–20–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NERO–STSP–22113; PPNESTSP00, PPMPSPD1Z.YM0000]

Notice of Meeting for the Star-Spangled Banner National Historic Trail Advisory Council

AGENCY: National Park Service, Interior.

ACTION: Notice of meeting.

SUMMARY: As required by the Federal Advisory Committee Act (5 U.S.C. Appendix 1–16), the National Park Service is hereby giving notice that the Star-Spangled Banner National Historic Trail Advisory Council will hold a meeting on Monday, January 23, 2017, in Baltimore, Maryland.

DATES: The Star-Spangled Banner National Historic Trail Advisory Council will meet from 10 a.m. to 2 p.m. on Monday, January 23, 2017. (EASTERN)

ADDRESSES: The meeting will be held at the Fort McHenry National Monument and Historic Shrine, 2400 E. Fort Avenue, Baltimore, Maryland 21030.

FOR FURTHER INFORMATION CONTACT: Charles Grady, Assistant Superintendent and Designated Federal Official, Fort McHenry National Monument and Historic Shrine, Hampton National Historic Site, Star-Spangled Banner National Historic Trail, National Park Service, telephone (410) 962–4290, or email *Charles_Grady@nps.gov.*

This meeting is open to the public. Preregistration is required for both public attendance and comment. Any individual who wishes to attend the meeting and/or participate in the public comment session should register via email at *Neil_Heinlein@nps.gov* or telephone (410) 962–4290. For those wishing to make comments, please provide a written summary of your comments prior to the meeting.

SUPPLEMENTARY INFORMATION: Designated through an amendment to the National Trails System Act (16 U.S.C. 1241 to 1251, as amended), the trail consists of ''water and overland routes totaling approximately 290 miles, extending from Tangier Island, Virginia, through southern Maryland, the District of Columbia, and northern Virginia, in the Chesapeake Bay, Patuxent River, Potomac River, and north to the Patapsco River, and Baltimore, Maryland, commemorating the Chesapeake Campaign of the War of 1812 (including the British invasion of Washington, District of Columbia, and its associated feints, and the Battle of Baltimore in summer 1814).''

Topics to be discussed include setting priorities for the trail in the coming years and reporting of past year's actions.

The Council meeting is open to the public. Comments will be taken for 30 minutes at the end of the meeting (from 1:30 p.m. to 2 p.m.). Before including your address, telephone 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 may 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. All comments will be made part of the public record and will be electronically distributed to all Council members.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2016–25546 Filed 10–20–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NCR–CHOH–22123; PPNCCHOHS0–PPMPSPD1Z.YM0000]

Notice of November 9, 2016, Meeting of the Chesapeake and Ohio Canal National Historical Park Commission

AGENCY: National Park Service, Interior.

ACTION: Meeting notice.

SUMMARY: This notice sets forth the meeting date of the Chesapeake and Ohio Canal National Historical Park Commission.

DATES: The public meeting of the Chesapeake and Ohio Canal National Historical Park Commission will be held on Wednesday, November 9, 2016, at 9 a.m. (Eastern).

ADDRESSES: The meeting of the Commission will be held on Wednesday, November 9, 2016, at 9 a.m., in the second floor conference room at park headquarters, 1850 Dual Highway, Suite 100, Hagerstown, Maryland 21740 to discuss the following:

1. Welcome and Introductions
2. History of the Chesapeake and Ohio Canal National Historical Park Commission
3. Review of Commission Charter
4. Review of Federal Advisory Committee Act
5. Discussion of General Policies and Specific Matters Related to the Administration of the Park

FOR FURTHER INFORMATION CONTACT: Kevin D. Brandt, Superintendent and Designated Federal Officer, Chesapeake and Ohio Canal National Historical Park, 1850 Dual Highway, Suite 100, Hagerstown, Maryland 21740–6620, or by email *kevin_brandt@nps.gov.*

SUPPLEMENTARY INFORMATION: The Commission is established by Section 6 of the Chesapeake and Ohio Canal Development Act (16 U.S.C. 410y–4), Public Law 91–664, 84 Stat. 1978 (1971), as amended, and is regulated by the Federal Advisory Committee Act, as amended, 5 U.S.C. Appendix 1–16. The purpose of the Commission is to consult with the Secretary of the Interior, or her designee, with respect to matters relating to the development of the

Chesapeake and Ohio Canal National Historical Park, and with respect to carrying out the provisions of section 6 establishing the Canal.

The meeting is open to the public. It is expected that 15 persons will be able to attend the meeting in addition to Commission members. Interested persons may make oral/written presentations to the Commission during the business meeting or file written statements. Such requests should be made to the park superintendent prior to the meeting. Before including your address, telephone 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 may 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.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2016–25544 Filed 10–20–16; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR02380000, 17XR0680A3, RX041689900000000]

Notice of Availability of the Draft Environmental Impact Statement for the Long-Term Plan To Protect Adult Salmon in the Lower Klamath River

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Reclamation has made available for public review and comment the Draft Environmental Impact Statement (DEIS) for the Long-Term Plan to Protect Adult Salmon in the Lower Klamath River (LTP). The DEIS describes the potential environmental effects of the No-Action and Action Alternatives to augment flows in the Lower Klamath River to reduce the likelihood, and reduce the severity, of any Ich epizootic event that could lead to an associated fish die-off in future years.

DATES: Send written comments on the DEIS on or before December 5, 2016. One open house followed by a public hearing will be held on Wednesday, November 9, 2016, in Redding, CA. Doors open at 5:00 p.m.; the open house is scheduled from 5:30 p.m. to 6:30 p.m.; and the public hearing is scheduled from 6:30 p.m. to 8:30 p.m.

ADDRESSES: Send written comments or requests for copies to Ms. Julia Long, Project Manager, Bureau of Reclamation, Northern California Area Office, 16349 Shasta Dam Blvd., Shasta Lake, CA 96019; or via email to *BOR-SLO-Sha-ltpeis-Public-Comments@usbr.gov.* The DEIS is also accessible from the following Web site: *http://www.usbr.gov/mp/nepa/nepa_projdetails.cfm?Project_ID=22021.*

The open house and public hearing will be held at the Holiday Inn, 1900 Hilltop Drive, Redding, CA.

FOR FURTHER INFORMATION CONTACT: Ms. Julia Long, Project Manager, 530–276–2044; or by email at *BOR-SLO-Sha-ltpeis-Public-Comments@usbr.gov.*

SUPPLEMENTARY INFORMATION: The DEIS documents the potential direct, indirect, and cumulative physical, biological, and socioeconomic environmental effects that may result from implementing flow augmentation actions in the Lower Klamath River.

The DEIS evaluates and discloses any potential environmental impacts associated with implementing the LTP. The purpose of the proposed action is to increase flows in the lower Klamath River to reduce the likelihood, and potentially reduce the severity, of any Ich epizootic event that could lead to an associated fish die-off in future years. The need is based on the past extensive fish die-off that occurred in 2002. Crowded holding conditions for pre-spawn adults, warm water temperatures, and the presence of disease pathogens are the likely major factors contributing to the adult salmon mortalities. The proposed increased flows would be provided primarily from releases of water stored in Trinity Reservoir on the main stem of the Trinity River.

In August and September 2002, an estimated 170,000 fall-run Chinook salmon returned to the Klamath River. During those two months, 33,000 adult Chinook salmon, including 344 Coho salmon which are listed as threatened under the Endangered Species Act, and other salmonids, died prematurely due to infection. Federal, tribal, and state biologists studying the die-off concluded that the pathogens Ich (*Ichthyophthirius multifiliis*) and Columnaris (*Flavobacterium columnare*), were the primary causes of death to fish. Contributing factors that lead to the infection were warm water temperatures, low water velocities and volumes, high fish density, and long fish residence times. Flows in the lower Klamath averaged about 2,000 cubic feet per second during September 2002.

Subsequent dry year conditions in 2003, 2004, and 2012 through 2016, prompted Reclamation to arrange for late-summer flow augmentation to reduce the probability of a disease outbreak. In each of these years, 38 thousand acre-feet (TAF) to 64 TAF of supplemental water was released from Trinity Reservoir.

Reclamation recognizes that there is an increasing need to provide augmentation flows in dry years for the foreseeable future to prevent fish mortalities due to Ich and Columnaris. Reclamation is developing a long-term plan to address this need.

Authority

The Trinity River Division Authorization Act of August 12, 1955 (Public Law 84–386) and the Trinity River Basin Fish & Wildlife Management Act of 1984 (Act of October 24, 1984, Public Law 98–541), as amended, provides Reclamation the authority to take action to protect fishery resources.

Public Review of DEIS

Copies of the DEIS are available for public review at the following locations:

1. Bureau of Reclamation, Mid-Pacific Region, Regional Library, 2800 Cottage Way, Sacramento, CA 95825.
2. Bureau of Reclamation, Northern California Area Office, 16349 Shasta Dam Blvd., Shasta Lake, CA 96019.
3. Natural Resources Library, U.S. Department of the Interior, 1849 C Street NW., Main Interior Building, Washington, DC 20240–0001.
4. Shasta County Public Library, Redding Library, 1100 Parkview Avenue, Redding, CA 96001.
5. Humboldt County Public Library, 1313 3rd Street, Eureka, CA 95501.
6. Klamath County Public Library, 126 S. 3rd Street, Klamath Falls, OR 97601.
7. Chiloquin Branch Library, 104 S. 1st Avenue, Chiloquin, OR 97624.
8. Los Banos Branch Library, 1312 S. 7th Street, Los Banos, CA 93635.

Special Assistance for Public Hearings

If special assistance is required at the public hearings, please contact Ms. Sheryl Harral, Bureau of Reclamation, Public Affairs Office, at *sharral@usbr.gov.* Please notify Ms. Harral as far in advance as possible to enable Reclamation to secure the needed services. If a request cannot be honored, the requestor will be notified. A telephone device for the hearing impaired (TDD) is available at 916–978–5608.

Public Disclosure

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.

Dated: October 6, 2016.

Federico Barajas,

Deputy Regional Director.

[FR Doc. 2016–25535 Filed 10–20–16; 8:45 am]

BILLING CODE 4332–90–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Mobile Electronic Devices, DN 3179* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing under 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,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure (19 CFR 210.8(b)) filed on behalf of Qualcomm Incorporated on October 14, 2016. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain mobile electronic devices. The complaint names as respondents Zhuhai Meizu Technology Co., Ltd of China; Zhuhai Meizu Telecom Equipment Co., Ltd. of China; Dest Technology Limited of China; LGYD Limited of China; and Overseas Electronics, Inc. of Chicago, IL. The complainant requests that the Commission issue a 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, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to § 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 3179'') in a prominent place on the cover page and/ or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures).[1] Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: October 17, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–25465 Filed 10–20–16; 8:45 am]

BILLING CODE 7020–02–P

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *http://edis.usitc.gov.*

JOINT BOARD FOR THE ENROLLMENT OF ACTUARIES

Meeting of the Advisory Committee on Actuarial Examinations

AGENCY: Joint Board for the Enrollment of Actuaries.

ACTION: Notice of Federal advisory committee meeting.

SUMMARY: The Executive Director of the Joint Board for the Enrollment of Actuaries gives notice of a closed meeting of the Advisory Committee on Actuarial Examinations.

DATES: The meeting will be held on November 7, 2016, from 8:30 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at Segal Consulting, 333 W. 34th St., New York, NY 10001–2402.

FOR FURTHER INFORMATION CONTACT: Patrick W. McDonough, Executive Director of the Joint Board for the Enrollment of Actuaries, at 703–414–2173.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Advisory Committee on Actuarial Examinations will meet at Segal Consulting, 333 W. 34th St., New York, NY, on November 7, 2016, from 8:30 a.m. to 5 p.m.

The purpose of the meeting is to discuss topics and questions that may be recommended for inclusion on future Joint Board examinations in actuarial mathematics, pension law and methodology referred to in 29 U.S.C. 1242(a)(1)(B).

A determination has been made as required by section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App., that the subject of the meeting falls within the exception to the open meeting requirement set forth in Title 5 U.S.C. 552b(c)(9)(B), and that the public interest requires that such meeting be closed to public participation.

Dated: October 13, 2016.

Patrick W. McDonough,

Executive Director, Joint Board for the Enrollment of Actuaries.

[FR Doc. 2016–25560 Filed 10–20–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. VA Partners I, LLC, et al.; Public Comment and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes below the comment received on the proposed Final Judgment in *United States* v. *VA Partners I, LLC, et al.,* Case No. 16–cv–01672 (WHA) (N.D. Cal.), together with the Response of the United States to Public Comment.

Copies of the comment and the United States' Response are available for inspection at the Department of Justice Antitrust Division, 450 Fifth Street NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *https://www.justice.gov/atr/case/us-v-va-partners-i-llc-et-al,* and at the Office of the Clerk of the United States District Court for the North District of California, 450 Golden Gate Avenue, San Francisco, CA 94102. Copies of any of these materials may also be obtained upon request and payment of a copying fee.

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Attorneys for Plaintiff United States of America

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff, v.

VA PARTNERS I, LLC, et al.,

Defendants.

Case No. 16–cv–01672 (WHA)

PLAINTIFF'S RESPONSE TO PUBLIC COMMENT

RESPONSE OF THE UNITED STATES TO PUBLIC COMMENT ON THE PROPOSED FINAL JUDGMENT

Pursuant to the Antitrust Procedures and Penalties Act (''APPA''), 15 U.S.C. § 16(b)–(h), the United States hereby files the single public comment received concerning the proposed Final Judgment in this case and responds to this comment. After careful consideration of the comment, the United States continues to believe that the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this response have been published in the **Federal Register** pursuant to 15 U.S.C. § 16(d).

I. PROCEDURAL HISTORY

On April 4, 2016, the United States filed a civil antitrust Complaint against VA Partners I, LLC, (''VA Partners I''), ValueAct Capital Master Fund, L.P. (''Master Fund''), and ValueAct Co-Invest International, L.P. (''Co-Invest Fund'') (collectively, ''ValueAct'' or ''Defendants''), to remedy violations of Section 7A of the Clayton Act, 15 U.S.C. § 18a, commonly known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the ''HSR Act'').

Following the filing of the Complaint, the parties engaged in settlement discussions that culminated in a consensual resolution of this matter. On July 12, 2016, the United States filed a proposed Final Judgment, a Stipulation and Proposed Order, and a Competitive Impact Statement (''CIS'') that explains how the proposed Final Judgment is designed to apply an appropriate penalty for, and adequately restrain, Defendants' HSR Act violations. (ECF No. 38, 39.) As required by the APPA,

the United States published the proposed Final Judgment and CIS in the **Federal Register** on July 25, 2016. *See* 81 Fed. Reg. 48,450 (July 25, 2016). In addition, the United States ensured that a summary of the terms of the proposed Final Judgment and the CIS, together with directions for the submission of written comments, were published in *The Washington Post* and the *San Francisco Chronicle* on seven different days during the period of July 18, 2016 to July 24, 2016. *See* 15 U.S.C. § 16(c). The 60-day waiting period for public comments ended on September 23, 2016. One comment was received and is described below and attached as Exhibit 1.

II. THE COMPLAINT AND PROPOSED SETTLEMENT

The Complaint alleges that ValueAct violated the HSR Act by failing to comply with the Act's premerger notification and reporting requirements in connection with its acquisition of voting securities of Halliburton Co. (''Halliburton'') and Baker Hughes Inc. (''Baker Hughes'') in 2014 and 2015.

The HSR Act states that ''no person shall acquire, directly or indirectly, any voting securities of any person'' exceeding certain thresholds until that person has filed pre-acquisition notification and report forms with the Antitrust Division of the Department of Justice (''DOJ'') and the Federal Trade Commission (''FTC'') (collectively, the ''Agencies'') and the post-filing waiting period has expired. 15 U.S.C. § 18a. A key purpose of the notification and waiting period is to protect consumers and competition from potentially anticompetitive transactions by providing the Agencies an opportunity to conduct an antitrust review of proposed acquisitions of voting securities exceeding certain thresholds before they are consummated.

As alleged in the Complaint and described further in the CIS, ValueAct made substantial purchases of stock in two direct competitors with the intent to participate in those companies' business decisions, without first complying with the notification and waiting period requirements of the HSR Act. Through these purchases, ValueAct simultaneously became one of the largest shareholders of both Halliburton and Baker Hughes. ValueAct established these positions as Halliburton and Baker Hughes—the second- and third-largest providers of oilfield services in the world—were being investigated for agreeing to a merger that threatened to substantially lessen competition in over twenty product markets in the United States. The United States filed a lawsuit to challenge the merger on April 6, 2016, and Halliburton and Baker Hughes abandoned the transaction a few weeks later. ValueAct's failure to comply with the HSR Act risked the government's ability to protect competition because it prevented the United States from reviewing in advance ValueAct's stock acquisitions, which were made with the intent of participating in the companies' business decisions and intervening with the management of each firm as necessary to increase the probability of the Halliburton-Baker Hughes merger being completed.

The Complaint alleges that Defendants could not excuse their failure to file the necessary notification and reporting forms by relying on the HSR Act's limited exemption for acquisitions made ''solely for the purposes of investment'' (the ''investment-only exemption''). Section 18a(c)(9) of the HSR Act exempts ''acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer.'' As explained in the regulations implementing the HSR Act, voting securities are held ''solely for the purpose of investment'' if the acquirer has ''no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.'' 16 C.F.R. § 801.1(i)(1) (''HSR Rule 801.1(i)(1)'').

As alleged in the Complaint, ValueAct did not qualify for the investment-only exemption because it intended from the time it purchased stock in these companies to participate in the business decisions of both companies. Specifically, ValueAct intended to use its position as a major shareholder of both Halliburton and Baker Hughes to obtain access to management; to learn information about the companies and the merger in private conversations with senior executives; to influence the decisions of these senior executives in a manner that increased the likelihood that Halliburton and Baker Hughes would be able to complete their anticompetitive merger; and ultimately to influence other business decisions regardless of whether the merger was consummated. The totality of the evidence, as described further in the Complaint, demonstrates that ValueAct was not entitled to claim the investment-only exemption.

The proposed Final Judgment provides for injunctive relief and the payment of civil penalties, which are designed to prevent future violations of the HSR Act. Specifically, the proposed Final Judgment prohibits Defendants from relying on the investment-only exemption if they intend to take, or their investment strategy identifies circumstances in which they may take, any of several specifically enumerated actions that reflect active participation in the company in which they are investing. The prohibited conduct provisions are aimed at deterring future HSR violations of the sort alleged in the Complaint. While this provision does not represent a comprehensive list of all conduct that would disqualify an acquirer of voting securities from relying on the investment-only exemption, it is aimed at deterring conduct that poses the greatest threat to competition. The proposed Final Judgment also provides for compliance, access, and inspection procedures to promote Defendants' compliance with the proposed Final Judgment and to enable the United States to monitor such compliance. Finally, the proposed Final Judgment imposes an $11 million civil penalty for Defendants' HSR Act violation. This penalty reflects the gravity of the conduct at issue and will adequately deter ValueAct and other companies from future HSR Act violations.

III. STANDARD OF JUDICIAL REVIEW

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (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 this public interest determination, the Court 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).

The public interest inquiry is necessarily a limited one, as the United States is entitled to deference in crafting its antitrust settlements, especially with respect to the scope of its complaint and the adequacy of its remedy. *See generally United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995) (holding that government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest''); *United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1, 10–11 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States* v. *US Airways Group, Inc.,* 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (noting that the court's ''inquiry is limited'' because the government has ''broad discretion'' to determine the adequacy of the relief secured through a settlement); *United States* v. *InBev N.V./S.A.,* No. 08–1965 (JR), 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent 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 mechanism to enforce the final judgment are clear and manageable'').

Under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not '''engage in an unrestricted evaluation of what relief would best serve the public.''' *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.''* More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).

Courts ''may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17. Rather, the ultimate question is whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.''' *Microsoft,* 56 F.3d at 1461. Accordingly, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also United States* v. *Apple, Inc.,* 889 F. Supp. 2d 623, 631 (S.D.N.Y. 2012). And, a ''proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is within the reaches of the public interest.'' *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations and internal quotations omitted); *see also United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

In its 2004 amendments to the APPA,[1] Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement by adding 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). The procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11; *see also United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (''[T]he Tunney Act expressly allows the court to make its public interest determination based on the basis of the competitive impact statement and response to public comments alone.''); *US Airways,* 38 F. Supp. 3d at 76 (same).

[1] The 2004 amendments substituted ''shall'' for ''may'' when setting forth the relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

IV. SUMMARY OF PUBLIC COMMENT AND RESPONSE OF THE UNITED STATES

During the 60-day comment period, the United States received one comment, from Phillip Goldstein, manager of activist hedge fund Bulldog Investors. Mr. Goldstein does not argue that the relief set forth in the proposed Final Judgment is inadequate to address the allegations in the Complaint, nor does he assert that the terms of the decree should be altered in any particular way. Instead, Mr. Goldstein claims that it ''appears'' that ValueAct settled this matter because the FTC increased the civil penalties for HSR violations and took the position that such increases could apply retroactively. Mr. Goldstein also claims that HSR Rule 801.1(i)(1)—the FTC's 1978 rule explaining the meaning of the ''investment only'' exemption—''irrationally'' draws a distinction between passive and active investors and thus should be revised. Mr. Goldstein further claims that HSR Rule 801.1(i)(1) is unconstitutional because it violates the First Amendment. In light of these arguments, Mr. Goldstein urges the United States to seek a stay of this enforcement action until this rule is revised. As explained below, none of Mr. Goldstein's arguments warrant delaying entry of the proposed Final Judgment.

First, as fully detailed in the CIS, the United States settled this case because it determined that the injunction and $11 million penalty imposed on ValueAct was in the public interest because this relief adequately addresses and reflects the gravity of ValueAct's wrongful conduct and will strongly deter ValueAct and other companies from violating the HSR Act. None of Mr. Goldstein's arguments provide a basis for questioning, let alone, overruling the United States' broad discretion in reaching this determination.

Second, Mr. Goldstein's passing reference to ValueAct's supposed ''coerced capitulation'' in agreeing to settle this action misses the mark because the sole purpose of the Tunney Act review process is to determine why the Agencies—rather than a defendant—decided to settle a civil antitrust enforcement action and whether doing so was in the public interest. *Bechtel,* 648 F.2d at 666 (''The court's role in [the Tunney Act review process] is one of insuring that the government has not breached its duty to the public in

consenting to the decree . . . [and] to determine . . . whether the settlement is 'within the reaches of the public interest.'"); *Inbev,* 2009 U.S. Dist. LEXIS 84787, at *3 (noting that the relevant inquiry during the Tunney Act review process is "whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable"). In any event, Mr. Goldstein's assertion that ValueAct was purportedly forced to settle because the FTC increased the potential fines during the pendency of this action ignores the fact that the $11 million fine that ValueAct agreed to pay was within the fine amount that the United States sought when it filed this action and that this amount was based on the penalties in effect *prior to* publication of the FTC's interim final rule on June 30, 2016. *See* Cmplt. ¶ 6 & Request for Relief.

Third, Mr. Goldstein's lengthy argument that the distinction drawn in HSR Rule 801.1(i)(1) between passive and active investors is "irrational" and should be revised is similarly outside the scope of this proceeding. As noted above, the court's inquiry in a Tunney Act proceeding is limited to "whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism[s] to enforce the final judgment are clear and manageable." *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Mr. Goldstein's assertions that HSR Rule 801.1(i)(1)—a rule that has been in effect for nearly thirty years—is "irrational" and should be revised are wholly irrelevant to the sole question before the Court: whether the proposed Final Judgment adequately addresses the harms alleged in the Complaint. In other words, Mr. Goldstein's assertions are plainly outside the scope of the limited review that Congress established under the Tunney Act. To the extent Mr. Goldstein wishes to dispute the appropriateness of HSR Rule 801.1(i)(1) and how it is applied, he can direct his suggestions to the FTC (or could have commented when the rule was originally passed [2]). He cannot, however, use his general opposition to HSR Rule 801.1(i)(1) as a basis to reject or delay entry of the proposed Final Judgment.

Finally, Mr. Goldstein's suggestion that this Court should reject the proposed Final Judgment because HSR Rule 801.1(i)(1) is "unconstitutional" has no merit. To the extent that this assertion—which has no bearing on whether the proposed Final Judgment adequately addresses the antitrust violations alleged in the Complaint—is properly before the Court, HSR Rule 801.1(i)(1) is content neutral and does not violate the First Amendment. Even if the rule implicated First Amendment interests, it would readily withstand review. *See Cableamerica Corp.* v. *FTC,* 795 F. Supp. 1082, 1093 (N.D. Ala. 1992) (dismissing claim that the FTC's enforcement of the HSR Act's reporting requirements violated the plaintiff's First Amendment rights).

For all of these reasons, Mr. Goldstein's public comment provides no basis to deny or delay entry of the proposed Final Judgment.

[2] Contrary to Mr. Goldstein's comment, the original revised HSR rules, including 16 C.F.R. § 801.1(i)(1), were subject to public comment prior to being adopted. *See* 42 Fed. Reg. 39040, 39047 (Aug. 1, 1977).

V. CONCLUSION

After reviewing the public comment, the United States continues to believe that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the comment and this response are published in the **Federal Register**.

Date: October 17, 2016

Respectfully submitted,

/s/Kathleen S. O'Neill

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July 27, 2016

United States of America v. VA Partners I, LLC, et al., Case No. 16–cv–01672 (WHA)

Dear Ms. O'Neill,

The announced settlement of the referenced matter appears to be a product of coerced capitulation rather than of the parties' relative assessments of the merits. It appears that ValueAct, in response to the FTC's post-litigation decision to dramatically increase the penalties for violations of the Hart-Scott-Rodino Antitrust Improvements Act (the "HSR Act") and to apply them retroactively, made a rational decision to settle.[1] As a result, the settlement avoids judicial scrutiny of, and perpetuates (by virtue of its *in terrorem* effect) a rule that, as explained below, should never have been adopted. For those reasons, the settlement is not in the public interest.

First, the enforcement action that the settlement resolves is based on a dubious premise, i.e., that the statutory phrase "solely for the purposes of investment" in connection with reporting and waiting period requirements of HSR Act means "solely for the purposes of *passive* investment." (Emphasis added.) While the FTC has long held that position, to my knowledge, the rule adopting it has never been subjected to judicial review to determine whether the FTC's addition of the word "passive" (which is absent in the statute) is reasonable. As explained below, it is not only unreasonable, it is irrational.

Rule 801.1(i)(1), which was apparently adopted without public comment in 1978, states: "Voting securities are held or acquired 'solely for the purpose of investment' if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." However, in the context the HSR Act, the purpose of which is to permit the FTC to analyze potential anticompetitive effects of business combinations before they occur, any distinction between an acquisition of stock by a passive investor and an investor that seeks to influence management (in contrast to an acquisition by a competitor, or a significant customer, supplier, or service provider [2]) is irrational as the facts in this case illustrate.

According to the DOJ's Competitive Impact statement ("CIS"):

[1] In a statement issued to news media, ValueAct explained why it settled:

ValueAct Capital fundamentally disagrees with DOJ's interpretation of the facts in connection with our investments in Halliburton and Baker Hughes. However, due to the sudden and unanticipated 150 percent increase in the potential penalties associated with alleged Hart Scott Rodino violations effective August 1, we felt we had no choice but to resolve this case as quickly as possible. We are pleased to have come to a resolution to this litigation that will not impact our business or strategy going forward.

[2] For example, a large acquisition of FedEx stock by Amazon would clearly raise concerns about a possible effect on competition in the package delivery business. The same acquisition by ValueAct, regardless of whether it was a passive or active investor, would raise no similar concern.

ValueAct intended from the time it made these stock purchases to use its position as a major shareholder of both Halliburton and Baker Hughes to obtain access to management, to learn information about the companies and the merger in private conversations with senior executives, to influence those executives to improve the chances that the Halliburton-Baker Hughes merger would be completed, and ultimately influence other business decisions regardless of whether the merger was consummated. ValueAct executives met frequently with the top executives of the companies (both in person and by teleconference), and sent numerous e-mails to these the top executives on a variety of business issues. During these meetings, ValueAct identified specific business areas for improvement. ValueAct also made presentations to each company's senior executives, including presentations on post- merger integration. The totality of the evidence described in the Complaint makes clear that ValueAct could not claim the limited HSR exemption for passive investment.

In other words, ValueAct did what a company's legal counsel or an investment bank might do, i.e., provide advice to management to increase the chances that a merger would be successfully completed, the only difference being that, rather than being paid for its advice, ValueAct hoped to profit through an increase in the value of its investment if the merger succeeded. Yet, attorneys and consultants are not required to make a filing with the FTC or pay a fee of $45,000 or more before they can speak with management. There is no good reason to discriminate against any stockholder, let alone a stockholder that owns less than 10% of a company's stock, that seeks only to profit from its investment by requiring it to cease trading for a period of time or to pay a large fee before it can exercise its right to communicate with management (nor, as explained below, could a law or regulation do so without violating the First Amendment).

There has been no allegation that ValueAct has ever contemplated merging with any company in which it owned stock including Halliburton or Baker Hughes. Nor was ValueAct a competitor, or a significant supplier, service provider, or customer of either company. The FTC and the DOJ do not seem to understand that active and passive investors have the same exact objective, i.e., to see the value of their investment increase. When a firm like ValueAct seeks to influence management of a company, that is merely a means to achieve that objective—not a separate objective.[3]

Indeed, DOJ's Competitive Impact Statement (''CIS''), in conclusory and circular fashion, alleges only one actual risk of harm caused by ValueAct: ''ValueAct's failure to file the necessary notifications prevented the Department from timely reviewing ValueAct's stock acquisitions, which risked harming competition given that they resulted in ValueAct's becoming one of the largest shareholders in two direct competitors that were pursuing an anticompetitive merger.'' But, the CIS is silent about precisely how ValueAct's failure to file caused (or could cause) any real harm to competition or impaired the FTC or DOJ from determining whether to challenge the merger between Halliburton and Baker Hughes.[4] If the FTC and DOJ cannot cite an example of harm that resulted from the acquisition of stock by an activist investor, that suggests that Rule 801.1(i)(1) is irrational—and regulators should not be perpetuating irrational regulations.

In short, for 38 years the FTC has wrongly interpreted the HSR's ''investment only'' exemption and it should stop treating activist investors like bogeymen. Notably, the SEC, which has extensive experience in regulating investors and investments, has adopted proxy rules that properly reflect the difference between actions intended for investment and non-investment purposes. Thus, SEC Rule 14a–2(b)(ix) excludes certain solicitations from the technical requirements of the proxy rules provided they are not made by or on behalf of ''[a]ny person who, because of a substantial interest in the subject matter of the solicitation, is likely to receive a benefit from a successful solicitation that would not be shared pro rata by all other holders of the same class of securities. . . .'' Similarly, SEC Rule 14a–8(i)(4) allows a company to exclude a shareholder proposal from its proxy statement ''[i]f the proposal relates to the redress of a personal claim or grievance against the company or any other person, or if it is designed to result in a benefit to you, or to further a personal interest, which is not shared by the other shareholders at large.''

The FTC should apply the same distinguishing principle to revise Rule 801.1(i)(1) to read as follows: ''Voting securities are held or acquired 'solely for the purpose of investment' if the person holding or acquiring such voting securities has no intention of receiving a benefit that will not be shared pro rata by all other holders of the same securities.'' Unlike the current rule, such a rule is consistent with, and faithful to, the purpose of the HSR Act.

Additionally, Rule 801.1(i)(1) violates the First Amendment because it requires a stockholder to pay a sizeable fee and to temporarily refrain from additional stock purchases in order to exercise his or her right to communicate with management about the company. Worse, it is content-based[5] and thus, presumptively unconstitutional.[6]

To conclude, the DOJ should seek a stay of its enforcement action until Rule 801.1(i)(1) is revised to conform to the intent of the HSR Act. Even though ValueAct has agreed to the proposed settlement it would be morally wrong for an agency that is supposed use reason and pursue justice to finalize a settlement of an enforcement action

[3] In the film, *Terms of Endearment,* after Emma's funeral, Garrett, her neighbor (played by Jack Nicholson) supportively pays special attention to Tommy, Emma's long-neglected son:

Garrett: I understand you're a swimmer. Me too.

Tommy: But you're an astronaut, right?

Garrett: I'm an astronaut and a swimmer

Similarly, an activist and an investor are not mutually exclusive things as the FTC would have it.

[4] According to the DOJ's announcement of the settlement: ''ValueAct acquired substantial stakes in Halliburton and Baker Hughes in the midst of our antitrust review of the companies' proposed merger, and used its position to try to influence the outcome of that process and certain other business decisions,'' said Principal Deputy Assistant Attorney General Renata Hesse, head of the Justice Department's Antitrust Division. ''ValueAct was not entitled to avoid the HSR requirements by claiming to be a passive investor, while at the same time injecting itself in this manner. The HSR notification requirements are the backbone of the government's merger review process, and crucial to our ability to prevent anticompetitive mergers and acquisitions.''

OK but where's the beef? As Matt Levine of *Bloomberg* pointed out: ''Hesse's last sentence, about the HSR notification being 'crucial to our ability to prevent anticompetitive mergers and acquisitions,' might be true in general, but it has nothing to do with this case. The Justice Department could—and did—prevent the Baker Hughes- Halliburton merger without ever giving any thought to ValueAct.'' (*http://www.bloomberg.com/view/articles/2016-07-13/sometimes-it-s-hard-for-owners-to-talk-to-companies*)

[5] See *Statement of the Federal Trade Commission In the Matter of Third Point,* File No. 121–0019, (August 24, 2015), (After enumerating Third Point's activist oriented communications in connection with its investment in Yahoo! Stock, the Commission concluded: ''Given these actions by Third Point, we do not believe the investment-only exemption applies.'' In responding to the statement of the dissenting Commissioners, it defensively added: ''In any event, the Commission's enforcement action does not prevent Third Point from engaging in shareholder advocacy that may be beneficial or procompetitive.'' In other words, ''We won't bring an enforcement action against a stockholder if we agree with it.'' That is a content-based regulation, plain and simple.

[6] To save a content-based restriction on speech, the government must show that the restriction is narrowly drawn to achieve a compelling governmental interest. Application of this standard almost always leads to invalidating the challenged restriction.

which is based upon, and perpetuates, a regulation that is unconstitutional, irrational, and inconsistent with the HSR Act.

Very truly yours,

/s/

Phillip Goldstein

[FR Doc. 2016–25525 Filed 10–20–16; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed National Resources Restoration Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act

On October 13, 2016, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the District of New Jersey in the lawsuit entitled *United States* v. *Wyeth Holdings LLC,* Civil Action No. 3:16–cv–07219–AET–LHG.

The United States filed this lawsuit under the Comprehensive Environmental Response, Compensation and Liability Act on behalf of the United States Fish and Wildlife Service and the National Oceanic and Atmospheric Administration. In its complaint the United States alleges that Defendant Wyeth Holdings LLC is liable for damages for, injury to, destruction of, or loss of natural resources in connection with the American Cyanamid Superfund Site in the Township of Bridgewater and Borough of Bound Brook, New Jersey. The proposed Consent Decree resolves claims brought by the United States and related claims brought by the New Jersey Department of Environmental Protection in a related action. In exchange for a covenant not to sue for injury to the Raritan River, Wyeth Holdings LLC agrees to remove the Weston Causeway Dam on the Millstone River; design a fish passage at the Island Farm Weir on the Raritan River; pay federal and state future oversight costs; reimburse federal and state assessment costs totaling $184,363; pay fish and habitat survey costs totaling $50,000; and fund the evaluation and monitoring of trust resources prior to and after removal of the Weston Causeway Dam.

The publication of this notice opens a period for public comment on the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Wyeth Holdings LLC,* Civil Action No. 3:16-cv-07219–AET–LHG, D.J. Ref. No. 90–11–3–07250/2. All comments must be submitted no later than sixty (60) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By 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 Consent Decree may be examined and downloaded at this Justice Department Web site: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ–ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $21.50 (25 cents per page reproduction cost) payable to the United States Treasury.

Robert E. Maher Jr.,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2016–25451 Filed 10–20–16; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Parole Commission

Sunshine Act Meeting

TIME AND DATE: 12:00 p.m., Wednesday, October 26, 2016.

PLACE: U.S. Parole Commission, 90 K Street NE., 3rd Floor, Washington, DC.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Determination on three original jurisdiction cases.

CONTACT PERSON FOR MORE INFORMATION: Jacqueline Graham, Staff Assistant to the Chairman, U.S. Parole Commission, 90 K Street NE., 3rd Floor, Washington, DC 20530, (202) 346–7010.

Dated: October 18, 2016.

J. Patricia W. Smoot,

Chairman, U.S. Parole Commission.

[FR Doc. 2016–25582 Filed 10–19–16; 11:15 am]

BILLING CODE 4410–31–P

DEPARTMENT OF JUSTICE

Parole Commission

Sunshine Act Meeting

TIME AND DATE: 11:00 a.m., October 26, 2016.

PLACE: U.S. Parole Commission, 90 K Street NE., 3rd Floor, Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: Approval of July 27, 2016 minutes.

CONTACT PERSON FOR MORE INFORMATION: Jacqueline Graham, Staff Assistant to the Chairman, U.S. Parole Commission, 90 K Street NE., 3rd Floor, Washington, DC 20530, (202) 346–7010.

Dated: October 18, 2016.

J. Patricia W. Smoot,

Chairman, U.S. Parole Commission.

[FR Doc. 2016–25583 Filed 10–19–16; 11:15 am]

BILLING CODE 4410–31–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meeting; National Science Board

The National Science Board, pursuant to NSF regulations (45 CFR part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n-5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives short notice of the scheduling of an Executive Committee teleconference for the transaction of National Science Board business. The Executive Committee determined that the interests of the National Science Foundation require the short notice.

DATE & TIME: Thursday, October 20, 2016 from 5:00 p.m. to 5:30 p.m. EDT.

SUBJECT MATTER: (1) Committee Chair's Opening Remarks; (2) Approval of Executive Committee Minutes of July 2016; (3) IPA Program Review.

STATUS: Open.

This meeting will be held by teleconference at the National Science Foundation, 4201Wilson Blvd., Arlington, VA 22230. A public audio stream will be available for this meeting. Request the link by contacting *nationalsciencebrd@nsf.gov* prior to the teleconference. Please refer to the National Science Board Web site for additional information and schedule updates (time, place, subject matter or status of meeting) which may be found at *http://www.nsf.gov/nsb/notices/.* The point of contact for this meeting is Kathy Jacquart, 4201 Wilson Blvd.,

Arlington, VA 22230. Telephone: (703) 292–7000.

Chris Blair,

Executive Assistant to the NSB Office.

[FR Doc. 2016–25635 Filed 10–19–16; 4:15 pm]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–457; NRC–2016–0215]

Exelon Generation Company, LLC; Braidwood Station, Unit 2

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment application; opportunity to comment, request a hearing, and petition for leave to intervene.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an amendment to Renewed Facility Operating License No. NPF–77, issued to Exelon Generation Company, LLC, for operation of Braidwood Station, Unit 2, located in Will County, Illinois. The proposed amendment would allow a one-time extension from 72 hours to 200 hours of the technical specification (TS) completion time associated with the 2A service water (SX) pump in support of maintenance activities.

DATES: Submit comments by November 21, 2016. Requests for a hearing or petition for leave to intervene must be filed by December 20, 2016.

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

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0215. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Cindy Bladey, Office of Administration, Mail Stop: OWFN–12–H08, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

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: Joel S. Wiebe, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington DC 20555–0001; telephone: 301–415–6606, email: *Joel.Wiebe@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2016–0215 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 Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0215.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ‘‘*ADAMS Public Documents*’’ and then select ‘‘*Begin Web-based ADAMS Search.*’’ For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The application for license amendment dated September 30, 2016 is available in ADAMS under Accession No. ML16274A474.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2016–0215 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 *http://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 submissions into ADAMS.

II. Introduction

The NRC is considering issuance of an amendment to Renewed Facility Operating License No. NPF–77, issued to Exelon Generation Company, LLC, for operation of Braidwood Station, Unit 2, located in Will County, Illinois.

The proposed amendment would allow a one-time extension from 72 hours to 200 hours of the TS completion time associated with the 2A SX pump in support of maintenance activities.

Before any issuance of the proposed license amendment, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended (the Act), and NRC's regulations.

The NRC has made a proposed determination that the license amendment request involves no significant hazards consideration. Under the NRC's regulations in section 50.92 of title 10 of the *Code of Federal Regulations* (10 CFR), 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. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes have been evaluated using the risk informed processes described in RG [Regulatory Guide] 1.174, ‘‘An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decisions on Plant-Specific Changes to the Licensing Basis,’’ Revision 2 dated May 2011, RG 1.177, ‘‘An Approach for Plant-Specific, Risk-Informed Decisionmaking: Technical Specifications,’’ Revision 1 dated May 2011 and NRC Regulatory Guide 1.200, ‘‘An Approach for Determining the Technical Adequacy of Probabilistic Risk Assessment Results for Risk-Informed Activities,’’ Revision 2 dated March 2009. The risk associated with the proposed change was found to be acceptable.

The previously analyzed accidents are initiated by the failure of plant structures, systems, or components. The SX System is not considered an initiator for any of these previously analyzed events. The proposed change does not have a detrimental impact on the integrity of any plant structure, system, or component that initiates an analyzed event. No active or passive failure mechanisms that could lead to an accident are affected. The proposed change will not

alter the operation of, or otherwise increase the failure probability of any plant equipment that initiates an analyzed accident.

Therefore, the proposed change does not involve a significant increase in the probability of an accident previously evaluated.

The proposed change does not alter or prevent the ability of structures, systems, and components (SSCs) from performing their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits. The proposed change does not require any physical change to any plant SSCs nor does it require any change in systems or plant operations. The proposed one-time increase in the CT [completion time] is consistent with the philosophy of the current TS LCO [limiting condition for operation] which allows one SX train to be inoperable for 72 hours. This change only extends the 72 hour CT to 200 hours which has been shown to be acceptable from a risk perspective. The minimum equipment required to mitigate the consequences of an accident and/or safely shut down the plant will be Operable or available during the extended CT. The proposed change is consistent with the safety analysis assumptions and resultant consequences. Based on the above, the proposed change does not involve a significant increase in the consequences of an accident previously evaluated.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes do not involve the use or installation of new equipment and the currently installed equipment will not be operated in a new or different manner. No new or different system interactions are created and no new processes are introduced. The proposed changes will not introduce any new failure mechanisms, malfunctions, or accident initiators not already considered in the design and licensing bases. Based on this evaluation, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change does not alter any existing setpoints at which protective actions are initiated and no new setpoints or protective actions are introduced. The design and operation of the SX System remains unchanged. The risk associated with the proposed increase in the time the 2A SX pump is allowed to be inoperable was evaluated using the risk informed processes described in RG 1.174, ''An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decisions on Plant-Specific Changes to the Licensing Basis,'' Revision 2 dated May 2011, RG 1.177, ''An Approach for Plant-Specific, Risk-Informed Decisionmaking: Technical Specifications,'' Revision 1 dated May 2011 and NRC Regulatory Guide 1.200, ''An Approach for Determining the Technical Adequacy of Probabilistic Risk Assessment Results for Risk-Informed Activities,'' Revision 2 dated March 2009. The risk was shown to be acceptable. Based on this evaluation, the proposed change does not involve a significant reduction in a margin of safety.

Based on the above, EGC [Exelon Generation Company, LLC] concludes that the proposed amendment does not involve a significant hazards consideration under the standards set forth in 10 CFR 50.92(c), and, accordingly, a finding of no significant hazards consideration is justified.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the license amendment request involves a No Significant Hazards Consideration.

The NRC is seeking public comments on this proposed determination that the license amendment request involves no significant hazards consideration. 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 amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day notice period if the Commission concludes the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment 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 in the **Federal Register** a notice of issuance. 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 infrequently.

II. 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 this action may file a request for a hearing and a petition for leave to intervene (petition) with respect to the 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, which is available at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. The NRC's regulations are accessible electronically from the NRC Library on the NRC's Web site at *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a petition is filed within 60 days, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the petitioner; (2) the nature of the petitioner's right under the Act 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. The petition must also set forth the specific contentions which the petitioner seeks to have litigated at 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 shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which 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 those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion to support its position on the issue. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the proceeding. The contention must be one

which, if proven, would entitle the petitioner to relief. A petitioner who fails to satisfy these requirements 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, and have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that person's admitted contentions 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. Requests for hearing, petitions for leave to intervene, and motions for leave to file new or amended contentions that are filed after the 60-day 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).

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held 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 any 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 by December 20, 2016. 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. A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof may also have the opportunity to participate under 10 CFR 2.315(c).

If a hearing is granted, any person who does not wish, or is not qualified, to become a party to the proceeding may, in 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 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.

III. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene (hereinafter ''petition''), and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562, August 3, 2012). 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. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

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 request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition (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 hearing in this 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 Web site at *http://www.nrc.gov/site-help/e-submittals/getting-started.html.* System requirements for accessing the E-Submittal server are available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/adjudicatory-sub.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Electronic Filing Help Desk will not be able to offer assistance in using unlisted software.

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a petition. Submissions should be in Portable Document Format (PDF). Additional guidance on PDF submissions is available on the NRC's public Web site at *http://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the documents are 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. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice 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 documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public Web site at *http://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 7 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a 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 by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/ehd/*, unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as Social Security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. However, in some instances, a petition will require including information on local residence in order to demonstrate a proximity assertion of interest in the proceeding. 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 are requested not to include copyrighted materials in their submission.

For further details with respect to this action, see the application for license amendment dated September 30, 2016 (ADAMS Accession No. ML16274A474).

Attorney for licensee: Tamra Domeyer, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Branch Chief: G. Edward Miller

Dated at Rockville, Maryland, this 12th day of October 2016.

For the Nuclear Regulatory Commission.

Joel S. Wiebe,

Senior Project Manager, Plant Licensing Branch III–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2016–25503 Filed 10–20–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2016–0001]

Sunshine Act Meeting Notice

DATES: Week of October 17, 2016.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public.

Week of October 17, 2016

Thursday, October 20, 2016

9:25 a.m.

Affirmation Session (Public Meeting) (Tentative)

Duke Energy Florida, LLC (Levy Nuclear Plant, Units 1 and 2): Mandatory Hearing Decision (Tentative)

This meeting will be webcast live at the Web address—*http://www.nrc.gov/*.

* * * * *

The schedule for Commission meetings is subject to change on short notice. For more information or to verify the status of meetings, contact Denise McGovern at 301–415–0681 or via email at *Denise.McGovern@nrc.gov*.

* * * * *

Additional Information

By a vote of 3–0 on October 19, 2016, the Commission determined pursuant to U.S.C. 552b(e) and '9.107(a) of the Commission's rules that the above referenced Affirmation Session be held with less than one week notice to the public. The meeting is scheduled on October 20, 2016.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html*.

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.* braille, large print), please notify Kimberly Meyer, NRC Disability Program Manager, at 301–287–0739, by videophone at 240–428–3217, or by email at *Kimberly.Meyer-Chambers@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555 (301–415–1969), or email *Brenda.Akstulewicz@nrc.gov* or *Patricia.Jimenez@nrc.gov*.

Dated: October 19, 2016.

Denise L. McGovern,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2016–25624 Filed 10–19–16; 4:15 pm]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2017–5 and CP2017–11; MC2017–6 and CP2017–12; CP2017–13; CP2017–14; CP2017–15; CP2017–16; and CP2017–17]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing recent Postal Service filings for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* October 24, 2016 (Comment due date applies to Docket Nos. MC2017–5 and CP2017–11; Docket Nos. MC2017–6 and CP2017–12); October 25, 2016 (Comment due date applies to Docket No. CP2017–13; Docket No. CP2017–14; Docket No. CP2017–15; Docket No. CP2017–16); October 26, 2016 (Comment due date applies to Docket No. CP2017–17).

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 Web site (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.40.

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2017–5 and CP2017–11; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 248 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* October 14, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Curtis E. Kidd; *Comments Due:* October 24, 2016.

2. *Docket No(s).:* MC2017–6 and CP2017–12; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Express & Priority Mail Contract 37 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* October 14, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Curtis E. Kidd; *Comments Due:* October 24, 2016.

3. *Docket No(s).:* CP2017–13; *Filing Title:* Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 3 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date:* October 14, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Jennaca D. Upperman; *Comments Due:* October 25, 2016.

4. *Docket No(s).:* CP2017–14; *Filing Title:* Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 3 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date:* October 14, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Jennaca D. Upperman; *Comments Due:* October 25, 2016.

5. *Docket No(s).:* CP2017–15; *Filing Title:* Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 3 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date:* October 14, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Kenneth R. Moeller; *Comments Due:* October 25, 2016.

6. *Docket No(s).:* CP2017–16; *Filing Title:* Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 3 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date:* October 14, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Kenneth R. Moeller; *Comments Due:* October 25, 2016.

7. *Docket No(s).:* CP2017–17; *Filing Title:* Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 3 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date:* October 14, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Curtis E. Kidd; *Comments Due:* October 26, 2016.

This notice will be published in the **Federal Register**.

Stacy L. Ruble,
Secretary.

[FR Doc. 2016–25461 Filed 10–20–16; 8:45 am]
BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79106; File No. SR–NYSE–2016–65]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Price List To Eliminate Take Fees for Bonds Executed on the NYSE Bonds℠ System

October 17, 2016.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on October 3, 2016, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Price List to eliminate take fees for bonds executed on the NYSE Bonds℠ system. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).
[2] 15 U.S.C. 78a.
[3] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Price List to eliminate take fees for bonds executed on the NYSE Bonds system. The Exchange currently charges transaction fees to liquidity takers for transactions executed on NYSE Bonds with a staggered fee schedule based on the number of bonds purchased or sold. Currently, the transaction fee for orders that take liquidity from the NYSE Bonds Book is $0.50 per bond for executions of one to ten (10) bonds; $0.20 per bond for executions of eleven (11) to twenty-five (25) bonds; and $0.10 per bond for executions of twenty-six (26) bonds or more. The Exchange also currently has a fee cap of $100 per execution.

The Exchange proposes to eliminate the take fee for all bonds executed on NYSE Bonds. The Exchange also proposes to remove text from the fee schedule regarding the maximum fee per execution because that text would no longer be applicable once the take fee is eliminated.

Additionally, the Exchange recently adopted the Liquidity Provider Incentive Program, a voluntary rebate program that pays Users[4] of NYSE Bonds a monthly rebate provided Users who opt into the rebate program meet specified quoting requirements.[5] Users who opt in to the Liquidity Provider Incentive Program are subject to a transaction fee for orders that provide liquidity to the NYSE Bonds Book of $0.50 per bond.[6] For orders that take liquidity from the NYSE Bonds Book, the current tiered fees noted above apply. However, with this proposed rule change, Users who opt into the Liquidity Provider Incentive Program would no longer be subject to fees for orders that take liquidity. To reflect the elimination of take fees as proposed herein, the Exchange proposes to delete text from the fee schedule regarding the applicability of standard execution fees under the Liquidity Provider Incentive Program for orders that take liquidity from the NYSE Bonds Book because that text would no longer be applicable.

The proposed rule change is intended to provide Users with a greater incentive to transact on the NYSE Bonds system.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[8] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed changes to eliminate the transaction fee for orders that take liquidity from the NYSE bonds Book is reasonable and equitable as it is designed to incentivize the submission of such orders and increase order volume on the Exchange. The proposed fee change is a reasonable amendment to the Exchange's fee schedule and is equitably allocated and does not unfairly discriminate between customers, issuers, and brokers or dealers because all Users are eligible to submit (or not submit) displayed liquidity taking orders in bonds traded on the Exchange. The Exchange believes that the proposed fee change is a reasonable method to incentivize the submission of such orders, which the Exchange believes will result in a greater number of bonds transacted on the Exchange, thereby increasing displayed liquidity and traded volume on the Exchange.

The Exchange is proposing to adopt a pricing model whereby Users that take liquidity from the NYSE Bonds system would not pay a fee. The proposed rule change will therefore benefit all Users that take liquidity from the NYSE Bonds system.

The Exchange further believes that the proposed rule change is equitable and not unfairly discriminatory in that it will apply uniformly to all Users accessing the NYSE Bonds system. All similarly situated Users would be subject to the same fee structure, and each User would have the ability to determine the extent to which the Exchange's proposed structure will provide it with an economic incentive to use the NYSE Bonds system, and model its business accordingly.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[9] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Debt securities typically trade in a decentralized OTC dealer market that is less liquid and transparent than the equities markets. The Exchange believes that the proposed change would increase competition with these OTC venues by creating additional incentives to engage in bonds transactions on the Exchange and rewarding market participants for actively quoting and providing liquidity in the only transparent bond market, which the Exchange believes will enhance market quality.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues that are not transparent. In such an environment, the Exchange must continually review, and consider adjusting its fees and rebates to remain competitive with other exchanges as well as with alternative trading systems and other venues that are not required to comply with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. As a result of all of these considerations, the Exchange does not believe that the proposed change will impair the ability of member organizations or competing order execution venues to maintain their competitive standing in the financial markets.

[4] Rule 86(b)(2)(M) defines a User as any Member or Member Organization, Sponsored Participant, or Authorized Trader that is authorized to access NYSE Bonds.

[5] *See* Securities Exchange Act Release Nos. 77591 (April 12, 2016), 81 FR 22656 (April 18, 2016) (SR–NYSE–2016–26); and 77812 (May 11, 2016), 81 FR 30594 May 17, 2016) (SR–NYSE–2016–34).

[6] The Exchange recently adopted a fee waiver applicable to Users that provide liquidity in 800 or more qualifying CUSIPs quoted on the NYSE Bonds Book, and a fee cap of $5,000 per month applicable to all Users that do not attain the fee waiver. *See* Securities Exchange Act Release No. 78108 (June 21, 2016), 81 FR 41636 (June 27, 2016) (SR–NYSE–2016–42).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4), (5).

[9] 15 U.S.C. 78f(b)(8).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[10] of the Act and subparagraph (f)(2) of Rule 19b–4[11] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[12] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2016–65 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2016–65. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2016–65, and should be submitted on or before November 14, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–25466 Filed 10–20–16; 8:45 am]

BILLING CODE 8011–01–P

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(2).

[12] 15 U.S.C. 78s(b)(2)(B).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79105; File No. SR–NASDAQ–2016–133]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Specialized Quote Feed Port Fees

October 17, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 3, 2016, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Chapter XV, entitled ''Options Pricing,'' at Section 3, entitled ''NASDAQ Options Market—Access Services.'' Chapter XV governs pricing for Exchange members using the NASDAQ Options Market LLC (''NOM''), the Exchange's facility for executing and routing standardized equity and index options. The Exchange proposes to amend Specialized Quote Feed (''SQF'') Port[3] Fees.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the SQF Port Fees in Chapter XV, Section 3 of the NOM Rules, while the Exchange transitions to state-of-the-art hardware and software architecture to achieve a more efficient and more robust infrastructure to support the growing needs of our Options Participants (''NOM Refresh''). In connection with the NOM Refresh, NOM Market Makers will be required to make changes to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] SQF ports are ports that receive inbound quotes at any time within that month. The SQF Port allows a NOM Market Maker to access information such as execution reports and other relevant data through a single feed. For example, this data would show which symbols are trading on NOM and the current state of an options symbol (*i.e.,* open for trading, trading, halted or closed). Auction notifications and execution reports are also available. NOM Market Makers rely on data available through the SQF Port to provide them the necessary information to perform market making activities.

connect to the new NOM System via their SQF Ports, among other changes. The number of SQF Ports required by NOM Market Makers may be reduced, since a single connection may be utilized to quote across all symbols. The Exchange anticipates that NOM Market Makers will benefit from the efficiency of the service that will be available to them as a result of the NOM Refresh. While NOM Market Makers will be required to make network and other technical changes in order to connect to NOM via SQF, the Exchange believes that costs will decline overall as a result of the more efficient connectivity offered by the NOM Refresh.

The Exchange intends to provide NOM Market Makers with new SQF ports for connectivity and functionality testing so that NOM Market Makers may migrate from the old to the new SQF Ports over a reasonable period of time. The Exchange proposes to amend the current SQF Port pricing of $750 per port, per month for purposes of the NOM Refresh. During the months of October and November 2016 (''NOM Refresh Period''), NOM Market Makers will be subject to a Fixed SQF Port Fee. The Fixed SQF Port Fee will be the amount that was paid by the NOM Market Maker for SQF Ports for the month of August 2016. NOM Market Makers will not be assessed an SQF Port Fee for their use of the new version of the SQF Ports to connect to the new environment during the NOM Refresh Period.[4] The current SQF Port Fee of $750 will no longer be assessed to current NOM Market Makers. Only new SQF Ports would be utilized as of December 1, 2016; the current ports will be eliminated after the NOM Refresh is complete.

If a NOM Participant applies to be a new NOM Market Maker after October 3, 2016 and requests an SQF Port during the time period from October 3, 2016 through November 30, 2016, the new NOM Market Maker would be assessed $750.00 per port, per month.

The Exchange intends to file a separate rule change to propose new SQF Ports Fees for December 2016.

The Exchange also proposes to delete the OTTO Port Transition Fee Waiver. This waiver states that NOM Participants will not be assessed an SQF Port Fee in the month in which the NOM Participant has cancelled an OTTO Port and transitioned to an SQF Port. In order to receive the waiver, the Participant is required to provide the Exchange with written notification of the transition. In light of the proposed amendments to SQF fees, the Exchange proposes to remove the OTTO Port Transition Fee Waive [sic].

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[6] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [7]

Likewise, in *NetCoalition* v. *Securities and Exchange Commission* [8] (''NetCoalition'') the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.[9] As the court emphasized, the Commission ''intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost.'' [10]

Further, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . .'' [11] Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange believes it is reasonable to allow NOM Market Makers to utilize new SQF Ports at no cost during the NOM Refresh Period to transition their current SQF Ports to the new SQF Ports that will be offered as a result of the NOM Refresh. In order to ease the transition from the current ports to new ports, NOM Market Makers would be given an extended period to test functionality and connectivity and resolve any issues that may arise during the testing phase with the new SQF Ports. Therefore, pursuant to this proposal, new SQF Ports will be offered at no cost to those NOM Market Makers that currently pay $750 per SQF Port, per month.

The Exchange believes it is equitable and not unfairly discriminatory to allow NOM Market Makers to utilize new SQF Ports at no cost because the Exchange is permitting all current NOM Market Makers, who will be paying the SQF Port Fixed Fee, the opportunity to utilize the new SQF Ports at no costs.

The Exchange's proposal to transition to a Fixed SQF Port Fee during the NOM Refresh Period (October and November 2016) is reasonable because NOM Market Makers will be able to continue to utilize their existing SQF Ports during the NOM Refresh Period to continue to conduct their business at a fixed cost. The Exchange believes that this will allow NOM Market Makers to have flexibility when testing the new SQF Ports as they will not be limited in number by cost.

The Exchange believes that assessing a Fixed SQF Port Fee utilizing the August 2016 billing is reasonable because the Exchange desires to offer NOM Market Makers who currently have SQF Ports some certainty with respect to their costs through the NOM Refresh. The Exchange believes that utilizing the month of August 2016 as the Fixed SQF Port Fee is reasonable because it should reflect an accurate representation of the number of ports typically utilized by that particular NOM Market Maker for SQF Ports. The month of August is typically not an active trading month and should be representative of the typical pattern of

[4] For example if a NOM Market Maker obtained 1 new SQF Port to test during the NOM Refresh Period, the NOM Market Maker would not be assessed a new SQF Port Fee for that port, but would only pay the Fixed SQF Port Fee during the two months.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4) and (5).

[7] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[8] *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010).

[9] *See NetCoalition,* at 534–535.

[10] *Id.* at 537.

[11] *Id.* at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

usage for the NOM Market Maker. Also, these NOM Market Makers would not be assessed any fees to utilize as many new SQF Ports as they require to test in the new system.

The Exchange believes that assessing a Fixed SQF Port Fee utilizing the August 2016 billing is equitable and not unfairly discriminatory because the Exchange will assess all current users of SQF Ports a Fixed SQF Port Fee based on the same criteria.

The Exchange believes that assessing new NOM Market Makers that do not have any SQF Ports and became NOM Market Makers after October 3, 2016, the current SQF Port fee of $750, per port, per month from October 3, 2016 through November 30, 2016 is reasonable because these NOM Market Makers would not be required to maintain two sets of ports during the transition.[12] Existing NOM Market Makers will be required to maintain old as well as new SQF ports during portions of the migration. These NOM Market Makers would be able to commence utilizing the new SQF ports for testing. As previously explained, the technology refresh will increase the efficiency with which members can connect to the NOM System. As a result of the refresh, members would not be required to utilize the same number of ports as they do today to connect to the NOM System and therefore this should reduce the number of SQF ports required and lower costs.

The Exchange believes that assessing new NOM Market Makers that do not have any SQF Ports and became NOM Market Makers after October 3, 2016, the current SQF Port fee of $750, per port, per month from October 3, 2016 through November 30, 2016 is equitable and not unfairly discriminatory because new NOM Market Makers would not be paying a Fixed SQF Port Fee for their current SQF Ports. All current NOM Market Makers would be paying a Fixed SQF Port Fee to utilize SQF Ports.

The Exchange's proposal to remove the OTTO Port Transition Fee Waiver is reasonable because the Exchange is amending the pricing for SQF Ports. Today, the Exchange is assessing $750 to obtain either an OTTO or SQF Port. With the NOM Refresh, the Exchange proposed to amend pricing for SQF Ports and eliminate the waiver because the pricing for SQF Ports is currently changing and will be changed again in November. A NOM Market Maker that does not have any SQF Ports and desires to obtain an SQF Port would be assessed $750.

The Exchange's proposal to remove the OTTO Port Transition Fee Waiver is equitable and not unfairly discriminatory because the Exchange will not offer any Participant the waiver.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the proposed changes to the SQF Port Fee do not impose a burden on competition because if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

In terms of intra-market competition, offering NOM Market Makers the opportunity to utilize certain SQF Ports during the NOM Refresh Period at no cost does not impose an undue burden on competition. NOM Market Makers would be able to readily test ports at no additional cost and without limit. The Exchange is permitting all current NOM Market Makers, who will be paying the SQF Port Fixed Fee, the opportunity to utilize the new SQF Ports at no costs.

The assessment of a Fixed SQF Port Fee does not impose an undue burden on competition because utilizing the month of August 2016 as the Fixed SQF Port Fee is an accurate representation of the number of ports typically utilized by that particular NOM Market Maker for SQF Ports. The month of August is typically not an active trading month and should be representative of the typical pattern of usage for the NOM Market Maker. All current users of SQF Ports will be assessed a Fixed SQF Port Fee based on the same criteria.

The Exchange believes that assessing new NOM Market Makers that do not have any SQF Ports and become NOM Market Makers after October 3, 2016, the current SQF Port fee of $750, per port, per month from October 3, 2016 through November 30, 2016 does not impose an undue burden on competition because new NOM Market Makers would not be paying a Fixed SQF Port Fee for their current SQF Ports. All current NOM Market Makers would be paying a Fixed SQF Port Fee to utilize SQF Ports.

The Exchange's proposal to delete the OTTO Port Transition Fee does not impose an undue burden on competition because the Exchange will not offer any Participant the waiver.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[13]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[12] Currently, all NOM Market Makers are utilizing SQF Ports. If a NOM Participant applied to become a NOM Market Maker from October 3, 2016 through November 30, 2016, they could still obtain the current SQF Ports. After December 1, 2016, only the new SQF Ports would be offered to all NOM Market Makers.

[13] 15 U.S.C. 78s(b)(3)(A)(ii).

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2016–133 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2016–133. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2016–133 and should be submitted on or before November 14, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–25467 Filed 10–20–16; 8:45 am]

BILLING CODE 8011–01–P

[14] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #14811 and #14812]

Louisiana Disaster Number LA–00065.

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 5.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Louisiana (FEMA–4277–DR), dated 08/14/2016.

Incident: Severe Storms and Flooding.

Incident Period: 08/11/2016 through 08/31/2016.

EFFECTIVE DATE: 10/13/2016.

Physical Loan Application Deadline Date: 11/14/2016.

EIDL Loan Application Deadline Date: 05/15/2017.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of LOUISIANA, dated 08/14/2016 is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to 11/14/2016.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2016–25450 Filed 10–20–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #14911 and #14912]

North Carolina Disaster Number NC–00081

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of North Carolina (FEMA—4285—DR), dated 10/10/2016.

Incident: Hurricane Matthew.

Incident Period: 10/04/2016 and continuing.

DATES: EFFECTIVE DATE: 10/11/2016.

Physical Loan Application Deadline Date: 12/09/2016.

Eidl Loan Application Deadline Date: 07/10/2017.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the Presidential disaster declaration for the State of North Carolina, dated 10/10/2016 is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties: (Physical Damage and Economic Injury Loans): Bertie, Johnston, Wayne,Wilson.

Contiguous Counties: (Economic Injury Loans Only):

North Carolina: Chowan, Hertford, Northampton.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2016–25445 Filed 10–20–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #14911 and #14912]

North Carolina Disaster Number NC–00081

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of North Carolina (FEMA–4285–DR), dated 10/10/2016.

Incident: Hurricane Matthew.

Incident Period: 10/04/2016 and continuing.

EFFECTIVE DATE: 10/12/2016.

Physical Loan Application Deadline Date: 12/09/2016.

EIDL Loan Application Deadline Date: 07/10/2017.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance,

U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the Presidential disaster declaration for the State of North Carolina, dated 10/10/2016 is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties: (Physical Damage and Economic Injury Loans): Greene, Harnett, Sampson.

Contiguous Counties: (Economic Injury Loans Only):

North Carolina: Chatham, Lee.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2016–25442 Filed 10–20–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #14911 and #14912]

North Carolina Disaster Number NC–00081

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 3.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of North Carolina (FEMA–4285–DR), dated 10/10/2016.

Incident: Hurricane Matthew.

Incident Period: 10/04/2016 and continuing.

EFFECTIVE DATE: 10/13/2016.

Physical Loan Application Deadline Date: 12/09/2016.

EIDL Loan Application Deadline Date: 07/10/2017.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the Presidential disaster declaration for the State of North Carolina, dated 10/10/2016 is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties: (Physical Damage and Economic Injury Loans): Dare, Hyde, Jones.

Contiguous Counties: (Economic Injury Loans Only):

North Carolina: Carteret, Currituck, Onslow, Tyrrell.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2016–25449 Filed 10–20–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #14911 and #14912]

North Carolina Disaster Number NC–00081

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 4.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of North Carolina (FEMA–4285–DR), dated 10/10/2016.

Incident: Hurricane Matthew.

Incident Period: 10/04/2016 and continuing.

EFFECTIVE DATE: 10/13/2016.

Physical Loan Application Deadline Date: 12/09/2016.

Eidl Loan Application Deadline Date: 07/10/2017.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the Presidential disaster declaration for the State of North Carolina, dated 10/10/2016 is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties: (Physical Damage and Economic Injury Loans): Duplin, Gates, Pender.

Contiguous Counties: (Economic Injury Loans Only):

North Carolina: Camden, New Hanover, Pasquotank, Perquimans.

Virginia: Southampton, Suffolk C.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2016–25444 Filed 10–20–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #14619]

California Disaster #CA–00244 Declaration of Economic Injury

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Economic Injury Disaster Loan (EIDL) declaration for the State of California, dated 02/08/2016.

Incident: Aliso Canyon Gas Leak.

Incident Period: 10/23/2015 and continuing through 10/06/2016.

EFFECTIVE DATE: 10/12/2016.

Economic Injury (EIDL) Loan Application Deadline Date: 11/08/2016.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the Economic Injury Disaster Loan (EIDL) declaration for the State of California, dated 02/08/2016 is hereby amended to establish the incident period for this disaster as beginning 10/23/2015 and continuing through 10/06/2016.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Dated: October 12, 2016.

Maria Contreras-Sweet,

Administrator.

[FR Doc. 2016–25443 Filed 10–20–16; 8:45 am]

BILLING CODE 8025–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36049]

CSX Transportation, Inc.—Trackage Rights Exemption—Central Railroad Company of Indianapolis, Chicago d/b/a Ft. Wayne and Eastern Railroad Division

CSX Transportation, Inc. (CSXT), a Class I rail carrier, has filed a verified notice of exemption under 49 CFR 1180.2(d)(7) for its acquisition of limited overhead trackage rights over a 70.4-mile portion of a rail line that Central Railroad Company of Indianapolis, d/b/a Chicago, Ft. Wayne and Eastern Railroad Division (CFE) leases from CSXT.[1] The limited overhead trackage rights are between Lima, Ohio (milepost QF 260.3) and Arcola/Columbia City, Ind. (milepost PC 330.4), the connection to the SDI Facility (Facility) at Arcola, including all sidings, yard tracks, and yard leads now existent or hereafter constructed along the subject tracks.[2]

CSXT states that the parties will enter into a written agreement for the limited overhead trackage rights, and a copy of the final trackage rights agreement will be filed with the Board when it is executed.

CSXT states that it acquires finished rail from the Facility for use throughout its system. CFE handles the traffic from the Facility to an interchange with CSXT at Lima. CSXT states that it is more efficient to handle the traffic from the origin at the Facility in single-line service to the various locations on its system where the rail will be used. As part of the lease, CFE agreed to grant CSXT limited overhead trackage rights to directly access the Facility at Arcola. CSXT states it is seeking the trackage rights to directly reach the Facility solely for the purpose of transporting finished rail for use on its system and empty cars in the opposite direction.

The transaction is scheduled to be consummated on November 5, 2016, the effective date of the exemption (30 days after the verified notice of exemption was filed).

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc.,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway—Lease & Operate—California Western Railroad,* 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed by October 28, 2016 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 36049, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Louis E. Gitomer, 600 Baltimore Ave., Suite 301, Towson, MD 21204.

Board decisions and notices are available on our Web site at ''*WWW.STB.GOV.*''

Decided: October 18, 2016.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Rena Laws-Byrum,

Clearance Clerk.

[FR Doc. 2016–25523 Filed 10–20–16; 8:45 am]

BILLING CODE 4915–01–P

[1] CFE was granted authority to lease and operate approximately 273 miles of rail line from CSXT in *Central Railroad Co. of Indianapolis—Lease & Operation Exemption—CSX Transportation, Inc.,* FD 34508 (STB served July 30, 2004).

[2] CSX states that the parties have entered into a written agreement for the limited overhead trackage rights and a copy of the final Agreement will be filed with the Board when executed. CSX simultaneously filed a motion for a protective order to protect the confidential and commercially sensitive information contained in the Agreement, which CSXT submitted under seal in this proceeding. That motion will be handled separately.

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in Utah

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Limitation of Claims for Judicial Review of Actions by FHWA and Other Federal Agencies.

SUMMARY: This notice announces actions taken by the FWHA that are final within the meaning of 23 U.S.C. 139(l)(1). The actions relate to the proposed 106th South, Redwood Road to Jordan Gateway, Project in Salt Lake County in the State of Utah. These actions grant approvals for the project.

DATES: By this notice, FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of FHWA actions on the highway project will be barred unless the claim is filed on or before March 20, 2017. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Bryan Dillon, Area Engineer, FHWA Utah Division, 2520 West 4700 South, Suite 9A, Salt Lake City, Utah 84129; telephone: 801–955–3517; email: *bryan.dillon@dot.gov.* The FHWA Utah Division Office's normal business hours are 7:30 a.m. to 4:30 p.m. (Mountain Standard Time), Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: Notice is hereby given that FHWA has taken final agency action subject to 23 U.S.C. 139(l)(1) by issuing licenses, permits, and approvals for the 106th South, Redwood Road to Jordan Gateway, Project in the State of Utah. The 106th South, Redwood Road to Jordan Gateway, Project proposes to provide transportation improvements along 106th South between Redwood Road and Jordan Gateway in South Jordan City, Salt Lake County, Utah.

The project consists of the following improvements: Add one travel lane in each direction between Redwood Road and Jordan Gateway, generally within the present roadway width; Provide 5-ft shoulder for bicyclists where right turns are not required and 8-ft outside shoulders where there are existing access points for right turns; Maintain two-way left-turn lane between approximately 1540 West and 1300 West; Remove pedestrian structure at 1300 West; Add dual left-turn lanes on all four legs of the 1300 West and 10600 South Intersection; Remove the landscaped center median and replace it in most locations with back-to-back curb between 1300 West and Jordan Gateway; Maintain existing left turn accesses at all locations with the exception of the access into the office plaza at 406 South Jordan Parkway which would be restricted to a right-in/right-out only access; Re-stripe River Front Parkway and 10600 South Intersection to include dual left-turn and dual right-turn lanes; Add dual left-turn lanes on all four legs of the Jordan Gateway and 10600 South Intersection; and Incorporate Transportation Management System (TSM) activities or strategies to maximize the efficiency of the existing system (*e.g.,* signal coordination and optimization, Intelligent Transportation Systems (ITS), and access management).

The actions by FHWA and the laws under which such actions were taken are described in the Environmental Assessment (EA) and Section 4(f) Evaluation and in the Finding of No

Significant Impact (FONSI) issued on September 21, 2016.

This notice applies to all FHWA decisions as of the issuance date of this notice and all laws under which such actions were taken. Laws generally applicable to such actions include but are not limited to:

- *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351; Federal-Aid Highway Act [23 U.S.C. 109].
- *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and 1536]; Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d); Migratory Bird Treaty Act [16 U.S.C. 703–712].
- *Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archaeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Archaeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11].
- *Noise:* Federal-Aid Highway Act of 1970 [Pub. L. 91–605, 84 Stat. 1713]
- *Executive Orders:* E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13287 Preserve America.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(l)(1).

Ivan Marrero,

Division Administrator, Federal Highway Administration.

[FR Doc. 2016–25256 Filed 10–20–16; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2016–0099]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel HOLOHOLO; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 21, 2016.

ADDRESSES: Comments should refer to docket number MARAD–2016–0099. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel HOLOHOLO is:

Intended commercial use of vessel: ''Non fishing ecotourism charters. Day eco tours, sightseeing and special events. Overnight eco tour charters for multi days up to 2 weeks for a maximum of up to 6 overnight guests plus captain and crew, for a total of 8 maximum people.''

Geographic region: ''Washington, Alaska (excluding waters in Southeastern Alaska and waters north of a line between Gore Point to Cape Suckling [including the North Gulf Coast and Prince William Sound]).''

The complete application is given in DOT docket MARAD–2016–0099 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: October 4, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–25229 Filed 10–20–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2015–0126; Notice 2]

Supreme Corporation, Grant of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Grant of petition.

SUMMARY: Supreme Corporation (Supreme), has determined that certain model year (MY) 2015–2016 Supreme Classic American Trolley buses manufactured between October 1, 2014 and November 2, 2015, do not fully comply with paragraph S6 of Federal Motor Vehicle Safety Standard (FMVSS) No. 205, *Glazing Materials.* Supreme filed a report dated November 20, 2015, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* Supreme then petitioned NHTSA under 49 CFR part 556 requesting a decision that the subject noncompliance is inconsequential to motor vehicle safety.

ADDRESSES: For further information on this decision contact Luis Figueroa, Office of Vehicles Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366–5298, facsimile (202) 366–5930.

SUPPLEMENTARY INFORMATION:

I. Overview

Pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49

CFR part 556), Supreme submitted a petition for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

Notice of receipt of the petition was published, with a 30-day public comment period, on March 3, 2016, in the **Federal Register** (81 FR 11358). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) Web site at: *http://www.regulations.gov/.* Then follow the online search instructions to locate docket number ''NHTSA–2015–0126.''

II. Buses Involved

Affected are approximately 21 MY 2015–2016 Supreme Classic American Trolley buses manufactured between October 1, 2014 and November 2, 2015.

III. Noncompliance

Supreme explains that the noncompliance is that the windshields on the subject Trolleys do not contain the ''AS1'' markings as required by paragraph S6 of FMVSS No. 205.

IV. Rule Text

Paragraph S6 of FMVSS No. 205 requires in pertinent part:

S6. Certification and marking.

S6.1 A prime glazing material manufacturer, must certify, in accordance with 49 U.S.C. 30115, each piece of glazing material to which this standard applies that is designed—

(a) As a component of any specific motor vehicle or camper; or

(b) To be cut into components for use in motor vehicles or items of motor vehicle equipment.

S6.2 A prime glazing manufacturer certifies its glazing by adding to the marks required by section 7 of ANSI/SAE Z26.1–1996, in letters and numerals of the same size, the symbol ''DOT'' and a manufacturer's code mark that NHTSA assigns to the manufacturer. NHTSA will assign a code mark to a manufacturer after the manufacturer submits a written request to the Office of Vehicle Safety Compliance, National Highway Traffic Safety Administration, 400 Seventh Street SW., Washington, DC 20590. The request must include the company name, address, and a statement from the manufacturer certifying its status as a prime glazing manufacturer as defined in S4. . . .

In addition, paragraph S5.1 of FMVSS No. 205 incorporates by reference ANSI Z26.1–1996 and other industry standards. Specifically, Section 7 (Marking of Safety Glazing Materials) of ANSI Z26.1–1996 requires that:

In addition to any other markings required by law, ordinance, or regulation, all safety glazing materials manufactured for use in accordance with this standard shall be legibly and permanently marked in letters and numerals . . . with the words American National Standard or the characters AS and . . . In addition to the preceding markings and immediately adjacent to the words American National Standard or the characters AS, each piece of glazing material shall further be marked . . . if complying with the requirements of Section 4, Application of Tests, Item 1 with the numeral 1; . . .

V. Summary of Supreme's Analyses

Supreme stated its belief that the subject noncompliance is inconsequential to motor vehicle safety for the following reasons:

(1) Supreme stated that the subject windshields meet all performance and other requirements of FMVSS No. 205 with the exception of the subject noncompliance.

(2) Supreme stated its belief that repair services for the subject windshields will not be affected because replacement windshields are typically obtained through Supreme distributors who have the correct and compliant replacement glazing.

(3) Supreme also stated that they have not received any consumer complaints, claims, or warranty claims related to this noncompliance.

(4) Supreme additionally made mention of similar inconsequential noncompliance petitions that were granted by the agency relating noncompliances that Supreme believes are similar to the subject FMVSS No. 205 noncompliance.

Supreme has informed NHTSA that for all affected vehicles that remain in Supreme's inventory and the inventory of Supreme's distributors, permanent markings in compliance with FMVSS No. 205 will be added to the vehicle windshields before delivery under a sale or lease.

In summation, Supreme believes that the described noncompliance of the subject windshields is inconsequential to motor vehicle safety, and that its petition, to exempt Supreme from providing recall notification of noncompliance as required by 49 U.S.C. 30118 and remedying the recall noncompliance as required by 49 U.S.C. 30120 should be granted.

NHTSA's Analysis: The petition pertains to a population of approximately 21 model year 2015 and 2016 ''Classic American Trolley'' vehicles, built by Supreme Corporation, that do not have the required ''AS1'' marking on their windshields. NHTSA has reviewed Supreme Corporation's arguments and has decided that the subject FMVSS No. 205 noncompliance is inconsequential to motor vehicle safety.

There is no effect of the noncompliance on the operational safety of the subject vehicles because the installed windshields meet all other labeling and performance requirements of FMVSS No. 205. Also, there is no possibility that a noncompliant windshield will be installed on a production vehicle or ordered as a replacement part since vehicles in inventory will have compliant windshields before sold or lease, and replacement windshields are obtained through Supreme Corporation.

NHTSA's Decision: In consideration of the foregoing analysis, NHTSA has decided that Supreme has met its burden of demonstrating that the FMVSS No. 205 noncompliance is inconsequential to motor vehicle safety. Accordingly, Supreme's petition is hereby granted and Supreme is exempted from the obligation of providing notification of, and a remedy for, the subject noncompliance under 49 U.S.C. 30118 and 30120.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, this decision only applies to the subject buses that Supreme no longer controlled at the time it determined that the noncompliance existed. However, the granting of this petition does not relieve equipment distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant buses under their control after Supreme notified them that the subject noncompliance existed.

Authority: (49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8).

Jeffrey M. Giuseppe,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2016–25509 Filed 10–20–16; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2015–0094; Notice 1]

Notice of Receipt of Petition for Decision That Nonconforming Model Year 1996 and 1997 Ferrari F50 Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Receipt of petition.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that model year (MY) 1996 and 1997 Ferrari F50 passenger cars (PC) that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS) are eligible for importation into the United States. A motor vehicle that was not originally manufactured to conform to all applicable FMVSS, and has no substantially similar U.S.-certified counterpart, shall be refused admission into the United States unless NHTSA has decided that the motor vehicle has safety features that comply with, or are capable of being altered to comply with, all applicable FMVSS based on destructive test data or such other evidence as NHTSA decides to be adequate.

DATES: The closing date for comments on the petition is November 21, 2016.

ADDRESSES: Comments should refer to the docket and notice numbers above and be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Instructions: Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

How to Read Comments submitted to the Docket: You may read the comments received by Docket Management at the address and times given above. You may also view the documents from the Internet at *https://www.regulations.gov.* Follow the online instructions for accessing the dockets. The docket ID number and title of this notice are shown at the heading of this document notice. Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically search the Docket for new material.

FOR FURTHER INFORMATION CONTACT: George Stevens, Office of Vehicle Safety Compliance, NHTSA (202–366–5308).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(B), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle has safety features that comply with or are capable of being altered to comply all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

J.K. Technologies, LLC (J.K.), Inc. of Baltimore, Maryland (Registered Importer R–90–006) has petitioned NHTSA to decide whether nonconforming 1996 and 1997 Ferrari F50 PC's are eligible for importation into the United States. J.K. believes these vehicles are capable of being modified to meet all applicable FMVSS. The petitioner seeks to use the U.S.-certified version of the 1995 Ferrari F50 PC for comparative purposes in establishing the import eligibility of the non-U.S. certified 1996 and 1997 models. The petitioner claims there is precedence for this approach in action taken by the agency on a petition involving Mercedes Benz S and SL class vehicles. The agency notes that in a petition involving MY 2001 and 2002 Mercedes-Benz SL class PC's, the petitioner, which was also J.K., asserted that even though there were no substantially similar U.S.-certified vehicles of the same model years, the petitioned vehicles had the same part numbers as those found on the U.S.-certified MY 2003 Mercedes-Benz SL class PC's, and that, as a consequence, the conformance modifications would be the same and utilize the same procedures as those required for conforming a non-U.S. certified version MY 2003 vehicle. See 67 FR 68908 (November 13, 2002). In like manner, J.K. asserts in this instance that the 1995 Ferrari F50 PC uses all of the same safety systems and part numbers to meet the FMVSS as the 1996 and 1997 versions.

J.K. contends that non-U.S. certified 1996 and 1997 Ferrari F50 PC's, as originally manufactured, meet FMVSS in many areas in the same manner as the U.S.-certified 1995 Ferrari F50 PC. The petitioner notes that many of the concerned parts have the same parts numbers as those on the U.S.-certified prior year model. Moreover, it claims that in all areas that have to be modified the parts will be supplied by the OEM manufacturer. J.K. asserts that the modifications that will be needed do not concern the basic structure of the vehicle, but only removable and available parts.

Specifically, the petitioner claims that the non U.S.-certified MY 1996 and 1997 Ferrari F50 PC's, as originally manufactured, conform to: Standard Nos. 102 *Transmission Shift Lever Sequence, Starter Interlock, and Transmission Braking Effect,* 103 *Windshield Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 105 *Hydraulic Brake Systems,* 106 *Brake Hoses,* 109 *New*

Pneumatic and certain Specialty Tires, 113 *Hood Latch System,* 116 *Motor Vehicle Brake Fluids,* 124 *Accelerator Control Systems,* 201 *Occupant Protection in Interior Impact,* 202 *Head Restraints,* 203 *Impact Protection for the driver from the Steering Control System,* 204 *Steering Control Rearward Displacement,* 205 *Glazing Materials,* 206 *Door Locks and Door Retention Components,* 207 *Seating Systems,* 210 *Seat Belt Assembly Anchorages,* 212 *Windshield Mounting,* 216 *Roof Crush Resistance,* 219 *Windshield Zone Intrusion,* and 302 *Flammability of Interior Materials.*

The petitioner also contends that the subject non-U.S certified vehicles are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* Replacement of the instrument cluster with the U.S.-model component and reprogramming the associated software as described in the petition.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* Installation of U.S.-conforming side marker lamps, headlamps, tail lamps, stop lamps, parking lamps, backup lamps turn signal lamps, and reflex reflectors with U.S.-model components if not already so equipped.

Standard No. 110 *Tire Selection and Rims:* Installation of the required tire information placard.

Standard No. 111 *Rearview Mirrors:* Inscription of the required warning statement on the face of the passenger side rearview mirror or replacement of the mirror with a U.S.-model mirror.

Standard No. 114 *Theft Protection:* Reprogramming the body and instrument ECU to activate the key warning and belt warning systems.

Standard No. 118: *Power Operated Window, Partition and Roof Panel Systems:* Reprogramming the window control module.

Standard No. 208 *Occupant Crash Protection:* Replacement of passive restraint system components, including the electrical wiring harness, the passenger's side seat belt, seatbelt tracks and electronic control unit (ECU), with U.S.-model components as described in the petition.

Standard No. 209 *Seat Belt Assemblies:* Replacement of the seat belts with U.S.-model components.

Standard No. 214 *Side Impact Protection:* Installation of U.S.-model side impact protection bars in the doors.

Standard No. 301 *Fuel System Integrity:* Replacement of fuel system components with U.S.-model components as necessary to meet all applicable requirements of the standards.

The petitioner additionally states that a vehicle identification plate must be affixed to the vehicle near the left windshield pillar to meet the requirements of 49 CFR part 565.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above addresses both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A), (a)(1)(B), and (b)(1); 49 CFR 593.7; delegation of authority at 49 CFR 1.95 and 501.8.

Jeffrey M. Giuseppe,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2016–25487 Filed 10–20–16; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8976

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8976, Notice of Intent to Operate Under Section 501(c)(4).

DATES: Written comments should be received on or before December 20, 2016 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of notice should be directed to Allan Hopkins at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Notice of Intent to Operate Under Section 501(c)(4).

OMB Number: 1545–2161.

Notice Number: Form 8976.

Abstract: This collection of information satisfies the statutory mandate in section 506. This information will be used by IRS to process the submitted notification form for completeness and to determine applicability of the penalties for failure to timely submit the notification imposed by section 6652(c)(4) of the Code.

Current Actions: Extension of currently approved collection. There are no changes being made to this collection at this time.

Type of Review: Extension of currently approved collection.

Affected Public: Individuals and households.

Estimated Number of Respondents: 2,500.

Estimated Average Time per Respondent: 45 mins.

Estimated Total Annual Burden Hours: 1,875 hrs.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation,

maintenance, and purchase of services to provide information.

Approved: October 14, 2016.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2016–25555 Filed 10–20–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Notice 2010–28, Stripping Transactions for Qualified Tax Credit Bonds.

DATES: Written comments should be received on or before December 20, 2016 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Allan Hopkins, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Stripping Transactions for Qualified Tax Credit Bonds.

OMB Number: 1545–2167. Notice number: 2010–28.

Abstract: The IRS requires the information to ensure compliance with the tax credit bond credit coupon stripping requirements, including ensuring that no excess tax credit is taken by holders of bonds and coupons strips. The information is required in order to inform holders of qualified tax credit bonds whether the credit coupons relating to those bonds may be stripped as provided under § 54A(i). The respondents are issuers of tax credit bonds, including states and local governments and other eligible issuers.

Current Actions: There is no change to this existing notice.

Type of Review: Extension of currently approved collection.

Affected Public: Individuals or households and business or other for-profit organizations.

Estimated Number of Respondents: 1,000.

Estimated Time per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 1,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 14, 2016.

Allan Hopkins,

Tax analyst.

[FR Doc. 2016–25558 Filed 10–20–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Special Medical Advisory Group, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. App. 2, that the Special Medical Advisory Group will meet on November 22, 2016, in the Potomac A Room at the VHA National Conference Center 2011 Crystal Drive Arlington, VA 22202 from 8 a.m. to 4 p.m. EST. The meeting is open to the public.

The purpose of the Group is to advise the Secretary of Veterans Affairs and the Under Secretary for Health on the care and treatment of Veterans, and other matters pertinent to the Department's Veterans Health Administration (VHA).

The agenda for the meeting will include the Presidential Transition and key issues facing the new administration including Choice and Budget Appropriations.

Thirty (30) minutes will be allocated for receiving oral presentations from the public. Members of the public may also submit written statements for review by the Committee to Ms. Chantelle Bartch, Department of Veterans Affairs, Office of Patient Care Services (10P4), Veterans Health Administration, 810 Vermont Avenue NW., Washington, DC 20420, or by email at *chantelle.bartch@va.gov.*

Any member of the public wishing to attend the meeting or seeking additional information should contact Ms. Chantelle Bartch at (202) 461–7154 or by email.

Dated: October 18, 2016.

LaTonya L. Small,

Federal Advisory Committee Management Officer.

[FR Doc. 2016–25543 Filed 10–20–16; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Veterans' Rural Health Advisory Committee; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act 5 U.S.C. App. 2, which the Veterans' Rural Health Advisory Committee will meet on November 15–16, 2016. On November 15, the meeting will be held in Conference Room 870 at 1800 G Street NW., Washington, DC 20006 and on November 16 it will be in Conference Room at the Vietnam Veterans of America, 8719 Colesville Road, Silver Spring, Maryland 20910. Both meetings will begin at 8:30 a.m. (EST) each day and adjourn at 5:00 p.m. (EST). The meetings are open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on Health care issues affecting enrolled Veterans residing in rural areas. The Committee examines programs and policies that impact the delivery of VA

health care to Veterans residing in rural areas and discusses ways to improve and enhance VA health care services for these Veterans.

The agenda will include updates from Department leadership, the Deputy Under Secretary for Health for Policy and Services, Director Office of Rural Health and Committee Chairwoman, as well as presentations on general health care access and quality.

Public comments will be received at 4:30 p.m. on November 16, 2016. Interested parties should contact Ms. Judy Bowie, via email at *VRHAC@va.gov,* or by fax 202–632–8609, or by mail at 810 Vermont Avenue NW., (10P1R), Washington, DC 20420. Individuals wishing to speak are invited to submit a 1–2 page summary of their Comment for inclusion in the official meeting record. Because the meeting is being held in a government building, a photo I.D. must be presented at the Guard's Desk as a part of the clearance process. Due to an increase in security protocols, and in order to prevent delays in clearance processing, you should allow an additional 30 minutes before the meeting begins. Any member of the public seeking additional information should contact Ms. Bowie at the phone number or email address noted above.

Dated: October 17, 2016.

LaTonya L. Small,

Advisory Committee Management Officer.

[FR Doc. 2016–25455 Filed 10–20–16; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 81 Friday,

No. 204 October 21, 2016

Part II

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Treatment of Certain Interests in Corporations as Stock or Indebtedness; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9790]

RIN 1545–BN40

Treatment of Certain Interests in Corporations as Stock or Indebtedness

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and temporary regulations.

SUMMARY: This document contains final and temporary regulations under section 385 of the Internal Revenue Code (Code) that establish threshold documentation requirements that ordinarily must be satisfied in order for certain related-party interests in a corporation to be treated as indebtedness for federal tax purposes, and treat as stock certain related-party interests that otherwise would be treated as indebtedness for federal tax purposes. The final and temporary regulations generally affect corporations, including those that are partners of certain partnerships, when those corporations or partnerships issue purported indebtedness to related corporations or partnerships.

DATES: *Effective Date:* These regulations are effective on October 21, 2016.

Applicability Dates: For dates of applicability, see §§ 1.385–1(f), 1.385–2(i), 1.385–3(j), 1.385–3T(k), 1.385–4T(g), and 1.752–2T(l)(4).

FOR FURTHER INFORMATION CONTACT: Concerning the final and temporary regulations, Austin M. Diamond-Jones, (202) 317–5363, and Joshua G. Rabon, (202) 317–6938 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these regulations has been reviewed and approved by the Office of Management and Budget under control number 1545–2267. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

I. In General

On April 8, 2016, the Department of the Treasury (Treasury Department) and the IRS published proposed regulations (REG–108060–15) under section 385 of the Code (proposed regulations) in the **Federal Register** (81 FR 20912) concerning the treatment of certain interests in corporations as stock or indebtedness. A public hearing was held on July 14, 2016. The Treasury Department and the IRS also received numerous written comments in response to the proposed regulations. All comments are available at *www.regulations.gov* or upon request. The comments received in writing and at the public hearing were carefully considered in developing the final and temporary regulations. In addition, certain portions of the proposed regulations that were substantially revised based on comments received are being issued as temporary regulations. The text of the temporary regulations serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject published in the Proposed Rules section of this issue of the **Federal Register**. In addition, this Treasury decision reserves on the application of certain portions of the proposed regulations pending additional study.

II. Summary of Section 385 and the Proposed Regulations

Section 385 authorizes the Secretary of the Treasury to prescribe rules to determine whether an interest in a corporation is treated for purposes of the Code as stock or indebtedness (or as in part stock and in part indebtedness) by setting forth factors to be taken into account with respect to particular factual situations. Under this authority, the proposed regulations provided specific factors that, when present in the context of purported debt instruments issued between highly-related corporations, would be dispositive.

Specifically, proposed § 1.385–2 provided that the absence of timely preparation of documentation and financial analysis evidencing four essential characteristics of indebtedness would be a dispositive factor requiring a purported debt instrument to be treated as stock for federal tax purposes. Because related parties do not deal independently with each other, it can be difficult for the IRS to determine whether there was an intent to create an actual debtor-creditor relationship in this context, particularly when the parties do not document the terms governing the arrangement or analyze the creditworthiness of the borrower contemporaneously with the loan, each as unrelated parties would do. For this reason, the proposed regulations prescribed the nature of the documentation necessary to substantiate the treatment of related-party instruments as indebtedness, including documentation to establish an expectation of repayment and a course of conduct that is generally consistent with a debtor-creditor relationship. Proposed § 1.385–2 required that such documentation be timely prepared and maintained, and provided that, if the specified documentation was not provided to the Commissioner upon request, the instrument would be treated as stock for federal tax purposes.

Proposed § 1.385–3 identified an additional dispositive factor that indicates the existence of a corporation-shareholder relationship, rather than a debtor-creditor relationship: The issuance of a purported debt instrument to a controlling shareholder in a distribution or in another transaction that achieves an economically similar result. These purported debt instruments do not finance any new investment in the operations of the borrower and therefore have the potential to create significant federal tax benefits, including interest deductions that erode the U.S. tax base, without having meaningful non-tax significance.

Proposed § 1.385–3 also included a ''funding rule'' that treated as stock a purported debt instrument that is issued as part of a series of transactions that achieves a result similar to a distribution of a debt instrument. Specifically, proposed § 1.385–3 treated as stock a purported debt instrument that was issued in exchange for property, including cash, with a principal purpose of using the proceeds to fund a distribution to a controlling shareholder or another transaction that achieves an economically similar result. Furthermore, the proposed regulations included a ''per se'' application of the funding rule that treated a purported debt instrument as funding a distribution or other transaction with a similar economic effect if it was issued in exchange for property (other than in the ordinary course of purchasing goods or services from an affiliate) during the period beginning 36 months before and ending 36 months after the funded member made the distribution or undertook the transaction with a similar economic effect.

Proposed § 1.385–3 included exceptions that were intended to limit the scope of the section to transactions undertaken outside of the ordinary course of business by large taxpayers

with complex organizational structures. The proposed regulations also included an anti-abuse provision to address a purported debt instrument issued with a principal purpose of avoiding the application of the proposed regulations. Proposed § 1.385–4 provided rules for applying proposed § 1.385–3 in the context of consolidated groups.

Finally, proposed § 1.385–1(d) provided the Commissioner with the discretion to treat certain interests in a corporation for federal tax purposes as indebtedness in part and stock in part (a ''bifurcation rule'').

III. Overview of Significant Modifications To Minimize Burdens

In response to the proposed regulations, the Treasury Department and the IRS received numerous detailed and thoughtful comments (including comments provided at the public hearing) suited to the highly technical nature of certain of the proposed rules. The Treasury Department and the IRS carefully considered these comments. Many of the comments expressed concern that the proposed regulations would impose compliance burdens and result in collateral consequences that were not justified by the stated policy objectives of the proposed regulations. In response to the comments received, the final and temporary regulations substantially revise the proposed regulations to achieve a better balance between minimizing the burdens imposed on taxpayers and fulfilling the important policy objectives of the proposed regulations. The remainder of this Part III summarizes the most noteworthy modifications included in the final and temporary regulations, which are the following:

Changes to the overall scope of the regulations:

- *Exclusion of foreign issuers.* The final regulations reserve on all aspects of their application to foreign issuers; as a result, the final regulations do not apply to foreign issuers.
- *Exclusion of S corporations and non-controlled RICs and REITs.* S corporations and non-controlled regulated investment companies (RICs) and real estate investment trusts (REITs) are exempt from all aspects of the final regulations.
- *Removal of general bifurcation rule.* The final regulations do not include a general bifurcation rule. The Treasury Department and the IRS will continue to study this issue.

Significant changes to the documentation requirements in § 1.385–2:

- *Extension of period required for timely preparation.* The final regulations eliminate the proposed regulations' 30-day timely preparation requirement, and instead treat documentation and financial analysis as timely prepared if it is prepared by the time that the issuer's federal income tax return is filed (taking into account all applicable extensions).
- *Rebuttable presumption based on compliance with documentation requirements.* The final regulations provide that, if an expanded group is otherwise generally compliant with the documentation requirements, then a rebuttable presumption, rather than per se recharacterization as stock, applies in the event of a documentation failure with respect to a purported debt instrument.
- *Delayed implementation.* The final regulations apply only to debt instruments issued on or after January 1, 2018.

Significant changes to the rules regarding distributions of debt instruments and similar transactions under § 1.385–3:

- *Exclusion of debt instruments issued by regulated financial groups and insurance entities.* The final and temporary regulations do not apply to debt instruments issued by certain specified financial entities, financial groups, and insurance companies that are subject to a specified degree of regulatory oversight regarding their capital structure.
- *Treatment of cash management arrangements and other short-term debt instruments.* The final and temporary regulations generally exclude from the scope of § 1.385–3 deposits pursuant to a cash management arrangement as well as certain advances that finance short-term liquidity needs.
- *Limiting certain ''cascading'' recharacterizations.* The final and temporary regulations narrow the application of the funding rule by preventing, in certain circumstances, the so-called ''cascading'' consequence of recharacterizing a debt instrument as stock.
- *Expanded earnings and profits exception.* The final and temporary regulations expand the earnings and profits exception to include all the earnings and profits of a corporation that were accumulated while it was a member of the same expanded group and after the day that the proposed regulations were issued.
- *Expanded access to $50 million exception.* The final and temporary regulations remove the ''cliff effect'' of the threshold exception under the proposed regulations, so that all taxpayers can exclude the first $50 million of indebtedness that otherwise would be recharacterized.
- *Credit for certain capital contributions.* The final and temporary regulations provide an exception pursuant to which certain contributions of property are ''netted'' against distributions and transactions with similar economic effect.
- *Exception for equity compensation.* The final and temporary regulations provide an exception for the acquisition of stock delivered to employees, directors, and independent contractors as consideration for the provision of services.
- *Expansion of 90-day delay for recharacterization.* The 90-day delay provided in the proposed regulations for debt instruments issued on or after April 4, 2016, but prior to the publication of final regulations, is expanded so that any debt instrument that is subject to recharacterization but that is issued on or before January 19, 2017, will not be recharacterized until immediately after January 19, 2017.

The foregoing changes significantly reduce the number of taxpayers and transactions affected by the final and temporary regulations. As narrowed, many issuers are entirely exempt from the application of §§ 1.385–2 and 1.385–3. Moreover, with respect to the large domestic issuers that are subject to § 1.385–3, that section is substantially revised to better focus on extraordinary transactions that have the effect of introducing related-party debt without financing new investment in the operations of the issuer. The final and temporary regulations thus apply in particular factual situations where there are elevated concerns about related-party debt being used to create significant federal tax benefits without having meaningful non-tax effects.

Summary of Comments and Explanation of Revisions

I. In General

The Treasury Department and the IRS received numerous comments requesting that various entities be excluded from the scope of the proposed regulations. After considering the comments received, the Treasury Department and the IRS have adopted several of these recommendations. As an alternative to excluding certain entities from the scope of the regulations, many comments also suggested adopting special rules or narrower technical exceptions to provide relief for particular issues. In many cases, adopting the broader comment to exclude certain entities from the scope of the final and

temporary regulations renders such alternative proposals moot. For example, comments requested a rule providing that recharacterized debt of an S corporation will not be treated as a second class of stock for purposes of section 1361(b)(1)(D). This comment is moot because the final and temporary regulations do not contain a general bifurcation rule and provide that S corporations are not treated as members of an expanded group (as described in Part III.B.2.b of the Summary of Comments and Explanation of Revisions) and therefore are not subject to the final and temporary regulations. Although the Treasury Department and the IRS considered all comments received, this preamble generally does not discuss comments suggesting alternative approaches to the extent such comments are rendered moot by adopting a broader comment. Similarly, because the final and temporary regulations do not contain the general bifurcation rule of proposed § 1.385–1(d), this preamble does not discuss that rule or the comments received with respect to it.

Many comments requested that the regulations include examples illustrating the application of specific rules of the proposed regulations to specific fact patterns. Where appropriate to illustrate the basic application of rules to common fact patterns, the final and temporary regulations provide the requested examples. In some cases, the Treasury Department and the IRS determined that a modification of a rule rendered such request moot or that a clarification of a rule was sufficient to illustrate the point the requested example would clarify. In other cases, the Treasury Department and the IRS clarified the issue through discussion in this preamble.

Numerous comments recommended that the Treasury Department and the IRS extend the deadline for receiving comments. Many of those comments recommended a 90-day extension. Other comments recommended that the Treasury Department and the IRS continue to solicit and consider taxpayer feedback outside of the comment period.

The Treasury Department and the IRS declined to extend the standard 90-day comment period because numerous detailed and substantive comments were received before the deadline. The proposed regulations provided that written or electronic comments and requests for a public hearing had to be received by July 7, 2016, which was 90 days after the publication of the notice of proposed regulations in the **Federal Register**. A public hearing was held on July 14, 2016. Sixteen speakers or groups of speakers spoke at the public hearing. Over 29,600 written comments were received, of which 145 were unique and commented on specific substantive aspects of the proposed regulations. Of the written comments, 6 were received after July 7, 2016, and all were considered in drafting the final and temporary regulations.

The final and temporary regulations reserve on several issues raised in comments, and this preamble includes a new request for comments regarding the type of rules that should apply in those contexts. See Future Guidance and Request for Comments. The Treasury Department and the IRS believe that all remaining issues raised in the comments are appropriately addressed in the changes described in this preamble, and, in the time since the comment period closed, have not been made aware of any particular additional issues that would benefit from an extended comment period.

In addition, because aspects of the final and temporary regulations apply to debt instruments issued after April 4, 2016, the Treasury Department and the IRS determined that it is important for taxpayers and for tax administration to issue the final and temporary regulations expeditiously after giving due consideration to all comments received.

II. Comments Regarding Authority To Issue Regulations Under Section 385

A. Interpretation of Authority Under Section 385

Various comments asserted that the proposed regulations were an invalid exercise of regulatory authority under section 385, including because the regulations were motivated in part by the concern over excessive interest deductions and that such purpose is not authorized by section 385.

The Treasury Department and the IRS have determined that the final and temporary regulations are a valid exercise of authority under section 385. Section 385(a) vests the Secretary with authority to promulgate such rules as may be necessary or appropriate to determine whether, for federal tax purposes, an interest in a corporation is treated as stock or indebtedness (or as in part stock and in part indebtedness). The final and temporary regulations exercise this authority consistent with Congress's mandate by providing factors that determine whether a purported debt interest is treated as stock, indebtedness, or in part stock and in part indebtedness in particular factual situations involving transactions among highly-related corporations (relatedness itself being a factor explicitly enumerated in section 385(b)(5)). Section 385 does not limit the Treasury Department and the IRS to issuing regulations only for certain purposes.

Consistent with section 385(a), the Treasury Department and the IRS have concluded that the regulations are necessary and appropriate. With respect to the documentation rules in § 1.385–2, as Congress observed when it enacted section 385, historically there has been considerable confusion regarding whether various interests are debt or equity or some combination of the two. *See* S. Rep. No. 91–552, at 138 (1969). The Treasury Department and the IRS have observed that this uncertainty has been particularly acute in the context of related-party debt instruments. Section 1.385–2 of the final regulations helps to resolve this uncertainty with respect to the particular factual situation of transactions among highly-related corporations by providing guidance on the type of documentation that is required to support debt classification. Focusing on this particular factual situation is appropriate because such debt raises unique concerns. Related parties do not have the same commercial incentives as unrelated parties to properly document their interests in one another, making it difficult to determine whether there exists an actual debtor-creditor relationship. In addition, because debt, in contrast to equity, gives rise to deductible interest payments, there are often significant tax incentives to characterize interests in a corporation as debt, which may be far more important than the practical commercial consequences of such characterization. Accordingly, when a controlling shareholder (or a party related to a controlling shareholder) invests in a corporation, it is necessary and appropriate to require the shareholder to document that an analysis was undertaken to establish an expectation of repayment and that the parties' conduct throughout the term of the loan is consistent with a debtor-creditor relationship.

With respect to the rules described in §§ 1.385–3, 1.385–3T, and 1.385–4T, a distribution of a note or an issuance of a purported debt instrument by a corporation to a controlling shareholder (or a person related to a controlling shareholder) followed by a distribution of the proceeds to a controlling shareholder, either actually or in substance, raises additional, unique concerns. These purported debt instruments have the potential to create significant federal tax benefits, but lack

meaningful non-tax significance, including because they do not finance new investment in the operations of the borrower. In the context of highly-related corporations, it is a necessary and appropriate exercise of the Secretary's rulemaking authority to provide that when this factor and the relatedness factor are present, an interest is treated as equity rather than indebtedness.

Various comments also asserted that the regulations are inconsistent with the Treasury Department and the IRS's statutory authority under section 385 because they fail to provide a rule of general application and instead address only a particular set of instruments that raise certain policy concerns.

The Treasury Department and the IRS have concluded that these comments lack merit. Section 385 does not require the promulgation of rules of general applicability. Nothing in section 385 requires the Treasury Department and the IRS to provide a universal definition of debt and equity that would apply to all possible transactions. Instead, the statute authorizes the Secretary to prescribe factors ''with respect to a particular factual situation,'' as opposed to all possible fact patterns. The statute's legislative history reinforces the validity of this approach by noting the difficulty of legislating ''comprehensive and specific statutory rules of universal and equal applicability'' and the desirability of addressing the characterization of an interest as debt or equity across ''numerous [and] different situations.'' S. Rep. No. 91–552, at 138.

The regulations follow this approach by addressing the characterization of interests in the particular factual situation of transactions among highly-related corporations. This is a context in which there is particular confusion regarding what is required in order to establish that a debtor-creditor relationship exists. In addition, in this context there are unique issues with respect to the ability to claim significant federal tax benefits through the creation of indebtedness that often lacks meaningful non-tax effects. The use of section 385's regulatory authority to provide guidelines for documentation is necessary and appropriate to provide greater certainty in determining the nature of interests in a context where there are often no third-party checks. Further, the use of this authority to identify determinative factors (the lack of new capital along with relatedness) is also necessary and appropriate to ensure that the significant tax advantages that accompany debt (in particular, the significant deductions that can be claimed) are limited to circumstances in which there is a financing of new investment.

Several comments asserted that regulations promulgated under section 385 must consist of a list of factors to be weighed on a case-by-case basis, and that the proposed regulations deviated from this requirement by providing dispositive factors.

The Treasury Department and the IRS have concluded that the authority under section 385 does not include such a limitation. Section 385(b) authorizes the Secretary to ''set forth factors which are to be taken into account in determining with respect to a particular factual situation'' whether an instrument is debt or equity. The final and temporary regulations include two factors that are specifically listed in section 385(b) (both of which are critical factors traditionally relied on by courts): The presence of a ''written'' promise to pay (section 385(b)(1)) and the relationship between holdings of stock in the corporation and holdings of the interest in question (section 385(b)(5)). Two other factors included in the regulations have been cited in the case law: Whether debt finances new investment in the operations of the borrower, and whether the taxpayer can demonstrate that at the time the advance was made the borrower could reasonably be expected to repay the loan. In the particular factual situation of loans between highly-related corporations, a factual situation in which the relatedness factor described in section 385(b)(5) is amplified, the final and temporary regulations appropriately elevate the importance of the other factors listed above.

Section 385(b) does not require the Secretary to set forth any particular factors (regulations ''may include'' certain enumerated factors), nor does it prescribe the weight to be given to any selected factors, only that they ''are to be taken into account.'' Those decisions are left to the discretion of the Secretary. *See* S. Rep. No. 91–552, at 138 (1969) (''The provision also specifies certain factors which may be taken into account in these [regulatory] guidelines. It is not intended that only these factors be included in the guidelines or that, with respect to a particular situation, any of these factors must be included in the guidelines, or that any of the factors which are included by statute must necessarily be given any more weight than other factors added by regulations.''). As the legislative history makes clear, the Treasury Department and the IRS have the authority also to omit factors in particular factual situations and instead emphasize certain other factors. The factors identified and taken into account in the regulations therefore fall within the authority conveyed by section 385. In addition, the fact that the final and temporary regulations provide for particular weighting of these factors (including treating certain factors as dispositive in a particular context) is consistent with the Secretary's discretion to ''set forth factors which are to be taken into account.''

Congress enacted section 385 to resolve the confusion created by the multi-factor tests traditionally utilized by courts, which produced inconsistent and unpredictable results. *See* S. Rep. No. 91–552, at 138 (1969). The congressional objective of providing clarity regarding the characterization of instruments would be undermined if the regulations authorized by section 385 were required to replicate the flawed multi-factor tests in the case law that motivated the enactment of section 385. Nothing in section 385 requires a case-by-case approach. The statute does not specify what level of generality is required in respect of a ''particular factual situation,'' and the Treasury Department and the IRS reasonably interpret this phrase to include the subset of transactions that take place among highly-related corporations. Furthermore, as discussed throughout this Part II.A, the legislative history indicates that Congress intended to grant the Secretary broad authority to provide different rules for distinguishing debt from equity in different situations or contexts. *See also* S. Rep. No. 91–552, at 138 (discussing the need for debt/equity rules given ''the variety of contexts in which this problem can arise'').

To underscore the regulations' consistency with the reference in section 385(b) to factors that are to be taken into account in particular factual situations, the final and temporary regulations first provide in § 1.385–1(b) a general rule that effectively implements the common law factors. Therefore, whether an interest is classified as debt or equity ordinarily will be determined based on common law, including the factors prescribed under common law. In the particular factual situation of a purported debt instrument issued between members of an expanded group, § 1.385–2 provides a minimum standard of documentation that must be met in order for an instrument to be treated as debt based on an application of the common law factors and adjusts the weighting of certain common law factors, while § 1.385–3 elevates two particular common law factors (the lack of new

investment in the operations of the issuer and relatedness) into determinative factors. The regulations' enumeration of these factors to determine the characteristics of an instrument is entirely consistent with the plain text of section 385.

Finally, several comments asserted that proposed § 1.385–3 set forth an inappropriate list of factors by exclusively considering circumstances outside the four corners of the instrument, such as the transaction in which the instrument is issued and the use of the funds received in exchange therefor, without regard to the characteristics of the instrument itself.

The Treasury Department and the IRS have concluded that the authority granted by section 385 is plainly broader than interpreted by the comments. As noted above, section 385 authorizes the Secretary to determine which factors must be taken into account when determining the nature of an interest in a particular factual situation. Nothing in the statute requires the Secretary to consider specific factors or, conversely, to disregard other factors. In any event, the factors set forth in the regulations derive from common law debt-equity analyses, which have, among various considerations, often looked beyond the characteristics of the instrument. For instance, Congress identified the relatedness of the parties to the transaction as among the factors that ''may'' be set forth under section 385, *see* section 385(b)(5) (''the relationship between holdings of stock in the corporation and holdings of the interest in question''), and this factor has been relied upon by numerous courts in similar factual situations. Likewise, the lack of new capital investment created by an issuance of debt is also a common law debt-equity factor. *See, e.g., Talbot Mills* v. *Comm'r,* 146 F.2d 809, 811 (1st Cir. 1944), *aff'd sub nom, John Kelley Co.* v. *Comm'r,* 326 U.S. 521 (1946); *Kraft Foods Co.* v. *Comm'r,* 232 F.2d 118, 126–27 (2d Cir. 1956).

B. Consideration of Costs

Various comments contended that the Treasury Department and the IRS failed to consider costs in the proposed regulations, that the consideration given to the costs imposed by the regulations was insufficient, or that the proposed regulations' analysis did not accurately reflect the costs of the proposed regulations. One comment cited the Supreme Court's decision in *Michigan* v. *EPA,* 135 S. Ct. 2699 (2015), as imposing an obligation to consider costs as part of establishing the appropriateness of regulation, claiming that the Treasury Department and the IRS failed to meet this obligation in the proposed regulations. Another comment asserted that the proposed regulations failed to comply with Executive Order 12866's instruction to assess the costs of regulatory action.

The Treasury Department and the IRS disagree with these comments. The final and temporary regulations are a necessary and appropriate exercise of the Secretary's authority based on the reasons described in Section A of this Part II and the analysis of the regulations' costs and benefits. The Treasury Department and the IRS do not agree with comments that the holding of *Michigan* v. *EPA* compels consideration of costs in every instance. In any event, the Treasury Department and the IRS analyzed the costs and benefits of the proposed regulations in a regulatory impact analysis. This regulatory impact analysis was conducted consistent with the proposed regulations' designation as a ''significant regulatory action'' under Executive Order 12866. *See https://www.regulations.gov/document?D=IRS-2016-0014-0001.*

The Treasury Department and the IRS received extensive comments regarding the costs of the proposed regulations and the regulatory impact analysis that accompanied the proposed regulations. The Treasury Department and the IRS carefully considered those comments in revising the proposed rules to significantly reduce compliance burdens and in developing the regulatory impact analysis of costs and benefits that accompanies and supports the final and temporary regulations. The regulatory impact analysis of the final and temporary regulations is consistent with Executive Order 12866.

As explained in greater detail in Part I of the Special Analyses, the Treasury Department and the IRS estimate that the aspects of the regulations that will apply most broadly (§ 1.385–2) will impact only 6,300 of the roughly 1.6 million C corporations in the United States (0.4 percent). The total start-up expenses for these affected taxpayers is estimated to be $224 million in 2016 dollars, with ongoing annual compliance costs estimated to be $56 million in 2016 dollars, or an average of $8,900 per firm. By comparison, the regulations will significantly reduce the tax revenue losses achieved by the avoidance strategies that these regulations address. Annualizing over the period from 2017 to 2026, the regulations are estimated to yield tax revenue of between $461 million per year (7% discount rate) or $600 million per year (3% discount rate) in 2016 dollars. The analysis concludes that the tax revenues generated from reduced tax avoidance would be at least 6 to 7 times as large as the compliance costs. The analysis also explains the additional, non-quantifiable benefits the regulations will generate, such as increased tax compliance system-wide, efficiency and growth benefits, and lower tax administration costs for the IRS. The analysis supports the conclusion that the regulations are an appropriate and effective exercise of the Treasury Department and the IRS's authority. The Office of Management and Budget reviewed and approved the analysis. The analysis and its conclusions rebut the assertions in comments that the Treasury Department and the IRS failed to consider costs, did not adequately consider costs, or did not accurately estimate costs.

As set forth in this Part II.B, the Treasury Department and the IRS disagree with the comment that the proposed regulations failed to comply with Executive Order 12866. Moreover, section 10 of Executive Order 12866 clearly states that the Order ''does not create any right or benefit, substantive or procedural, enforceable at law''; rather, the Order ''is intended only to improve the internal management of the Federal Government.''

III. Comments and Changes to § 1.385–1—General Provisions

A. General Approach

1. Regulations Limited to U.S. Borrowers

The proposed regulations applied to certain EGIs and debt instruments issued by corporations to members of the same expanded group without regard to the residency of the issuer. Numerous comments recommended that the regulations not apply to foreign borrowers, including in particular transactions where both the borrower and the lender are foreign corporations (foreign-to-foreign transactions). These comments pointed to various concerns, including the complexity of applying the regulations to potentially hundreds of foreign entities in a multinational group and certain unique consequences that would follow from such application, such as a loss of foreign tax credits. Some comments also questioned the purpose of applying the rules to foreign borrowers. Other comments acknowledged that the United States can have an interest in the tax treatment of indebtedness issued by foreign corporations, in particular indebtedness issued by controlled foreign corporations (CFCs), but observed that the United States' interest is less direct, and of a different nature, than in the

case of indebtedness issued by U.S. borrowers.

The Treasury Department and the IRS have determined that the application of the final and temporary regulations to indebtedness issued by foreign corporations requires further study. Accordingly, the final and temporary regulations apply only to EGIs and debt instruments issued by members of an expanded group that are domestic corporations (including corporations treated as domestic corporations for federal income tax purposes, such as pursuant to section 953(d), section 1504(d), or section 7874(b)), and reserve on the application to EGIs and debt instruments issued by foreign corporations. The final and temporary regulations achieve this result by creating a new term ''covered member,'' which is defined as a member of an expanded group that is a domestic corporation, and reserves on the inclusion of foreign corporations.

One comment questioned how the proposed regulations would apply to U.S. branches of a foreign issuer. Although it is possible to increase the debt attributable to a U.S. branch through issuances of debt by the foreign owner to a related party, the various requirements on allocating liabilities between a branch and its home office (whether under the Code or a relevant bilateral tax treaty) raise unique issues. This preamble does not address those issues because the final and temporary regulations reserve on their application to foreign issuers, including with respect to U.S. branches of foreign issuers.

2. Treatment of Consolidated Groups as One Corporation

Proposed § 1.385–1(e) treated members of a consolidated group as one corporation for purposes of the regulations under section 385.

As discussed in Part IV.B.1.b of this Summary of Comments and Explanation of Revisions, the final regulations do not apply the rule in proposed § 1.385–1(e) to § 1.385–2. Instead § 1.385–2 provides that an interest issued by a member of a consolidated group and held by another member of the same consolidated group is not within the scope of an applicable interest as defined in § 1.385–2. As a result, such an interest is not subject to the documentation rules in § 1.385–2. Sections 1.385–3, 1.385–3T, and 1.385–4T continue to treat members of a consolidated group as one corporation. Because the rule described in proposed § 1.385–1(e) is now only applicable for purposes of §§ 1.385–3 and 1.385–3T and relates to the treatment of consolidated groups, the rule is moved to § 1.385–4T. See Part VI of this Summary of Comments and Explanation of Revisions for a discussion of the comments and revisions to the rules regarding the application of §§ 1.385–3 and 1.385–3T to consolidated groups.

B. Definitions

1. Controlled Partnership

One comment requested that the regulations clarify that non-controlled partnerships are outside the scope of the regulations. The Treasury Department and the IRS have determined that proposed § 1.385–3 was sufficiently clear that the partnership-specific provisions only applied to controlled partnerships and their partners. Therefore, the regulations do not contain clarifying language to that effect. The application of §§ 1.385–3 and 1.385–3T to controlled partnerships is discussed further in Parts V.H.3 and 4 of this Summary of Comments and Explanation of Revisions.

a. Determining Partners' Interests in Partnership Capital or Profits

The proposed regulations defined the term controlled partnership as a partnership with respect to which at least 80 percent of the interests in partnership capital or profits are owned, directly or indirectly, by one or more members of an expanded group.

A comment recommended the adoption of rules for determining whether members of an expanded group own 80 percent of the capital or profits interests of a partnership. The determination of whether a partner's share of partnership profits or capital is above or below a threshold is necessary to apply various provisions of the Code or regulations. In most cases, neither term is defined with specificity. *See, e.g.,* sections 163(j)(4)(B)(i) and (j)(6)(D)(ii)(II), 613A(d)(3)(B), 707(b)(1) and (2), and 708(b)(1)(B), as well as § 1.731–2(e)(4)(ii). The Treasury Department and the IRS decline to provide more specific rules regarding the determination of profits or capital interests in the context of identifying a controlled partnership for purposes of the section 385 regulations.

The comment also specifically recommended that, for purposes of measuring partners' profits interests, consideration be given to the use of a reasonable estimate of the partners' aggregate profit shares over time in order to prevent a partnership from flipping in and out of controlled partnership status (for example, when profit allocations are based on distribution waterfalls, which shift over time). This recommendation, made in the context of identifying controlled partnerships, echoed other comments regarding the determination of a partner's share of profits for purposes of applying the aggregate approach to partnerships under proposed § 1.385–3. The Treasury Department and the IRS recognize that a partner's share of partnership profits may not always be knowable with certainty, regardless of the purpose for making such determination. However, such determination must always be made in a reasonable manner. In some cases, that reasonable determination will require a partner or the partnership to make estimates regarding a partnership's profitability over some period of time.

The comment also recommended that the definition of a controlled partnership should not take percentages of capital interests into account, but should instead focus solely on a metric based on cumulative shares of profits. The Treasury Department and the IRS have determined that such a limitation would be inappropriate because in certain circumstances a partner's share of capital may be a good metric for identifying control.

As an alternative, the comment recommended that a shift in capital that is small or transitory be disregarded for purposes of the controlled partnership definition. The Treasury Department and the IRS have determined that such a rule would be difficult to administer because it would result in an additional deemed fiction—that is, a partner's share of capital for this purpose could be different from the partner's actual share. The test for control looks to shares of profits or capital, not profits and capital, and because the threshold is 80 percent, small or transitory shifts in capital that would result in a partnership becoming or ceasing to be a controlled partnership should happen infrequently.

b. Indirect Ownership

A comment requested confirmation that determining the status of a partnership as a controlled partnership is a separate and independent inquiry from determining the status of a corporation as an expanded group member. The comment suggested that it was unclear whether, in applying the section 318(a) attribution rules to determine ''partnership interest'' ownership, such partnership interests are then treated as actually owned for purposes of then applying the section 318(a) attribution rules to determine ''stock'' ownership. The final regulations clarify that determining the status of a partnership as a controlled

partnership is a separate and independent inquiry from determining the status of a corporation as an expanded group member.

c. Unincorporated Organizations

One comment requested that the regulations not treat certain unincorporated organizations described in § 1.761–2 as controlled partnerships. The final regulations clarify that an unincorporated organization described in § 1.761–2 that elects to be excluded from all of subchapter K is not a controlled partnership. Thus, the Treasury Department and the IRS anticipate that such unincorporated organizations will apply the rules of section 385 in a manner consistent with their pure aggregate treatment.

d. Treatment as a Publicly Traded Partnership

A comment expressed concern that a debt instrument issued by a securitization vehicle organized as a partnership that is treated as stock in the expanded group partner under the proposed regulations could be treated as a partnership interest within the meaning of § 1.7704–1(a)(2)(i)(B) because a ''partnership interest'' for this purpose can include certain derivative and other indirect contract rights and interests with respect to a partnership. The comment stated that many securitization transactions require an unqualified opinion of tax counsel that the entity is not a publicly traded partnership treated as a corporation for federal income tax purposes, and that the recharacterization rules create uncertainty in this regard.

Section 1.385–2 of the final regulations does not explicitly apply to a debt instrument issued by a controlled partnership. While such a debt instrument may be subject to the anti-avoidance rule in § 1.385–2(f), the concern raised in the comment would only arise under the final regulations if the debt instrument is issued with a principal purpose of avoiding the application of § 1.385–2.

Similarly, § 1.385–3T(f)(4) provides that a debt instrument issued by a controlled partnership is not recharacterized as stock. Instead, as described in more detail in Part V.H.4 of this Summary of Comments and Explanation of Revisions, the holder of a debt instrument (holder-in-form) all or a portion of which otherwise would be treated as stock is deemed to transfer such debt instrument to the partner or partners in the controlled partnership in exchange for stock in the partner or partners. While the deemed partner stock that the holder-in-form of the debt instrument would receive in exchange for the deemed transfer of all or a portion of the debt instrument to the partner or partners in the controlled partnership may be a non-debt financial instrument or contract the value of which is determined in whole or in part by reference to the partnership that issued the debt instrument pursuant to § 1.7704–1(a)(2), the qualified dealer debt instrument exception in the final and temporary regulations is expected to address this issue. That exception applies to make a debt instrument acquired by a dealer in securities not a covered debt instrument, and therefore, not subject to the rules that could result in deemed partner stock.

2. Expanded Group

a. General Framework

The proposed regulations defined the term expanded group by reference to the term ''affiliated group'' in section 1504(a), with several modifications. Section 1504(a) defines an affiliated group for various purposes under the Code, including for purposes of defining an affiliated group of corporations that are permitted to file a consolidated return. Comments expressed concern that the proposed regulations' modifications to the definition in section 1504(a) for purposes of defining an expanded group would treat certain corporations as members of the same expanded group in situations where the corporations are not ''highly related,'' which would not be consistent with the policy concerns that the regulations are intended to address. In particular, many comments described the proposed regulations' adoption of the attribution rules of sections 304(c)(3) and 318 in the definition of an expanded group as overly broad. Comments also requested that certain corporations not be included in an expanded group because their special federal tax status made their treatment as an expanded group member less relevant to the policy concerns of the proposed regulations.

Many comments proposed changes to the definition of an expanded group to better align that definition with the regulations' policy concerns, with the majority of the comments recommending changes that would retain section 1504 as the starting point for the definition, including adjustments to the attribution rules of sections 304(c)(3) and 318. However, two comments suggested that section 1563 would be a preferable starting point. Section 1563 defines a ''controlled group of corporations'' for various purposes under the Code. One comment suggested that, to the extent the regulations treat corporations that are commonly controlled by non-corporate persons (for example, individuals, family members, or partnerships) as an expanded group (brother-sister groups), section 1563, with certain modifications, would be a better starting point than section 1504. Another comment asserted that the attribution rules in section 1563 would be more effective at including in an expanded group only the most highly-related entities. Other comments recommended that brother-sister groups should not be treated as a single expanded group in any case.

As described in more detail in Sections B.2.b through B.2.g of this Part III, the final regulations continue to define the term expanded group using concepts similar to those used to define the term ''affiliated group'' in section 1504(a). However, changes have been made and new examples added to address concerns expressed in comments regarding both the asserted overbreadth with respect to the types of corporations included in the proposed definition of an expanded group and with respect to the indirect ownership rules under the proposed regulations. Changes also have been made in response to comments to clarify other situations in which entities inadvertently were not treated as members of an expanded group under the proposed regulations but where the policy goals of the regulations clearly are implicated.

Additionally, the modifications that were made to the section 1504-based definition of an expanded group in response to the majority of comments achieve the same results that the two comments proposing a section 1563 approach indicated would be achieved through the use of a section 1563 starting point. Accordingly, the Treasury Department and the IRS decline to adopt the recommendation to use section 1563 concepts in defining an expanded group. The Treasury Department and the IRS have determined that the modifications discussed in Sections B.2.a through g of this Part III more precisely define an expanded group to address those situations in which highly-related corporations implicate the policy goals of the regulations.

b. Exclusion of Certain Entities

In defining an expanded group, the proposed regulations included several modifications to the definition of an affiliated group under section 1504(a). Unlike an affiliated group, an expanded group was defined to include corporations that, under section 1504(b),

would not be included within an affiliated group, including foreign corporations, tax-exempt corporations, S corporations, and RICs and REITs. In addition, indirect stock ownership was taken into account for purposes of the stock ownership requirement of section 1504(a)(1)(B)(i). Finally, the proposed regulations also modified the definition of affiliated group to treat a corporation as a member of an expanded group if 80 percent of the vote *or* value is owned by expanded group members (a disjunctive test) rather than 80 percent of the vote *and* value (a conjunctive test), as required under section 1504(a).

Numerous comments requested exclusions from the definition of an expanded group for entities described in sections 1504(b)(6) (RICs and REITs) and 1504(b)(8) (S corporations). Comments noted that RICs, REITs, and S corporations generally are not subject to corporate level taxation either because of the flow-through treatment accorded under the Code (in the case of an S corporation generally) or because of the dividends paid deduction that can have a similar effect (in the case of a RIC or REIT). In that respect, comments asserted that RICs, REITs, and S corporations are similar to non-controlled partnerships, which the proposed regulations would not have included in an expanded group. Comments also noted that the recharacterization of an instrument issued by an S corporation, REIT, or RIC could jeopardize the entity's federal tax status. Consequently, comments suggested that the regulations exclude S corporations, REITs, and RICs from any expanded group.

In response to these comments, the final regulations exempt S corporations from being expanded group members. The final regulations also exempt RICs or REITs from being expanded group members unless the RIC or REIT is controlled by members of the expanded group. The Treasury Department and the IRS have determined that an S corporation, RIC, or REIT that otherwise would be the parent of an expanded group is generally analogous to a non-controlled partnership. Under both the proposed and the final regulations, a non-controlled partnership that would, if it were a corporation, be the parent of an expanded group is excluded from the expanded group because, by definition, the partnership is not a corporation and only corporations can be members of an expanded group. Consistent with the partnership's status generally as an aggregate of its owners, the partnership should not be a member of the expanded group if its partners would not be members. S corporations, RICs, and REITs have similar flow-through characteristics as partnerships and therefore also should not be members of the expanded group, despite otherwise being corporations that could own stock of members of an expanded group.

However, the final regulations continue to treat a RIC or REIT that is controlled by members of the expanded group as a member of the expanded group. Similar to a controlled partnership, a controlled RIC or REIT should not be able to break affiliation with respect to an otherwise existing expanded group. Unlike partnerships, RICs and REITs are corporations and in certain limited cases are subject to federal income tax at the entity level. Therefore, the final regulations continue to treat controlled RICs and REITs as members of an expanded group, rather than as aggregates of their owners. Because an S corporation cannot be owned by persons other than U.S. resident individuals, certain trusts, and certain exempt organizations, an S corporation cannot be controlled by members of an expanded group in a manner that implicates the policies underlying the final and temporary regulations. S corporations are therefore excluded from the definition of an expanded group member for all purposes of the final and temporary regulations.

Several comments specifically requested exceptions for corporations exempt from taxation under section 501 and insurance companies subject to taxation under section 801. The final regulations do not adopt the recommendation to exclude these corporations from the definition of an expanded group. Although generally exempt from taxation, section 501 corporations may still be subject to tax on unrelated business income and therefore still present concerns relating to related-party indebtedness. In addition, while section 501 corporations are themselves generally tax exempt, they may own taxable C corporation subsidiaries. Even though S corporations and non-controlled REITs and RICs may also own taxable C corporation subsidiaries, in those situations income of the S corporation, REIT, or RIC is generally included in the income of their owners, whereas unrelated business taxable income of a corporation that is exempt from taxation under section 501 is not includible in another taxpayer's income. With respect to insurance companies subject to taxation under section 801, like other corporations, they may also use related-party indebtedness to reduce their taxable income. However, as discussed in Part V.G.2 of this Summary of Comments and Explanation of Revisions, the final and temporary regulations exclude from the application of § 1.385–3 debt instruments issued by certain regulated insurance companies, which generally include insurance companies subject to taxation under section 801.

Finally, one comment requested ''specific evidence-based findings'' justifying the inclusion of any entity described in section 1504(b) in an expanded group, while another comment asserted that defining a new category of related parties as an expanded group, rather than relying on a statutory definition such as an ''affiliated group,'' was an inappropriate use of the regulatory process. Section 385 authorizes regulations that affect the treatment of certain interests in corporations as stock or indebtedness. However, the regulations limit their application to expanded group members and are premised on a broad definition of expanded group that generally applies to all types of corporations that are closely related. In defining an expanded group, the Treasury Department and the IRS are not constrained to include only ''includible corporations'' for purposes of determining an affiliated group of corporations under section 1504(a) or to rely on other predefined groups. The exclusion of specific types of corporations under section 1504(b) is intended to ensure that only certain corporations are permitted to benefit from consolidation for U.S. federal income tax purposes. An exclusion of a certain type of corporation from the expanded group definition, on the other hand, results from a determination by the Treasury Department and the IRS that indebtedness between such entity and its affiliates does not sufficiently implicate the policy concerns of section 385 to subject the corporation to the final and temporary regulations.

c. Indirect Stock Ownership

To determine indirect stock ownership for purposes of defining an expanded group, the proposed regulations applied the constructive ownership rules of section 304(c)(3), which in turn applies section 318(a) subject to certain modifications. This Part III.B.2.c discusses comments related to indirect ownership and the application of section 318(a).

i. Indirect Ownership Under Section 1504(a)(1)(B)(ii)

For purposes of defining an expanded group, proposed § 1.385–1(b)(3)(i)(B) modified section 1504(a)(1)(B)(i) by providing that a common parent must

own 80 percent of the vote or value of at least one other includible corporation (without regard to section 1504(b)) ''directly or indirectly'' rather than ''directly.'' The proposed regulations did not include a similar modification to section 1504(a)(1)(B)(ii) (relating to the required ownership in includible corporations (without regard to section 1504(b)) other than the common parent); specifically, the regulations required that 80 percent of the vote or value of each includible corporation be owned ''directly'' by one or more includible corporations other than the common parent. Several comments recommended that, for purposes of defining an expanded group, section 1504(b)(1)(B)(ii) also be modified by substituting ''directly or indirectly'' for ''directly.''

In response to comments, the final regulations extend the ''directly or indirectly'' language to both the common-parent test of section 1504(a)(1)(B)(i) and the each-includible-corporation test of section 1504(a)(1)(B)(ii). Accordingly, the indirect ownership rules of section 318, as modified by § 1.385–1(c)(4)(iii) (discussed in detail in Section B.2.c.ii of this Part III) apply for purposes of both tests in section 1504(a)(1)(B). However, to make clear that the ownership tests of section 1504(a)(1)(B) apply to all corporations that can be members of an expanded group (as opposed to only includible corporations within the meaning of section 1504(b)), the final regulations provide the modified section 1504(a)(1)(B) tests in their entirety rather than by cross-reference to section 1504(a)(1)(B). Therefore, federal tax principles that are applicable in determining whether a corporation is a member of an affiliated group under section 1504(a)(1) and (a)(2) are generally applicable in determining whether a corporation is a member of an expanded group.

ii. Definition of Indirect Ownership

As noted in Section B.2.c of this Part III, the proposed regulations cross referenced the rules of section 304(c)(3), which themselves cross reference section 318(a) (with certain modifications), to define indirect ownership. In order to clarify how to determine indirect ownership for purposes of determining an expanded group, the final and temporary regulations cross reference section 318 and the regulations thereunder with modifications, rather than cross reference section 304(c)(3). The regulations under section 318(a) and, with respect to certain options, the regulations under section 1504, apply when determining a shareholder's indirect ownership for purposes of the final regulations.

One comment suggested that the regulations should indicate that indirect stock ownership is determined by ''applying the constructive ownership rules of section 304(c)(3),'' given that section 304(c)(3) refers to constructive ownership rather than indirect stock ownership. The final regulations do not adopt this comment and instead define indirect stock ownership by reference to the ''constructive ownership rules'' of section 318, with appropriate modifications.

iii. Stock Owned Through Partnerships

Under section 318(a)(2)(A), stock owned by a partnership is considered owned ''proportionately'' by its partners. Comments requested guidance on how ''proportionately'' should be determined under section 318(a)(2)(A) for purposes of determining stock ownership under the proposed regulations. Comments noted that, in the partnership context, determining the value of a partnership interest is not always straightforward, which makes it difficult to determine partners' proportionate interests in a partnership. To address these issues, comments requested safe harbors, including a safe harbor based on the liquidation value of a partner's interest.

The final regulations do not provide guidance on how ''proportionately'' should be determined under section 318(a)(2)(A) for purposes of determining stock ownership. The proper interpretation of ''proportionately'' in the context of section 318(a)(2)(A) is relevant to many provisions. *See* sections 304(c)(3) (providing constructive ownership rules for purposes of determining control), 355(e)(4)(C)(ii) (providing attribution rules applicable on a distribution of stock and securities of a controlled corporation), and 958(b) (regarding constructive ownership of stock for many international provisions). Thus, the Treasury Department and the IRS have determined that providing guidance on this issue is beyond the scope of these regulations because these regulations do not require a different application of section 318(a)(2)(A).

iv. Hook Equity

A comment requested guidance regarding the application of the rules of section 318 to ownership structures involving hook equity. The comment indicated that the proposed regulations would increase the circumstances under which hook equity arises, increasing the need for guidance on the treatment of hook equity under section 318 under current law.

The Treasury Department and the IRS have concluded that the constructive ownership rules of section 318 already address the effect of hook equity. In general, under section 318(a)(2), the equity in the entity owning the hook equity can be attributed, in whole or in part, to the non-hook equity holder. Under section 318(a)(5)(A), stock constructively owned by a person by reason of section 318(a)(2) is considered as actually owned by such person. Section 318(a)(5)(A) permits a recursive application of section 318(a)(2), pursuant to which a non-hook equity holder is treated as owning a percentage of the hook equity owned. *See* Examples 3 and 4 of § 1.385–1(c)(4)(vii).

v. Downward Attribution and Brother-Sister Groups

Comments recommended that, for purposes of the expanded group definition, the ''downward attribution'' rule of section 318(a)(3)(A) be modified to prevent taxpayers that are not highly-related from being treated as members of the same expanded group. Under section 318(a)(3)(A), all of the stock owned by a partner is treated as owned by the partnership, regardless of the partner's ownership interest in the partnership. Thus, for example, assume that USS1 owns a 1 percent interest in PRS, a partnership. Further assume that USS1 wholly owns S1, which wholly owns S2. PRS wholly owns S3. S1, S2, and S3 are all corporations. Pursuant to section 318(a)(3)(A), PRS is treated as wholly owning S1 and S2 (after application of section 318(a)(2)(A)). Under section 318(a)(3)(C), S3 is treated as owning S1 and S2. As a result, S1, S2, and S3 would comprise an expanded group under the proposed regulations despite minimal common ownership between S3 and the other corporations.

To address fact patterns similar to the example above, comments recommended that the section 318(a)(3)(A) downward attribution rule apply only from partners with a specific threshold ownership interest in a partnership, such as partners that own 50 percent or 80 percent of the interests in a partnership. Other comments suggested different solutions to the same problem, including limiting section 318(a)(3)(A) attribution to situations in which related parties owned 80 percent or more of the interests in a partnership, or modifying section 318(a)(3)(A) attribution for these purposes such that a partnership is treated as owning only a proportionate amount of any stock owned by a partner. As an alternative,

one comment recommended that the regulations include an override rule, pursuant to which two entities will not be treated as members of the same expanded group unless one of the entities has a direct or indirect ownership interest of 80 percent or more in the other entity, while applying proportionality principles under this override rule. One comment specifically requested that the downward attribution rule of section 318(a)(3)(A) be limited for purposes of applying the threshold rule of proposed § 1.385–3(c)(2).

Comments also requested similar limits on downward attribution to entities other than partnerships. Specifically, comments recommended that section 318(a)(3) in general should apply only when the interest holder owns 80 percent or more of the entity, or that section 318(a)(3)(C) be modified to provide that the corporation is attributed only a proportionate amount of the stock owned by its shareholder. One comment asserted, without explanation, that an expanded group should be determined entirely without reference to section 318(a)(3) or similar rules.

The principal consequence of requiring downward attribution for purposes of determining indirect ownership under the proposed regulations is that an expanded group included so-called ''brother-sister'' groups of affiliated corporations that are commonly controlled by non-corporate owners. Similarly, the principal consequence of applying section 318(a)(1) (in connection with section 318(a)(3)), which attributes stock owned by individual members of a family, would also be the treatment of brother-sister groups with non-corporate owners as part of an expanded group. The Treasury Department and the IRS continue to study the issue of brother-sister groups, including the implications of applying the final and temporary regulations to groups with identical members but different expanded group member corporate parents. As a result, the final regulations reserve on the application of section 318(a)(1) and (a)(3) for purposes of determining indirect ownership pending further study.

vi. Option Attribution

A comment requested that, for purposes of determining an expanded group, the option attribution rule of section 318(a)(4) should not apply. The comment suggested that the anti-abuse rule should instead expressly apply to the use of options to avoid the expanded group definition. The comment asserted that it would not be appropriate, for example, to treat a 50–50 joint venture between unrelated corporations as an expanded group member of one or both corporations because of the existence of buy-sell rights that are common in many joint ventures.

The final regulations limit the application of the option attribution rule of section 318(a)(4) in two respects. First, the rule only applies to options that are described in § 1.1504–4(d), which can include: Call or put options, warrants, convertible obligations, redemption agreements, or any instrument (other than stock) that provides for the right to issue, redeem, or transfer stock, and cash settlement options, phantom stock, stock appreciation rights, or any other similar interests. Second, the rule only applies to the extent the options are reasonably certain to be exercised based on all the facts and circumstances as described in § 1.1504–4(g). By limiting the application of the option attribution rule in this manner, the Treasury Department and the IRS intend that ownership of stock will be attributed to an option holder only in the limited circumstances in which the option is analogous to actual stock ownership.

The final regulations also provide a special rule for indirect ownership through options for certain members of consolidated groups. Under this special rule, in applying section 318(a)(4) to an option issued by a member of a consolidated group (other than the common parent of the consolidated group), section 318(a)(4) only applies to the option if the option is treated as stock or as exercised under § 1.1504–4(b) for purposes of determining whether a corporation is a member of an affiliated group. This rule is intended to address cases where, because of the reasonable anticipation requirement of § 1.1504–4(b)(2)(i)(A), members of a consolidated group could theoretically be treated as members of different expanded groups.

vii. Knowledge of Constructive Ownership

A comment indicated that, under the proposed regulations' attribution rules, it would be difficult in certain cases to determine whether entities are treated as members of the same expanded group. The comment requested that a person should be treated as owning stock by reason of attribution solely to the extent such person has actual knowledge of a relationship or should have reasonably known of such relationship after due investigation. The comment did not specify the relationship with respect to which the proposed knowledge qualifier would apply (for example, whether the entities would need to have actual knowledge of their status as members of an expanded group, or if they would only require actual knowledge of the applicable relationship described in section 318 (as modified by section 304(c)(3)).

The final regulations do not adopt a knowledge qualifier with respect to the application of the attribution rules. The attribution rules in the final regulations are similar to attribution rules that are applicable under other Code sections, which are based on objective metrics rather than a subjective determination that would be difficult for the IRS and taxpayers to administer. Furthermore, in the case of highly-related groups, the requisite information needed to determine constructive ownership should be readily available to group members. Therefore, the Treasury Department and the IRS do not expect there will be situations in which taxpayers would be unable to determine constructive ownership after reasonable investigation and legal analysis.

d. Time for Determining Member Status

Comments requested that the regulations clarify when a corporation's status as a member of an expanded group is determined for purposes of § 1.385–3. Several comments recommended that the regulations adopt a ''snapshot'' approach, under which a corporation's membership in an expanded group is tested immediately before a transaction that is subject to the regulations. In the alternative, one comment suggested that, for purposes of determining whether a corporation has become a member of an expanded group at the time of a distribution or acquisition, its membership should be determined at the close of the transaction or series of related transactions that include the distribution or acquisition. For example, assume FP, a foreign corporation, owns a minority equity interest in USS1, a domestic corporation, with an unrelated party owning the remainder of USS1's stock. USS1 issues a note to FP to redeem FP's stock in USS1. Pursuant to the same plan, FP purchases 100 percent of USS1's stock from the unrelated party. If this comment were adopted, FP and USS1 would be treated as members of the same expanded group at the time of the USS1 redemption because at the close of a series of transactions, FP and USS1 are members of the same expanded group. Accordingly, the USS1 note would be subject to recharacterization under § 1.385–3.

The Treasury Department and the IRS have determined that a snapshot

approach to determining expanded group status is more administrable and results in more consistent outcomes than determining expanded group membership after the transaction and a series of related transactions. Accordingly, the final regulations provide that the determination of whether a corporation is a member of an expanded group at the time of a distribution or acquisition described in § 1.385–3(b)(2) or (b)(3)(ii) is made immediately before such distribution or acquisition.

e. Exceptions for Certain Stock Holdings

i. Voting Rights Held by Investment Advisors

A comment recommended that, for purposes of the expanded group definition, any vote held by an investment advisor, or an entity related to the investment advisor, should be ignored. The comment indicated that private investment funds are typically structured so that the fund's investment adviser, or a related entity, owns the voting interests in the investment fund (which may be taxable as a corporation for federal income tax purposes), while investors own non-voting interests in the fund that represent most of the fund's value. As a result, groups of investment funds managed by the same investment manager may be part of an expanded group because a common investment adviser, or a related entity, controls all of the voting interests in the investment funds. Furthermore, the comment noted that because an investment advisor generally owes separate duties to its investment funds, it does not enter into transactions to shift tax obligations from one fund to another, in contrast to a typical corporate structure.

The final regulations do not adopt this recommendation. The Treasury Department and the IRS disagree that any fiduciary duty owed by an investment advisor to its funds places meaningful limits on the ability for such funds to transact with each other through loans. To the extent that an investment advisor and its investment funds constitute an expanded group, it does not follow that intercompany transactions among such parties that give rise to tax benefits for one or more of them would be violative of fiduciary duties. In addition, unlike certain companies subject to regulation and oversight, *see* Part V.G.1 and 2 of this Summary of Comments and Explanation of Revisions, these funds are not subject to capital or leverage requirements that restrict their ability to issue debt. Without such restrictions, investment advisors that control investment funds may cause the funds to engage in transactions otherwise subject to the final and temporary regulations.

ii. Interests Required To Be Held by Law

A comment requested that, for purposes of determining membership in an expanded group, stock ownership should be disregarded to the extent that the stock is required to be held by law. The comment offered as an example risk retention rules applicable to asset-backed securities, which generally require sponsors to retain either five percent of the most subordinate tranche of a securitization vehicle or to retain a portion of each tranche of the securitization vehicle's securities.

The Treasury Department and the IRS decline to adopt this recommendation for purposes of defining an expanded group because the expanded group definition is already limited to corporations with a high degree of relatedness. However, as discussed in Part V.F.5 of this Summary of Comments and Explanation of Revisions, the final and temporary regulations adopt certain recommended changes to limit the application of § 1.385–3 in certain securitization transactions.

f. Investment Blockers

The preamble to the proposed regulations requested comments on whether certain debt instruments used by investment partnerships, including indebtedness issued by certain ''blocker'' entities, implicate similar policy concerns as those motivating the proposed regulations, such that the scope of the proposed regulations should be broadened. Several comments recommended that the scope of the proposed regulations should not be broadened to apply to such transactions (by, for example, treating a partnership that owns 80 percent or greater of the stock of a blocker corporation as an expanded group member). The final and temporary regulations do not adopt special rules for debt instruments used by investment partnerships, including indebtedness issued by certain ''blocker'' entities. The Treasury Department and the IRS continue to study these structures and these transactions in the context of the section 385 regulations.

g. Overlapping Expanded Groups

One comment requested clarification that, although a corporation may be a member of multiple expanded groups, any particular expanded group can have only one common parent, such that having a common expanded group member does not cause overlapping expanded groups to be treated as a single expanded group. For example, the comment requested clarification that if USS1, a domestic corporation, owned 80% of the value of X, a corporation, and USS2, also a corporation, owned 80% of the vote of X, USS1 and USS2 would not be treated as members of the same expanded group by virtue of being common parents with respect to X.

The Treasury Department and the IRS agree that, while a corporation can be a member of more than one expanded group (overlapping expanded groups), an expanded group can have only a single common parent (an expanded group parent). The final regulations add an example to clarify that the expanded group parents of overlapping expanded groups are not themselves members of the same expanded group. See § 1.385–1(c)(4)(vii) *Example 1*.

C. Deemed Exchange Rule

Under the proposed regulations, the recharacterization of an interest that was treated as debt when issued and then later characterized under the proposed regulations as stock gave rise to a deemed exchange of that interest for stock. Comments requested further guidance to address the tax implications of the deemed exchange of a debt instrument for stock under the proposed regulations. Comments requested clarification regarding the extent to which gain or loss would be recognized on the deemed exchange, as well as the treatment of any gain or loss recognized.

Comments also requested clarity on the treatment of the deemed exchange when an interest previously treated as stock under the regulations ceases to be between two members of an expanded group and, as a result, is recharacterized as indebtedness. A number of comments requested that the regulations minimize the collateral consequences when an interest treated as equity under the regulations leaves the group, and urged that the consequences be similar to those occurring when an interest originally treated as debt is recharacterized as stock. Of particular concern was the treatment of accrued but unpaid interest; comments asked for clarification of the treatment of such amounts as part of the redemption price, noting that such treatment should be consistent with the original issue discount rules. One comment requested confirmation that the deemed exchange that occurs when an issuer or holder leaves the expanded group should be treated as a section 302(a) redemption with sale or exchange treatment.

In addition, comments requested further guidance on the treatment of tax

attributes of an interest following the deemed exchange, including clarification of the treatment of foreign exchange gain or loss on qualified stated interest (QSI) and of the continued deductibility of QSI. Comments asked that the regulations address the various consequences of repayment of indebtedness that is treated as stock, including for example the effects on the basis of the stock upon redemption.

Comments also requested that the regulations clarify that the deemed exchange rule applies notwithstanding section 108(e)(8), which treats the satisfaction of indebtedness with a payment of corporate stock as a payment of an amount of money equal to the fair market value of the stock for purposes of determining the income from discharge of indebtedness.

The final regulations address these comments by adding a sentence to clarify that the rule that excludes QSI from the computation that takes place pursuant to the exchange does not affect the rules that otherwise apply to the debt instrument or EGI before the date of the deemed exchange. Thus, for example, the regulations do not affect the issuer's deduction of unpaid QSI that accrued before the date of the deemed exchange, provided that such interest would otherwise be deductible. The final regulations also clarify that the rule that treats a holder as realizing an amount equal to the holder's adjusted basis in a debt instrument or EGI that is deemed to be exchanged for stock, as well as the rule that treats an issuer as retiring the debt instrument or EGI for an amount equal to its adjusted issue price as of the date of the deemed exchange, apply for all federal tax purposes.

A new paragraph is added to the final regulations to specifically provide that, when an issuer of a debt instrument or an EGI treated as a debt instrument is treated as retiring all of or a portion of the debt instrument or EGI in exchange for stock, the stock is treated as having a fair market value equal to the adjusted issue price of the debt instrument or EGI as of the date of the deemed exchange for purposes of section 108(e)(8). This clarification also responds to the treatment of foreign exchange gain or loss, which generally follows the realization rules on indebtedness.

The final regulations do not otherwise change the rules in the proposed regulations that address the treatment of a deemed exchange. In particular, the regulations treat a debt instrument recharacterized as equity under § 1.385–3 that leaves an expanded group as the issuance of a new debt instrument rather than reinstating the original debt instrument. In the case of an EGI recharacterized as equity under § 1.385–2 that subsequently leaves the expanded group, federal tax principles apply to determine whether the interest is treated as a debt instrument and, if so, a new debt instrument is deemed exchanged for the EGI before it leaves the expanded group. Treating a debt instrument as newly issued in this context matches the treatment of an intercompany obligation that leaves a consolidated group in § 1.1502–13(g)(3)(ii)(A). The final and temporary regulations provide no additional rules because there are detailed rules in sections 1273 and 1274 that describe how to determine issue price when a debt instrument is issued for stock.

The final regulations include a rule that coordinates § 1.385–1(d) with the modified approach in the temporary regulations for controlled partnerships in § 1.385–3T(f) and the modified approach in the final and temporary regulations for disregarded entities in §§ 1.385–2(e)(4) and 1.385–3T(d)(4). The temporary regulations addressing partnerships in § 1.385–3T(f)(4) provide that a debt instrument that is issued by a partnership that becomes a deemed transferred receivable, in whole or in part, is deemed to be exchanged by the holder for deemed partner stock. *See* Part V.H.4 of this Summary of Comments and Explanation of Revisions. The final and temporary regulations addressing disregarded entities in §§ 1.385–2(e)(4) and 1.385–3T(d)(4) provide that an EGI or debt instrument that is issued by a disregarded entity is deemed to be exchanged for stock of the regarded owner. *See* Parts IV.A.4 and V.H.5 of this Summary of Comments and Explanation of Revisions.

D. Payments Made on Bifurcated Instruments

Proposed § 1.385–1(d) contained a general bifurcation rule that permitted the Commissioner to treat certain debt instruments as in part indebtedness and in part stock (that is, to "bifurcate" the interest). Bifurcation of an interest could occur if an analysis of the relevant facts and circumstances under general federal tax principles resulted in a determination that the interest should be bifurcated as of its issuance into part stock and part indebtedness for federal tax purposes.

The Treasury Department and the IRS received many comments requesting additional guidance concerning how the portion of a bifurcated interest treated as stock would be determined, and how payments on such bifurcated interest would be treated for federal tax purposes. As noted in Part III of the Background, the final regulations do not contain a general bifurcation rule. The Treasury Department and the IRS continue to study the comments received. See the discussion regarding the treatment of payments with respect to debt instruments that are bifurcated pursuant to § 1.385–3 in Part V.B.3 of this Summary of Comments and Explanation of Revisions.

IV. Comments and Changes to § 1.385–2—Treatment of Certain Interests Between Members of an Expanded Group

A. In General

The Treasury Department and the IRS received a significant number of comments on the rules of proposed § 1.385–2 requiring preparation and maintenance of certain documentation with respect to an expanded group interest (EGI). As noted in Part II of the Background, proposed § 1.385–2 prescribed the nature of the minimum documentation necessary to substantiate the presence of four factors that are essential to the treatment of an EGI as indebtedness for federal tax purposes. The four factors are: (1) The issuer's binding obligation to pay a sum certain; (2) the holder's rights to enforce payment; (3) a reasonable expectation of repayment; and (4) a course of conduct that is generally consistent with a debtor-creditor relationship.

Comments received with respect to proposed § 1.385–2 include the following:

- Comments regarding the necessity of proposed § 1.385–2;
- Requests to extend the timely preparation periods;
- Requests to reconsider per se stock treatment for an undocumented EGI; and
- Requests that certain issuers or interests be exempted from proposed § 1.385–2 based on a lack of earnings-stripping potential.

While a number of the comments received were critical of proposed § 1.385–2, the Treasury Department and the IRS also received a number of comments that supported the goals of the documentation rules.

As noted in Part III of the Background and discussed in the remainder of this Part IV, the final regulations address many of the concerns raised in comments by adopting the following modifications:

- First, the final regulations narrow the application of § 1.385–2 by excluding an EGI issued by a foreign issuer or an S corporation, and generally excluding interests issued by REITs, RICs, and controlled partnerships.

- Second, the final regulations replace the proposed 30-day (and 120-day) timely preparation requirements with a requirement that documentation and financial analysis be prepared by the time that the issuer's federal income tax return is filed (taking into account all applicable extensions).
- Third, the final regulations provide a rebuttable presumption to characterization as stock for EGIs that fail to satisfy the documentation rules, provided the expanded group demonstrates a high degree of compliance with § 1.385–2. If an expanded group does not demonstrate a high degree of compliance with § 1.385–2, an EGI for which the requirements of the documentation rules are not satisfied would be treated as stock for federal tax purposes.
- Fourth, the final regulations clarify the application of the documentation rules to certain interests issued by regulated financial services entities and insurance companies that are required by regulators to include particular terms.
- Fifth, the final regulations clarify the ability of expanded group members to satisfy the documentation rules for EGIs issued under revolving credit agreements, cash pooling arrangements, and similar arrangements by establishing overall legal arrangements (master agreements).
- Finally, § 1.385–2 applies only with respect to an EGI that is issued on or after January 1, 2018. The effect of this change in combination with the final regulations' new timely preparation requirements is that taxpayers will have until the filing date of their taxable year that includes January 1, 2018, to complete the documentation requirements under § 1.385–2.

This Part IV addresses these modifications and additional changes suggested by comments that the Treasury Department and the IRS have adopted or declined to adopt in the final regulations.

1. Necessity of Documentation Rules

Some of the comments perceived the proposed documentation rules as beyond what would be necessary to impose discipline on related-party transactions, and some perceived the recharacterization of indebtedness as stock as a penalty disproportionate to the concern addressed by the proposed regulations. A number of comments considered the proposed documentation rules to be duplicative of existing rules and regulations that place on taxpayers both the burden of proof and the obligation to keep appropriate books and records. As a result, many of those comments urged the complete withdrawal of proposed § 1.385–2.

Some comments suggested that the regulatory approach of characterizing an EGI as stock where adequate documentation is not prepared and maintained should be abandoned in favor of seeking legislation that would provide authority to the Treasury Department and the IRS to impose a monetary fine in such cases. Some comments noted that the documentation rules are, to some extent, duplicative of documentation requirements under section 6662 (relating to the accuracy-related penalty for underpayments) and suggested the adoption of the principles of § 1.6662–6(d)(2)(iii)(B) (providing documentation rules for transfer pricing analysis purposes) to give taxpayers more guidance on the requirements of the regulations. Alternatively, some comments suggested relocating the proposed documentation rules under sections 6662 or 482. A number of comments urged that, in any event, the regulations should require only that a taxpayer's position with respect to the characterization of an interest as indebtedness be reasonable based on the available facts and circumstances instead of requiring documentation of prescribed factors, regardless of whether the IRS necessarily agreed with the taxpayer's characterization. Comments also suggested that the documentation rules would need to be revised in some manner, because the comments asserted that such rules could not override ''substantial compliance'' principles under common law.

However, in recognition of the policy concerns stated by the Treasury Department and the IRS, virtually all of these comments also suggested modifications to make the documentation rules of proposed § 1.385–2 more reasonable and administrable for both taxpayers and the IRS. Provided certain modifications were made to relax the burden of the documentation rules, many comments stated that taxpayers could comply with such modified rules. A number of comments suggested streamlining the documentation requirements, for example, by allowing (i) master agreements to support multiple transactions, (ii) balance sheets to evidence solvency, and (iii) the advance preparation of credit analysis of issuers. While many comments recognized the value of the certainty that could come from increased specificity and objective rules, many comments were equally concerned that the regulations be flexible regarding the manner in which the documentation rules apply.

The Treasury Department and the IRS have determined that the documentation rules of proposed § 1.385–2 further important tax administration purposes. Moreover, the Treasury Department and the IRS have determined that the presence or absence of documentation evidencing the four indebtedness factors is more than a ministerial issue to be policed with a fine or penalty. These factors are substantive evidence of the intent to characterize an EGI as indebtedness for federal tax purposes. In addition, characterizing purported indebtedness as stock is not a penalty for failing to meet a ministerial requirement. Such characterization results from a failure to evidence the intent of the parties when the issuer characterizes the EGI for federal tax purposes or from a failure to act consistent with such characterization during the life of the purported indebtedness. As noted earlier in this Section A, the Treasury Department and the IRS have determined that many of the concerns raised by comments can and should be addressed by modifying the approach taken in proposed § 1.385–2 and, as discussed in the remainder of this Section A, that many of the modifications suggested by comments would enhance both the reasonableness and effectiveness of the final regulations.

2. Timely Preparation Requirement

Under proposed § 1.385–2, documentation of an EGI issuer's binding obligation to pay a sum certain, the holder's rights under the terms of the EGI to enforce payment, and the reasonable expectation of repayment under the terms of the EGI generally would be required to be prepared within 30 days of the ''relevant date'' to which the documentation relates. Documentation of actions evidencing a debtor-creditor relationship would be required to be prepared within 120 days of the ''relevant date'' to which the actions relate.

Many comments raised concerns with the proposed timeliness rules. Some comments noted that the documentation rules did not correspond to business practice, were not reasonable, and would be impossible to satisfy without an expense to taxpayers far in excess of any benefit to be achieved. Comments argued that there was no administrative need for the documentation to be done in the timeframes specified, as the documentation would not be required until requested by the IRS in audit.

The timely preparation requirements in proposed § 1.385–2 were intended to approximate third-party practice with

respect to contemporaneous documentation of relevant events demonstrating the creation of a debtor-creditor relationship. The documentation rules relating to post-issuance actions or inaction of issuers and holders were intended to demonstrate that the issuer and holder continued such a relationship. Thus, the Treasury Department and the IRS have determined that it is not appropriate for taxpayers to prepare documentation of the four indebtedness factors only if the IRS requests such information during an audit. Documentation prepared during an audit could not reasonably be viewed as contemporaneous evidence of the intent of the taxpayers when an EGI was issued.

After consideration of the comments, however, the Treasury Department and the IRS have determined that the objectives of the proposed regulations can still be achieved while allowing taxpayers more time to satisfy the documentation requirements. Many comments suggested that a reasonable and appropriate time for requiring compliance with the documentation rules would be by the time that the issuer's federal income tax return must be filed (taking into account any extensions) for the tax year of the relevant date. This timeframe would also be consistent with the framework of section 385(c), under which an issuer and holder provide notice to the Commissioner of their characterization of an interest on their tax returns. The Treasury Department and the IRS have determined that documentation prepared within such a timeframe could provide reasonable evidence of the intent of the issuer and the holder in connection with the issuance of the EGI. Accordingly, the final regulations adopt this comment for all documentation required to be prepared with respect to a relevant date for an EGI that is subject to the documentation rules (a covered EGI).

3. Per Se Stock Treatment

Under proposed § 1.385–2, if the documentation rules for an EGI were not satisfied, the EGI would be automatically treated as stock for federal tax purposes. The overwhelming response from comments was that this aspect of the documentation rules was too harsh. As described in Part V.B of this Summary of Comments and Explanation of Revisions, comments noted numerous and potentially adverse consequences from characterizing purported indebtedness as stock, including purported indebtedness issued by foreign issuers.

Comments stated that, because of the per se aspect of the documentation rules, the penalty of recharacterization would often be substantially disproportionate to the failure to comply with the documentation rules, as arguably minor instances of noncompliance could trigger a recharacterization of an interest as stock for federal tax purposes with potentially severe consequences. Comments also raised concerns that the per se aspect of the documentation rules would automatically treat an interest as stock for federal tax purposes without allowing for an alternative characterization of a transaction, such as, in substance, a distribution or contribution of purported financing proceeds.

Comments offered various solutions to address these concerns. A number of comments urged that, before any consequences attached, taxpayers be allowed to cure any defect in their documentation. Some comments urged that, instead of characterization of purported indebtedness as stock for federal tax purposes, the penalty for a failure to satisfy the documentation rules could be a denial of any interest deduction under section 163; similarly, other comments suggested allowing taxpayers to make an election to forego interest deductions under section 163 to cure any documentation defect. Some comments suggested that the bifurcation rule in proposed § 1.385–1(d) could be used to reach a more proportionate characterization result.

Section 385(a) directs that regulations promulgated under that section be applicable for all purposes of the Code. Accordingly, the Treasury Department and the IRS do not consider it appropriate to limit the federal tax consequences of the characterization of a covered EGI under § 1.385–2 to particular Code provisions, such as section 163. Instead, as discussed in Part V.B of this Summary of Comments and Explanation of Revisions with respect to §§ 1.385–3, 1.385–3T, and 1.385–4T, the final regulations generally retain the approach of the proposed regulations under which related-party indebtedness treated as stock by application of § 1.385–2 is stock for all U.S. federal tax purposes, including for purposes of applying section 1504(a) in the context of § 1.385–2.

As discussed in Sections A.3.a through c of this Part IV, the risk of per se stock characterization as a result of a documentation failure is substantially reduced under the final regulations by the addition of rebuttable presumption rules.

a. Availability of Rebuttable Presumption

If the expanded group demonstrates a high degree of compliance with the documentation rules, the final regulations provide a rebuttable presumption (rather than a per se characterization) that a covered EGI that is noncompliant with the requirements of § 1.385–2 is treated as stock for federal tax purposes. To demonstrate a high-degree of compliance with the documentation rules, a taxpayer must demonstrate that one of two tests is met. Under the first test, a taxpayer must demonstrate that covered EGIs representing at least 90 percent of the aggregate adjusted issue price of all covered EGIs within the expanded group comply with § 1.385–2. Under the second test, a taxpayer must demonstrate either that (1) no covered EGI with an issue price in excess of $100,000,000 failed to comply with § 1.385–2 and less than 5 percent of the covered EGIs outstanding failed to comply with § 1.385–2 or (2) that no covered EGI with an issue price in excess of $25,000,000 failed to comply with § 1.385–2 and less than 10 percent of the covered EGIs outstanding failed to comply with § 1.385–2.

If eligible, an expanded group member can rebut the presumption that a covered EGI is stock with evidence that the issuer intended to create indebtedness for federal tax purposes and that there are sufficient factors present to treat the covered EGI as indebtedness for federal tax purposes.

Several comments suggested that the final regulations include a de minimis rule excepting interests under a certain amount, specified as either a fixed dollar amount or a percentage of assets. The Treasury Department and the IRS are concerned that this would provide a ready method for circumventing the rules and so decline to adopt this suggestion. However, the rebuttable presumption rule contained in the final regulations would operate to mitigate these concerns. In particular, the second test for demonstrating a high degree of compliance with the documentation rules permits a simplified calculation based only on the number of covered EGIs that failed to comply with § 1.385–2. This test reflects an understanding by the Treasury Department and the IRS that simplified compliance rules are appropriate where relatively smaller EGIs fail to comply with § 1.385–2.

In cases where the rebuttable presumption rule applies, the final regulations provide that in applying federal tax principles to the determination of whether an EGI is

indebtedness or stock, the indebtedness factors in the documentation rules are significant factors to be taken into account. The final regulations further provide that other factors that are relevant are taken into account in the determination as lesser factors.

b. Ministerial or Non-Material Failure or Errors

The final regulations adopt a rule intended to safeguard against characterizing a covered EGI as stock for federal tax purposes if the failure to comply with the documentation rules is attributable to a minor error of a ministerial or non-material nature, such as a clerical error. In such a case, if a taxpayer discovers and corrects the documentation failure or error before discovery by the Commissioner, the failure or error will not be taken into account in determining whether the requirements of the documentation rules have been satisfied.

c. Reasonable Cause Exception

Proposed § 1.385–2 included an exception that would allow for ''appropriate modifications'' to the documentation requirements when a failure to satisfy the requirements was due to reasonable cause (the reasonable cause exception). Proposed § 1.385–2 adopted the principles of § 301.6724–1 for purposes of determining whether reasonable cause exists in any particular case. These principles provide that a reasonable cause exception will apply if there are significant mitigating factors with respect to the failure or if the failure arose from events beyond the control of the members of the expanded group. Moreover, these principles provide that, in order for the reasonable cause exception to apply, the members of the expanded group must act in a responsible manner, both before and after the time that the failure occurred. Thus, under proposed § 1.385–2, if the reasonable cause exception did not apply, any failure to comply with the documentation requirements would give rise to a characterization as stock.

Comments viewed the exception as unnecessarily narrow in scope and unclear in application and effect. Some comments suggested adding factors to be considered and guidance about how modifications would be made to the rules. Suggestions for a more lenient standard included exceptions for ''good cause,'' ''good faith,'' ''reasonable behavior,'' ''innocent error,'' ''unintentional,'' ''inadvertent,'' or ''lacking willfulness.''

The Treasury Department and the IRS have determined that given the rebuttable presumption rule and the ministerial error rule adopted in the final regulations, the scope of the reasonable cause exception is appropriate. Accordingly, the final regulations retain the reasonable cause exception, including its incorporation of the principles of § 301.6724–1 for guidance concerning its application. In addition, the final regulations provide that once a taxpayer establishes that the reasonable cause exception applies to an EGI, the taxpayer must prepare proper documentation in respect of the EGI.

4. Treatment of EGI Issued by Disregarded Entities

Comments raised a number of questions and concerns regarding the characterization of an interest issued by a disregarded entity under proposed § 1.385–2. The concerns largely centered on the collateral consequences of treating the interest as equity in the issuing legal entity, because in such a case the entity would have at least two members and therefore would be treated as a partnership under § 301.7701–2(c)(1) rather than as a disregarded entity under § 301.7701–2(c)(2). This change in treatment could create the potential for gain recognition and additional significant collateral issues.

The Treasury Department and the IRS have determined that the analysis of whether there is a reasonable expectation of repayment of an interest must be made with respect to the legal entity (whether regarded or disregarded for federal tax purposes) that issued the interest for non-tax purposes, taking into account the extent to which other entities may have legal liability for the obligations of the issuing entity. In addition, documentation in respect of the other indebtedness factors must be prepared and maintained for the legal entity (whether regarded or disregarded for federal tax purposes) that issued the interest for non-tax purposes. To avoid the effects that could occur if an interest issued by a disregarded entity is characterized as equity under the documentation rules, § 1.385–2 provides, under the authority of section 7701(l), that, in such cases, the regarded corporate owner of the disregarded entity is deemed to issue stock to the formal holder of the interest in the disregarded entity (and, if the recharacterization occurs later than the issuance of the interest, in exchange for that interest). The stock deemed issued is deemed to have the same terms as the interest issued by the disregarded entity, other than the identity of the issuer, and payments on the stock are determined by reference to payments made on the interest issued by the disregarded entity.

5. Exemption Based on Lack of Earnings-Stripping Potential

Some comments requested that the final regulations exclude from the documentation rules several categories of transactions believed not to raise earnings-stripping concerns. For example, many comments requested that transactions done in the ordinary course of business be exempt from the documentation rules. These comments argued in part that the sheer volume of such transactions would render any documentation requirement overly burdensome, especially given the proposed 30-day time period for the completion of such documentation and the proposed consequence of failing to prepare and maintain such documentation. These comments also asserted that the nature of ordinary course transactions makes them an unlikely means of accomplishing abuse and a poor candidate for ultimate recharacterization as stock.

Some comments argued that this rationale would also support an exemption from proposed § 1.385–2 for all interests created under cash pooling and similar arrangements. Other comments urged that all trade payables and any debt that financed working capital needs be excluded from proposed § 1.385–2. A number of these comments recognized the difficulty of determining how such transactions could be identified and suggested various formulas. For example, some comments suggested formulas based on an average balance over a specified period or the average length of time outstanding. Other suggested methods included formulas based on the relationship of the underlying transaction to the operation of the business, such as financing inventory, services, fixed assets, rent, or royalties.

In addition to comments based on the nature of particular transactions, there were requests to limit application of the proposed documentation rules to the extent that the terms of a particular arrangement do not present earnings-stripping potential. Thus, for example, some comments suggested exemptions be made for purported indebtedness that is short term, with a low rate of interest (or no interest), or that is issued and held within the expanded group for a limited period.

The Treasury Department and the IRS considered these requests for exclusions from the regulations under § 1.385–2, but generally declined to adopt them, principally because the goal of the documentation rules is not solely to prevent earnings-stripping. Rather, the documentation rules are also intended

to facilitate tax administration by imposing minimum documentation standards for transactions between highly related persons to determine the federal tax treatment of covered EGIs. Such minimum documentation standards are warranted as related-party transactions have historically raised concerns as to the use of purported indebtedness and the lack of proper documentation to verify the nature of the interest purported to be indebtedness. Adopting the broad exceptions urged by comments would undermine this goal. In addition, it is unclear how to administer an exemption from requirements to document ordinary course arrangements because, if taxpayers do not otherwise adequately document such arrangements, it is unclear how to determine whether they are, in fact, ordinary course arrangements.

B. Scope of Covered EGIs

Many of the modifications suggested by comments would reduce the number of persons, types of entities, or transactions that would be covered by the regulations under § 1.385–2. Comments regarding the scope of proposed § 1.385–2 as applied to particular categories of issuers or transactions not addressed elsewhere in this Summary of Comments and Explanation of Revisions are addressed in this Section B.

1. Scope of Issuers

Under proposed § 1.385–2, an issuer of an interest included, solely for purposes of the documentation rules, a person (including a disregarded entity) that is obligated to satisfy any material obligations created under the terms of an EGI. Proposed § 1.385–2 also treated a person as an issuer if such person was expected to satisfy any material obligations created under the terms of an EGI. Comments asked for clarification regarding the circumstances under which someone other than the person that is primarily liable under the terms of an EGI (the primary obligor), including a co-obligor, would be expected to satisfy an obligation created under the terms of the EGI.

Similar to the documentation rules in proposed § 1.385–2, the final regulations provide that the term issuer means any person obligated to satisfy any material obligations created under the terms of an EGI, without regard to whether the person is the primary obligor. The Treasury Department and the IRS intend that the question of whether a person other than the primary obligor under the EGI is to be treated as its issuer should be analyzed under the principles of section 357(d), which contains a similar analysis with respect to liability assumptions. One comment asked for clarification as to when an obligor could be treated as an issuer for this purpose. An issuer for this purpose could include a guarantor of a primary obligor's obligations created under the terms of an EGI if the guarantor is expected to satisfy any of the material obligations under that EGI. An issuer could also include a person that assumes (as determined under section 357(d)) any material obligation under the EGI, even if such assumption occurs after the date of the issuance of the EGI.

a. Partnerships

Comments raised a number of concerns with the application of proposed § 1.385–2 to controlled partnerships. Although the four indebtedness factors at the core of the documentation rules are important factors in determining the federal tax treatment of purported indebtedness issued by any entity, after consideration of the issues raised by the comments, the Treasury Department and the IRS have determined that the documentation rules should not generally apply to partnerships under the final regulations. However, the Treasury Department and the IRS remain concerned that expanded group members could use partnerships (or other non-corporate entities) with a principal purpose of avoiding the application of the documentation rules. Accordingly, such transactions remain subject to the final regulations' anti-abuse rule.

In addition, because controlled partnerships are not treated as expanded group members under the final regulations, § 1.385–2 provides that an EGI issued by an expanded group member and held by a controlled partnership with respect to the same expanded group is a covered EGI.

b. Consolidated Groups

For purposes of proposed § 1.385–2, members of a consolidated group were generally treated as ''one corporation'' and so interests issued between members of the consolidated group were not subject to the documentation rules. However, as noted in Parts III.A.2 and VI.A of this Summary of Comments and Explanation of Revisions, the one-corporation approach gave rise to numerous questions and concerns about both the implementation of the rule and the effect of this rule on the application of other provisions of the Code.

There were two reasons for excluding indebtedness between members of a consolidated group from the application of the documentation rule. The principal reason was that the consolidated return regulations, specifically § 1.1502–13(g), already provide a comprehensive regime governing substantially all obligations between members. This is not the case with respect to indebtedness between consolidated group members and nonmembers, even if highly related. The second reason was that, in the very few cases where such obligations would not be subject to § 1.1502–13(g), the inapplicability of § 1.1502–13(g) would generally be of limited duration and, in the meantime, all items of income, gain, deduction, and loss attributable to the obligation would offset on the consolidated federal income tax return.

The Treasury Department and the IRS have determined that the existing regulations governing obligations between members of a consolidated group are sufficiently comprehensive to warrant the exclusion of these obligations from the documentation rules. However, the Treasury Department and the IRS have reconsidered the use of the one-corporation approach with respect to § 1.385–2 and determined that a simpler, more targeted approach would be to exclude obligations between consolidated group members from the category of instruments subject to the documentation rules. This approach, as provided in § 1.385–2(d)(2)(ii)(A) of the final regulations, retains the general exclusion for intercompany obligations while eliminating many of the questions and concerns raised by comments, such as the question of whether a particular member of a consolidated group (or the consolidated group as a whole) would be the issuer of an EGI.

The final regulations do not, however, adopt the suggestion to expand the exception to exclude other obligations, such as obligations between affiliated corporations that are not includible corporations under section 1504(b) (such as a REIT or RIC) or that are prohibited from joining the group under section 1504(c) (certain insurance companies) and obligations between group members and controlled partnerships. In such cases, even though the obligations may generate items that may be reflected in a consolidated federal income tax return, none of the obligations generating the items are governed by the consolidated return regulations.

The final regulations also do not adopt the request to limit the consequences of characterizing an EGI as stock under § 1.385–2, for example, by disregarding such stock for purposes

of determining affiliation. The Treasury Department and the IRS view the characterization of an EGI as stock under § 1.385–2 as a determination that general federal tax principles would preclude a characterization of the interest as indebtedness. Thus, the Treasury Department and the IRS have determined that it is appropriate to treat an EGI characterized as stock pursuant to § 1.385–2 as stock for federal tax purposes generally.

c. Regulated Entities

A number of comments were received requesting exemptions from the documentation rules for various regulated entities, such as insurance companies, financial institutions, and securities brokers or dealers. Comments stated that a rationale for the proposed documentation rules, facilitating tax administration by imposing minimal documentation standards for transactions between highly-related persons, is addressed by existing non-tax regulations and oversight already imposed on these entities. The Treasury Department and the IRS recognize that the various requirements noted by comments, such as the Basel III framework and increased capitalization requirements, risk management ratios, and liquidity requirements that are applicable to certain regulated financial entities, all afford increased assurance regarding certain aspects of the documentation requirements, particularly with respect to the creditworthiness of the issuer.

Accepting the fact that non-tax regulations may constrain the terms and conditions of the obligations issued and held by entities subject to those regulations does not, however, change the fact that a determination of whether an EGI is characterized as stock or indebtedness for federal tax purposes is made under federal tax principles. This determination necessarily involves the preparation of documentation in respect of the four indebtedness factors. In addition, a non-tax regulator may not have the same interests as the Treasury Department and the IRS. Such a non-tax regulator may not constrain (and in some cases may encourage) actions to lower federal tax costs for the entities that it regulates so that more assets may be available to the depositors in, or creditors of, such entities.

Accordingly, the Treasury Department and the IRS have determined that it is not appropriate to exclude taxpayers from the documentation rules on the grounds that some of the documentation and information required may also be required by and provided to non-tax regulators. Indeed, to the extent the final regulations require documentation that is otherwise prepared and maintained under requirements imposed by non-tax regulators, such as may be required under regulations under 12 CFR part 223 (Regulation W) issued by the Board of Governors of the Federal Reserve System, any additional burden imposed by the final regulations is reduced.

d. Expanded Groups Subject to § 1.385–2

Under proposed § 1.385–2, an EGI would not be subject to the documentation rules unless (i) the stock of any member of the expanded group was publicly traded, (ii) all or any portion of the expanded group's financial results were reported on financial statements with total assets exceeding $100 million, or (iii) the expanded group's financial results were reported on financial statements that reflect annual total revenue exceeding $50 million.

A number of comments suggested raising the asset and revenue thresholds, particularly for regulated businesses with high asset levels relative to revenue, such as banks, or for issuers with high amounts of revenue but low profit margins, such as construction companies. However, comments did not suggest particular levels to which the asset or revenue thresholds should be raised. As a result of the modifications made to § 1.385–2 in the final regulations, the Treasury Department and the IRS have determined that the application of the documentation rules will be appropriately restricted to minimize burden and therefore decline to adopt this suggestion.

Accordingly, the final regulations continue to provide that an EGI is not subject to the documentation rules unless one of the following three conditions is present. First, if the stock of any member of the expanded group is publicly traded. Second, if all or any portion of the expanded group's financial results are reported on financial statements with total assets exceeding $100 million. Or third, if the expanded group's financial results are reported on financial statements that reflect annual total revenue that exceeds $50 million.

2. Special Categories of EGIs

a. Certain Interests of Regulated Entities

Many of the comments submitted by or on behalf of regulated entities requested that, if a broad exception were not adopted for regulated entities, certain arrangements should be excluded from the documentation rules. As an example, several comments requested an ordinary course exception to the documentation rules applicable to all payments on insurance contracts, funds-withheld arrangements in connection with reinsurance, funds-withheld reinsurance, and surplus notes. Comments noted the need for further guidance on the documentation that would be required for many of these interests, as they are typically executed by contract, not loan documents. The Treasury Department and the IRS do not agree that there is a need for guidance with respect to reinsurance or funds-withheld reinsurance, because these arrangements are not debt in form and are typically governed by the terms of a reinsurance contract (and other ancillary contracts). As such, they are not covered EGIs under the final regulations.

Comments also suggested that the final regulations create safe harbor exceptions for instruments issued to satisfy regulatory capital requirements and regulatory instruments issued in the legal form of debt that contain required features that could impair their characterization as debt, such as instruments with loss-absorbing capacity that are required by the Federal Reserve Board. For example, if a borrower's obligation to pay interest or principal, or a holder's right to enforce such payment, is conditioned upon the issuer receiving regulatory approval, but the instrument otherwise satisfies the unconditional obligation to pay a sum certain and creditor rights factors, comments argued that the required regulatory approval should not prevent the interest from being treated as debt. Similarly, comments requested the final regulations provide that, if regulatory approval delays an action, such delay will not prevent an issuer from satisfying the timeliness requirement.

The Treasury Department and the IRS agree that certain regulated entities may be required in some cases to issue an instrument that would be indebtedness under federal tax principles but for certain terms or conditions imposed by a regulator. To address this situation, the final regulations provide an exception from the documentation requirements for certain instruments issued by an excepted regulated financial company or a regulated insurance company, as those terms are defined in § 1.385–3(g). An EGI issued by an excepted regulated financial company is considered to meet the documentation rules as long as it contains terms required by a regulator of that issuer in order for the EGI to satisfy regulatory capital or similar rules that govern resolution or orderly liquidation. An EGI issued by a regulated insurance

company issuer is considered to meet the documentation rules even though the instrument requires the issuer to receive approval or consent of an insurance regulatory authority before making payments of principal or interest on the EGI. In both cases, the regulations require that the parties expect at the time of issuance that the EGI will be paid in accordance with its terms and that the parties prepare and maintain the documentation necessary to establish that the instrument in question qualifies for the exception.

The Treasury Department and the IRS are aware that certain instruments required by regulators raise common law debt-equity issues that extend beyond the scope of these regulations. The scope and the form of additional guidance to address these instruments are under consideration.

b. Certain Interests Characterized Under the Code or Other Regulations

Several comments requested clarification that instruments that are specifically treated as indebtedness under the Code and the regulations thereunder, such as mineral production payments under section 636, are not treated as applicable instruments, and accordingly not treated as EGIs subject to proposed § 1.385–2. The final regulations clarify that such instruments are not subject to the documentation rules.

c. Master Agreements, Revolving Credit Agreements, and Cash Pooling Arrangements

Under proposed § 1.385–2, members of an expanded group using revolving credit agreements, cash pooling arrangements, and similar arrangements under a master agreement were generally required to prepare and maintain documentation for the master agreement as a whole (rather than for each individual transaction), but comments contained a number of questions concerning the requirements applicable to these master agreements.

Some comments requested that master agreements be excluded altogether from the documentation rules, excluded at least for specific activities, or excluded if their terms exceeded those given by third parties. These comments argued that such agreements were not likely vehicles for earnings stripping. The Treasury Department and the IRS decline to provide an exemption for these master agreements because if such an exemption were granted, such master agreements could replace all other forms of indebtedness between highly-related parties, resulting in avoidance of the documentation rules. In addition, interests issued under these master agreements must be characterized for federal tax purposes, and there is no clear justification for treating such interests as exempt from the modified documentation requirements in the final regulations based on the fact that these interests are documented under a master agreement.

Many comments focused on solutions for making the application of the documentation rules to master agreements simpler, clearer, more workable for taxpayers, and more administrable for the IRS. Comments requested that the basic operation of the rules governing master agreements be clarified to provide certainty for taxpayers that (i) a comprehensive agreement such as a revolving credit agreement could satisfy the documentation requirements and (ii) individual draws under the revolving credit agreement would not be treated as separate loans for purposes of the documentation rules. Comments also requested additional definitions and rules, for example clarifying the interaction of the documentation rules and § 1.1001–3(f)(7) and the treatment of a cash pool financing both ordinary course and capital expenditures. The Treasury Department and the IRS decline to provide special rules under § 1.385–2 for the cash pool financing of ordinary course and capital expenditures. In general, the question of whether an EGI is ordinary course or is used for capital expenditures is not relevant to the question of whether the EGI is indebtedness for federal tax purposes. In particular, this question is not relevant to determine whether there is an unconditional obligation to pay a sum certain, whether there are creditor's rights under the EGI, whether the parties have a reasonable expectation of repayment, or whether the parties' actions are consistent with a debtor-creditor relationship. As a result, the final regulations provide that an EGI issued under a cash pool arrangement must meet the same documentation requirements regardless of whether the EGI funds ordinary course expenses or capital expenditures.

The policy behind § 1.1001–3(f)(7) is to encourage workouts when debtors have difficulty repaying their obligations to third-party creditors. In such a case, the debtor (and any shareholders of the debtor), have different economic interests from the creditors, and any modifications to a debt instrument are likely to meaningfully maintain the rights of the creditors. In the case of highly-related entities that meet the definition of expanded group, these different economic interests are not present. As a result, the final regulations provide that the rules of § 1.385–2 apply before the rules of § 1.1001–3(f)(7). The final regulations therefore require documentation as of certain deemed reissuances under § 1.1001–3 (even in cases where § 1.1001–3(f)(7) would not require an analysis of whether a modification resulted in an instrument being treated as an instrument that is not indebtedness for federal income tax purposes).

Many comments suggested that the number of credit analyses required for master agreements be limited. For example, several comments asserted that the time for testing the issuer's ability to repay should be limited to the time of an interest's issuance. Comments also suggested that EGIs issued under master agreements should require credit analysis only upon the execution of the master agreement and subsequently upon an increase of the credit limit under the master agreement, provided that the amount of credit and term of the master agreement is reasonable. Comments generally suggested that the credit analysis be required to be repeated on a specified schedule, ranging from three to five years. The Treasury Department and the IRS generally agree with a specified schedule approach for determining the required credit analysis with respect to master agreements but have concerns about potential changes in an issuer's creditworthiness over longer periods. Because such agreements among members of an expanded group do not generally contain covenants, financial information provision, and other protections analogous to those in similar arrangements among unrelated parties, it is necessary to require a credit analysis under these agreements more frequently than every three to five years.

The Treasury Department and the IRS have addressed these comments by clarifying in the final regulations that with respect to EGIs governed by a master agreement or similar arrangement, a single credit analysis may be prepared and used on an annual basis for all interests issued by a covered member up to an overall amount of indebtedness (including interests that are not EGIs) set forth in the annual credit analysis. The final regulations make it clear that the first such annual credit analysis should be performed upon the execution of the documents related to the overall arrangement. The only exception to this annual credit analysis rule is when the issuer has undergone a material change within the year intended to be covered by the annual credit analysis. In this

case, the final regulations require a second credit analysis to be performed with a relevant date on or after the date of the material change. This requirement is consistent with commercial practice with respect to revolving credit agreements, which typically contain covenants requiring such terms.

Some comments requested clarification of the treatment of notional cash pools, noting that such arrangements are not documented as debt in form between expanded group members. The final regulations do not adopt this comment except to clarify that a notional cash pool is generally subject to the same documentation requirements as other cash pools when the notional cash pool provider operates as an intermediary. For example, a notional cash pool in which the cash received by a non-member cash pool provider from expanded group members is required to equal or exceed the amount loaned to expanded group members will generally be treated as a loan directly between expanded group members, even though the interests may be in form documented as debt between an expanded group member and a non-member facilitator. See, Rev. Rul. 87–89 (1987–2 C.B. 195). Such arrangements present the same issues as other related-party instruments and arrangements transacted under a master agreement and should be subject to the documentation rules. Because these arrangements are administered by a non-member, it is generally expected that most of the documentation required under the final regulations would already be prepared, limiting the incremental burden of the final regulations on these arrangements.

Several comments also suggested limiting the application of the documentation rules to amounts in excess of average balances. The final regulations do not adopt this approach because almost all provisions of the Internal Revenue Code pertaining to indebtedness and stock analyze particular interests, not average or net balances. Thus, to apply the documentation rules to average or net balances would not adequately serve the purpose of determining whether a particular interest is properly treated as indebtedness or stock for federal tax purposes.

Comments also noted that coming into compliance following finalization of the regulations would be facilitated by allowing an extended time frame to document these arrangements and by excluding balances outstanding on the effective date of the final regulations. The final regulations implement this comment. Only interests issued or deemed issued on or after January 1, 2018, including EGIs issued on or after January 1, 2018 under a master agreement in place before January 1, 2018, will be subject to § 1.385–2.

C. Indebtedness Factors Generally

While many comments acknowledged a need for documentation rules, there were two overarching concerns with respect to the form of such rules. First, comments suggested that the requirements be made as streamlined as possible. Second, comments requested clarification of the indebtedness factors so that taxpayers could have certainty about what information is requested and what documentation will satisfy the requirements of the regulations.

Some comments suggested that the Treasury Department and the IRS publish a form that taxpayers could use to report new loans or payments, with sufficient instructions to forestall debate over whether adequate documentation is provided. Under such an approach, if the form were properly completed with respect to an interest, an audit would then proceed to the merits of the debt-equity determination for the interest. The Treasury Department and the IRS have determined that the modifications made in the final regulations address these concerns. Other comments suggested providing for a level of documentation scaled to the principal amount of the loan, or that would be reduced in the case of loan guaranteed by a solvent parent or affiliate. The Treasury Department and the IRS do not adopt this suggestion. Such an approach would allow taxpayers to use numerous smaller loans to avoid the full application of the documentation rules.

Several comments suggested using a ''market standard safe harbor'' that would treat the documentation requirements as satisfied by the documentation customarily used in third-party transactions. The final regulations adopt this comment and provide that such documentation may be used to satisfy the indebtedness factors related to an unconditional obligation to pay a sum certain and creditor's rights.

A number of comments also requested guidance regarding the effect of a significant modification of an instrument under section 1001 and under § 1.1001–3. The consensus among comments was that the final regulations should provide that when there is a modification of an interest, as long as such modification is not very significant, no additional documentation should be required. The Treasury Department and the IRS have decided that a deemed reissuance under § 1.1001–3 represents a case where the economic rights and obligations of the issuer and holder have changed in a meaningful way. As a result, the final regulations provide that the deemed reissuance of an EGI under § 1.1001–3 generally requires a new credit analysis to be performed (unless an annual credit analysis is in place at the time of the deemed reissuance). However, the final regulations do not require new documentation in respect of the factors regarding an unconditional obligation to pay a sum certain or creditor's rights, as of such a deemed reissuance, unless such deemed reissuance relates to an alteration in the terms of the EGI reflected under an express written agreement or written amendment to the EGI.

Finally, comments noted that it was unclear who was required to prepare and maintain the documentation, and some of these comments made suggestions as to the persons that should be required to prepare and maintain the documentation. Proposed § 1.385–2 did not include any requirement in this respect because the taxpayer is in the best position to determine who should prepare and maintain its documents; the IRS's interest in this respect is limited to requiring that the proper documentation be prepared and maintained and ensuring that the IRS may obtain the documentation. In addition, if the documentation rules contained specific requirements as to the person or persons required to prepare and maintain documentation, such requirements would imply that an interest does not comply with the documentation rules (even when appropriate documentation was prepared and maintained) merely because the wrong member of the expanded group prepared or maintained the documentation for the interest. Such arguments would be harmful to taxpayers and would not advance the policy goals of the documentation rules. Thus, proposed § 1.385–2 was purposely silent on the question of who must prepare and maintain documentation. The final regulations continue this same approach.

1. Unconditional Obligation To Pay a Sum Certain

Comments requested several clarifications regarding the requirement that there be an unconditional obligation to pay a sum certain. A number of comments asked for clarification that an obligation would not automatically fail because of a contingency or because it was a nonrecourse obligation. Several comments also requested a clarification

that the sum need only be an amount that is reasonably determinable as opposed to a specified total amount due on a single specified date. A number of other comments also requested confirmation that, if a borrower's binding obligation to pay under an interest is subject to the condition of a regulatory approval before repayment, but otherwise satisfies the requirement that there be an unconditional obligation to pay a sum certain, the fact that regulatory approval is required before repayment should not prevent the interest from satisfying that requirement. The Treasury Department and the IRS generally agree with these comments, and the final regulations provide rules clarifying these points. The effect of a contingency that may result in the repayment of less than an instrument's issue price has not been addressed by the Treasury Department or the IRS, and the documentation rules are not the appropriate place for guidance in that area. The final regulations provide that the documentation must establish that the issuer has an unconditional and legally binding obligation to pay a fixed or determinable sum certain on demand or at one or more fixed dates, without elaborating on the amount of the sum certain.

2. Creditor's Rights

Comments requested a number of clarifications regarding the requirement that the documents evidence the creditor's right to enforce the obligation. The most common concern raised by comments was that the requirement be modified to recognize that creditor's rights are often established by law, and, in such cases, would not necessarily be included in the loan documentation. Comments requested that the rules treat this requirement as established in such cases, without regard to whether the rights are reiterated in the loan documents. In such cases, comments requested that creditor's rights be respected without requiring additional documentation.

The final regulations adopt this comment with one modification. If creditor's rights are created under local law without being reflected in writing in a loan agreement and no creditor's rights are written as part of the documentation of an interest, the documentation must refer to the law that governs interpretation and enforcement (for example, Delaware law or bankruptcy law). This requirement verifies that the issuer and holder did intend to create creditor's rights and assists the IRS in confirming that such creditor's rights apply to the holder of the interest.

Several comments requested clarification that the fact that a note is nonrecourse does not prevent the satisfaction of the creditor's rights requirement. Further, comments requested clarification that, if a creditor only has rights to certain assets under the terms of an interest, the reference to assets of the issuer means only those assets, and such a limitation would not result in the interest failing to satisfy the creditor's rights indebtedness factor. The final regulations clarify these points.

Finally, a number of comments suggested that the final regulations remove the proposed prohibition on subordination to shareholders in the case of dissolution. The principal concern of the comments was that, if, for example, one EGI (EGI#1) issued by an issuer were subordinate to another EGI (EGI#2) issued by the same issuer, and EGI#2 were recharacterized as stock under the proposed § 1.385–3 regulations, EGI#1 would fail this requirement because it would be subordinate to EGI#2 (which is treated as stock for federal tax purposes). In such case, EGI#1, because it is subordinate to EGI#2, would be subordinate to shareholders (the holders of EGI#2) in a dissolution of the issuer and would therefore violate the proposed prohibition on subordination to shareholders in the case of dissolution. The Treasury Department and the IRS have considered this comment and determined that it would be appropriate to disregard subordination if the recharacterization occurred as a result of § 1.385–3 and the final regulations reflect that decision. However, because a characterization under the documentation rules speaks to the substance of the interest itself, including whether the interest properly could be indebtedness for federal tax purposes under general federal tax principles, the Treasury Department and the IRS do not agree that it is appropriate to disregard a characterization caused by the documentation rules of § 1.385–2 for this purpose.

One comment asked for clarification that equitable subordination imposed by a court would not affect this determination. The Treasury Department and the IRS are not aware of a situation in which it would be appropriate to disregard equitable subordination as a factor in determining whether an interest is properly indebtedness or stock, and so the final regulations do not adopt this comment.

Several comments noted that subordination to later issued, unrelated-party indebtedness is common and should not be a negative factor. The Treasury Department and the IRS do not expect this circumstance will cause a problem under the regulations, as the unrelated-party indebtedness is not subject to recharacterization under the final regulations and the documentation rules only require that an interest be superior to the rights of shareholders, rather than debt holders.

3. Reasonable Expectation of Ability To Repay EGI

A number of comments requested clarifications regarding the requirement that there be a reasonable expectation of the issuer's ability to repay its obligation. Comments also requested that the final regulations clarify that the expectation is subjective and that the creditor should be given reasonable latitude based on its business judgment. In addition, comments requested that the regulations should specify how frequently credit analysis is required. For example, some comments suggested that an approach similar to that taken for master agreements be adopted to allow a single agreement and a single credit analysis (done annually or at other specified intervals) to document multiple loans by expanded group members to a particular member. Other comments requested that the regulations should clarify whether it is only necessary to retest credit worthiness as often as is typical under commercial practice, or whether an annual analysis is sufficient. In response to these comments, the final regulations assist in implementing the documentation requirements for multiple EGIs issued by the same issuer by making it clear that a single credit analysis may be prepared on an annual basis and used for all interests issued by the issuer, up to an overall amount of indebtedness set forth in the annual credit analysis.

With respect to the time for measuring an issuer's reasonable expectation of ability to repay an EGI, comments presumed that the issue date of the interest would be the appropriate date to measure. Although comments also noted that there are questions as to when this measuring date would arise. Comments also suggested that the reasonable expectation of ability to repay could be reevaluated if there is a deemed reissuance of the interest under the rules of section 1001, unless the parties can show a third party would have agreed to a modification.

The regulations retain the requirement that documentation be prepared and maintained containing

information establishing that, as of the date of issuance of the EGI, the issuer's financial position supported a reasonable expectation that the issuer intended to, and would be able to, meet its obligations pursuant to the terms of the EGI. The rules addressing the reasonable expectation of repayment factor thus retain the EGI's issuance date as the appropriate date for measuring the issuer's financial position. Issuance dates are to be determined under federal tax principles.

With respect to whether the issuer's financial position supports a reasonable expectation that the issuer intended to, and would be able to meet its obligations pursuant to the terms of the obligation, comments requested that the application of a creditworthiness test of the issuer's financial position be excluded if the indebtedness is secured by specific property of the issuer. In response to this concern, the final regulations clarify that if the EGI is nonrecourse to the issuer, then the documentation to support such indebtedness must include the value of property available to support repayment of the nonrecourse EGI.

Comments suggested that the creditworthiness of the issuer could be determined by a confirmation of the creditworthiness of the issuer by a third party or internal staff of the issuer. They further suggested that the regulations could provide safe harbors for creditworthiness using ratios such as a minimum debt-to-equity or ''EBIDTA''-to-interest ratios. Comments also requested that the regulations provide a list of documents that would satisfy the reasonable expectation requirement, which could include documents that would be sufficient (but not necessary) to show that the obligation could have been issued on the same terms with a third party. The final regulations clarify that documentation may include cash flow projections and similar economic analyses prepared by either the members of the expanded group of the issuer or third parties.

Comments also requested clarification that refinancing would be an acceptable method to repay an EGI and that a refinancing does not adversely impact and may be assumed as part of the credit analysis; in other words, if the issuer could have issued the obligation to a third party with the ability to refinance the obligation on its maturity date, then the issuer would satisfy this requirement. Moreover, comments were of the view that in fact, a borrower's ability to refinance obligations when due should be a positive factor in a credit analysis. The final regulations provide that the credit analysis may assume that the principal amount of an EGI may be satisfied with the proceeds of another borrowing by the issuer to the extent that such borrowing could occur on similar terms with a third party.

Comments requested clarity as to whose credit is being analyzed, specifically, whether it is only the ''recipient'' of funds or, if the issuer is a member of consolidated group, whether it is the entire consolidated group. Because the final regulations remove the one-corporation rule for purposes of the documentation rules, the member that is the issuer of an interest would be analyzed for this purpose.

One comment requested that the regulations clarify limits on privileged documents and provide specific limitations regarding the ability of the IRS to request, review, and maintain such information. The final regulations do not adopt this comment. The IRS routinely reviews and maintains confidential taxpayer information as part of its tax administration function, and strong protections for confidential taxpayer information already exist.

4. Actions Evidencing Debtor-Creditor Relationship

Comments requested clarification that certain types of payments such as payments-in-kind, additions to principal, and payments of interest could be evidenced by journal entries in centralized cash management systems in which payables and receivables are managed. They also noted that the journal entries could be made with respect to the treasury center in such cases. The Treasury Department and the IRS agree that as long as a payment is in fact made and a written record of the payment is prepared and maintained, the documentation rules should not require that the payment be made or recorded in any particular manner. However, the Treasury Department and the IRS have determined that there is no need to expressly note that payments-in-kind or additions to principal should be included because these actions generally would take place and be recorded in as a part of journal entries reflecting a payment of interest. As a result, the final regulations adopt these comments in respect of journal entries (other than with respect to payments-in-kind or additions to principal).

Comments requested that the rules make clear that the existence of creditors' rights is more important than their exercise. They urged a flexible approach that included much deference to the judgment of the creditor, suggesting a generous period in which to act on default. Comments noted that common law recognizes that choosing not to enforce the terms of the obligation may be completely consistent with indebtedness treatment and does not necessarily require an interest to be characterized as stock. For example, if the debtor's position deteriorates, if a default could trigger other default events, or if there are reasons to expect the debtor's situation to improve, a creditor may be well advised to choose forbearance. There may also be legal constraints or obligations arising out of the relationship between an issuer and holder that are in an expanded group that prevent or forestall enforcement action, including fraudulent conveyance laws.

Most comments, however, sought a clear affirmation that this rule relates only to the documentation required, not the substantive evaluation of the creditor's actions. The Treasury Department and the IRS agree that this rule addresses only the requirement to document actions. However, the rules also require that an explanation be documented for inaction by a creditor upon failure of the issuer to comply with the terms of purported indebtedness and that the explanation for such inaction is an indebtedness factor. In the context of highly-related parties, where economic interests of the issuer and holder are aligned, there is a greater need for scrutiny where there is nonperformance and no assertion of creditor's rights. The lack of an explanation for such inaction may give rise to a substantive determination that the parties did not intend to create indebtedness in substance or ceased to treat an interest as indebtedness. Thus, the final regulations do not provide any specific guidance that addresses the comments related to the substantive evaluation of the actions the debtor or creditor must take. The final regulations provide a cross reference to § 1.1001–3(c)(4)(ii), which provides rules regarding when a forbearance may be a modification of a debt instrument and therefore may result in an exchange subject to § 1.1001–1(a). As later discussed, such an exchange could be a relevant date under the documentation rules.

5. Requests for Additional Guidance

Many comments requested more detail about the type and extent of documentation that would be necessary in order to satisfy the documentation rules, often suggesting that examples and specific guidelines should be included in the regulations. Comments expressed concern that the lack of such guidelines would cause administrative difficulties, as agents would request,

and taxpayers would produce, unnecessary documentation. As a result, time would be spent unnecessarily on disputes over whether the documentation rules were satisfied instead of on the underlying substantive determination of the character of the interest at issue.

Comments suggested the issuance of audit guidelines, the use of ''fast track'' review by the IRS Office of Appeals, and the admission of these issues relating to the satisfaction of the documentation rules into the pre-filing agreement program as ways to facilitate administration for taxpayers and the IRS alike. The IRS agrees that these administrative procedures could assist both taxpayers and the IRS in the efficient resolution of cases. They are available under generally applicable criteria and procedures.

The Treasury Department and the IRS have considered these comments and agree that the purpose of the documentation rules is not to prepare and maintain unnecessary documentation. Rather, the purpose of the documentation rules is to provide a taxpayer with guidance regarding what broad categories of information are necessary to be documented to evidence the creation of a debtor-creditor relationship, as well as to facilitate tax administration.

D. Specific Technical Questions

1. Relevant Dates

Under proposed § 1.385–2, the relevant date for purposes of documenting the issuer's unconditional obligation to repay and the creditor's right to repayment was generally either the date that an expanded group member issued an EGI or the date that an instrument became an EGI. The relevant date for purposes of documenting the reasonable expectation of repayment was generally either the date that an expanded group member issued an EGI, the date that an EGI was deemed reissued under § 1.1001–3, or the date that an instrument became an EGI. The relevant date for purposes of documenting actions evidencing a debtor-creditor relationship was generally either the date that a payment was made or the date on which an event of default occurred. Proposed § 1.385–2 provided that no date before the applicable instrument becomes an EGI is a relevant date.

Some comments suggested that the ''relevant date'' be the same for the documentation requirements regarding the issuer's obligations, the holder's rights, or the reasonable expectation of payment. The Treasury Department and the IRS have not adopted this suggestion because these dates will not and should not always match. For example, under a revolving credit agreement individual draws would typically be made at different times than the requisite credit analysis of the borrower. The Treasury Department and the IRS have determined that the appropriate times for retesting the reasonable expectation of repayment and for documenting other indebtedness factors may differ. For example, if there is a material event affecting the solvency or business of the issuer, an updated analysis of the reasonable expectation of repayment may be appropriate, even where the legal documents related to an interest have not been modified.

In addition, proposed § 1.385–2 provided that the relevant date with respect to cash pools, master agreements, and similar arrangements included the date of the execution of the legal documents governing the arrangement and the date of any amendment to those documents that provides for an increase in the permitted maximum amount of principal.

Comments suggested that relevant dates for such arrangements should include only the dates that the arrangement is put into place, new members are added, or the maximum loan amount is increased. The final regulations clarify that these dates are generally the relevant dates for these arrangements. However, as previously discussed, an annual credit analysis (as well as a credit analysis as of a material event of an issuer) must be performed under these arrangements and, as a result, the final regulations provide that relevant dates for that credit analysis include the anniversary of the credit analysis as well as the date of any material event of the issuer.

2. Maintenance Requirements

Proposed § 1.385–2 provided that required documentation must be maintained for all taxable years that an EGI is outstanding, until the period of limitations expires for any federal tax return with respect to which the treatment of the EGI is relevant. Comments raised concerns that this rule was burdensome and requested that the final regulations include a practical way to limit the length of time that documentation must be maintained. The Treasury Department and the IRS do not adopt this request because they consider it inappropriate to permit the destruction of documentation while such documentation is relevant for federal tax purposes because this would be inconsistent with the requirements of section 6001 (requirement to keep books and records).

3. Period When § 1.385–2 Characterization Is Given Effect

a. Debt Instrument Becomes an EGI

Proposed § 1.385–2 provided that, in the case of an interest that was an EGI when issued, if the EGI is determined to be stock as a result of the documentation rules, the EGI is generally treated as stock as of its issuance. The exception to this general rule was if the failure to comply with the documentation rules related to an action evidencing a debtor-creditor relationship; in that case, the EGI would be treated as stock as of the time that the failure to comply occurs. However, if the interest was not an EGI when issued but later becomes an EGI that is determined to be stock under the documentation rules, the EGI is treated as stock from the date it becomes an EGI.

Comments urged that the documentation rules apply only once an interest becomes an EGI and that any characterization based on the application of rules be limited to the treatment of the EGI after it becomes an EGI. The Treasury Department and the IRS intended that the documentation rules would not generally apply to an interest until it becomes an EGI, and the final regulations clarify this point.

Several comments also requested that the rules not apply to any interest if, when issued, either the issuer or holder was not subject to federal tax, was a CFC, or was a controlled foreign partnership. The final regulations reserve on the treatment of foreign issuers, and, other than potentially under the anti-abuse rule, do not apply to interests issued by a partnership. Accordingly, the final regulations do not adopt this comment.

Comments suggested clarifying the treatment of an interest when its status changes from an EGI to an intercompany obligation subject to § 1.1502–13(g) and when its status changes from an intercompany obligation subject to § 1.1502–13(g) to an EGI. Some comments requested that in the case of an intercompany obligation becoming an EGI, the regulations treat the issue date as the date the interest ceases to be an intercompany obligation. Conversely, another comment urged that if an interest becomes an EGI, it should nevertheless be excluded from the regulations. The final regulations address this comment by treating such an EGI as subject to the documentation rules when it becomes an EGI. This approach is consistent with the

approach in § 1.1502–13(g)(3)(ii), which treats such an EGI as a new obligation for all federal income tax purposes.

Many comments urged that there was no need to impose documentation requirements regarding the issuer's obligations, the holder's rights, or the reasonable expectation of payment when a non-EGI became an EGI because such documentation would be done on issuance under common commercial practices. As such, it arguably would be adequate to police these requirements with an anti-abuse rule. Similarly, some comments urged there be no such documentation requirement when an expanded group acquired an EGI from another expanded group because the documentation rules would apply at the time the EGI was issued.

Thus, under either suggestion, the only documentation requirement that would apply to such notes would be that relating to evidence of a debtor-creditor relationship. These comments also requested that, if these suggestions were not adopted, the regulations allow at least a year for taxpayers to bring incoming EGIs into compliance. The Treasury Department and the IRS have determined that the documentation requirements are necessary for EGIs, regardless of whether they are initially issued within the expanded group or whether they become EGIs after issuance. The fact that such interests may have been initially issued among less-related parties does not change the requirement that the interests must be characterized under federal tax principles as debt or equity, and the indebtedness factors in the documentation rules are important factors for the debt-equity analysis of any interest. Moreover, once an interest becomes an EGI, meaning that the issuer and holder are highly related, the terms and conditions may no longer be followed due to this high degree of relatedness. Because of this issue, it is necessary for such EGIs to be subject to the rules in order to ensure that the policy goals of the documentation rules are achieved. Treating a loan differently once it becomes held by an entity related to the issuer is not unique to these rules. For purposes of testing for cancellation of indebtedness income, section 108(e)(4) takes a similar approach by treating a purchase of a note by a party related to the issuer as in effect a repurchase of the note by the issuer. However, the Treasury Department and the IRS have relaxed the timely preparation requirement so that the documentation of all EGIs does not have to be prepared and maintained until the time for filing the issuer's federal income tax return (taking into account all relevant extensions).

b. EGI Treated as Stock Ceases To Be an EGI

Comments requested that, if an EGI that was treated as stock under the documentation rules ceases to be treated as stock when it ceases to be an EGI, the recharacterization back to indebtedness is deemed to occur immediately after the interest ceases to be an EGI. The reason offered was to avoid creating a noneconomic dividend when the stock is deemed exchanged for the note. The final regulations do not adopt this comment. Under the final regulations, if an EGI that was treated as stock under the documentation rules ceases to be treated as stock when it ceases to be an EGI, the recharacterization back to indebtedness is deemed to occur immediately before the interest ceases to be an EGI. This rule is intended to ensure that the treatment of a third-party purchaser of the EGI is not affected by the final regulations, which are not intended to affect issuances of notes among unrelated parties. If the rule suggested by the comment were adopted, a third-party purchaser would be treated as purchasing stock that is immediately recharacterized as indebtedness for federal tax purposes. Such a rule would result in an issue price of the new debt instrument determined under section 1274, rather than section 1273, and might result in other collateral consequences to the third party purchaser.

4. Applicable Financial Statements

Comments requested clarification on the definition of the term applicable financial statement. For example, some comments suggested that the regulations define the term to mean the most recent regularly prepared financial statements, provided that the statements were prepared annually and that the taxpayer was not aware of any material adverse decline in the issuer's financial position. Other comments asked for clarification on the applicable financial statement that should be used if more than one member of the expanded group has a separate applicable financial statement. Proposed § 1.385–2 referred to a combination of applicable financial statements in such a case. The final regulations clarify that, if there are multiple separate applicable financial statements that do not duplicate the assets or income of expanded group members, the applicable financial statements must be combined to determine whether the expanded group is under the threshold for the application of the documentation rules. The final regulations provide that in the case of applicable financial statements that reflect the total assets or annual total revenue of the same expanded group member, the applicable financial statement with the greatest amount of total assets is to be used. The final regulations also provide rules that address the potential double counting of assets or revenue when a combination of applicable financial statements is used. However, the final regulations retain the rule that the set of applicable financial statements are those prepared in the past three years. This rule eliminates the possibility that the most recent applicable statement may not be representative of the long-term asset and revenue history of the expanded group. The Treasury Department and the IRS have determined that this history is an appropriate measure of whether a group should be subject to the documentation rules. Because the expanded group definition and the consolidation rules for financial accounting rules differ, it will frequently be the case that applicable financial statements will provide information about a set of corporations that does not precisely match the set of corporations in an expanded group. Applicable financial statements therefore provide an approximation of the assets and revenue of the expanded group. Thus, even if the most recent applicable financial statement were below the threshold, it may not provide definitive information about the assets and revenue of the expanded group.

One comment noted that, unless stock and notes of expanded group members were excluded from the computation of assets and income, such amounts could be duplicated in the calculation of total assets or total annual revenue. The final regulations exclude expanded group member stock and notes, as well as any payments with respect to such stock or notes to the extent that those expanded group members are consolidated for financial accounting purposes in the applicable financial statements used to calculate whether the asset or revenue thresholds are met.

5. Consistency Rule

Proposed § 1.385–2 provided that an EGI would be respected as indebtedness only if the documentation requirements were satisfied. Further, if an issuer treated an EGI as indebtedness, the issuer and all other persons, except the Commissioner, were required to treat the EGI as indebtedness for all federal tax purposes. Comments requested clarification of this rule if a taxpayer subsequently discovered that an interest it treated as indebtedness would be

treated as stock under the documentation rules. The final regulations adopt these comments with respect to the consistency rule and clarify that only the issuer and holder of an EGI are subject to the consistency rule. Comments also urged that taxpayers be permitted to treat interests inconsistently with their classification under the documentation rule once an interest ceases to be subject to the rule, provided such inconsistencies were disclosed on the taxpayers' returns. The final regulations do not adopt this comment because the final regulations, including the consistency rule, would not apply to an EGI for the period it were not an EGI.

6. No Affirmative Use Rule

Proposed § 1.385–2 included a rule providing that the documentation rules would not apply if a failure to comply with the rules had as a principal purpose reducing the federal tax liability of any person. Comments urged that this rule be removed, as they felt it caused significant uncertainty that could lead to conflicts with tax authorities. Comments also urged that the rule be limited to failures of the requirement to document actions evidencing a debtor-creditor relationship, inasmuch as taxpayers that intended an interest to be treated as stock on issuance could simply fashion the interest as stock or nonqualified preferred stock at that time.

In response to comments, including comments about the no affirmative use rule creating unnecessary uncertainty, the Treasury Department and the IRS reserve on the application of the no affirmative use rule in § 1.385–2 pending continued study after the applicability date.

7. Anti-Abuse Rule

Under proposed § 1.385–2, if a debt instrument not issued and held by members of an expanded group was issued with a principal purpose of avoiding the documentation rules, the interest nevertheless would be subject to the documentation rules. Comments suggested that this broad anti-abuse rule be removed, or at least narrowed, so that it would not apply to loans between unrelated parties.

The Treasury Department and the IRS decline to remove the rule as it serves an important tax administration purpose. Without such a rule, applicable instruments not constituting EGIs could be issued, for example, by a non-corporate entity or a slightly less-related corporation to circumvent the documentation rules. Further, the Treasury Department and the IRS decline to adopt the suggestion to limit the rule to loans between related parties as that would permit the use of accommodation parties to avoid the documentation rules.

V. Comments and Changes to § 1.385–3—Certain Distributions of Debt Instruments and Similar Transactions

A. General Approach of § 1.385–3

1. Overview

The proposed regulations provided that, to the extent a debt instrument is treated as stock by reason of proposed § 1.385–3, the debt instrument would be treated as stock for all federal tax purposes.

Comments requested that proposed § 1.385–3 be withdrawn or thoroughly reconsidered before being finalized. Other comments recommended that proposed § 1.385–3 be withdrawn and replaced with more limited rules, such as rules applicable solely to inverted entities or foreign-parented multinationals. Comments also recommended withdrawal of portions of the proposed regulations that would have a significant impact on ordinary business transactions. In some cases these comments specified which provisions should be withdrawn, such as the per se rule described in proposed § 1.385–3(b)(3)(iv)(B), while in other cases, the comments did not specify which provisions should be withdrawn. In addition, comments suggested that the treatment of certain transactions (such as foreign-to-foreign issuances or C corporation-to-C corporation issuances) be excluded or reserved in the final and temporary regulations based on the U.S. tax status of the issuer or holder of the instrument, or based on whether the interest income from the instrument is subject to federal income tax.

As explained in this Part V.A, the Treasury Department and the IRS decline to adopt the alternative approaches suggested by comments and have determined that the general approach of proposed § 1.385–3, including the per se funding rule, should be retained. However, based on the comments received, the Treasury Department and the IRS have determined that it is appropriate to make significant modifications to the scope of transactions that must be considered in applying the final and temporary regulations in order to reduce the impact on ordinary business transactions. These modifications are described throughout this Part V.

The remainder of this Part V refers to the ''per se funding rule'' to mean either the rule described in proposed § 1.385–3(b)(3)(iv)(B) or § 1.385–3(b)(3)(iii) of the final regulations, or both, as the context requires.

2. U.S. Tax Status of Issuer or Holder

The final and temporary regulations do not limit the application of § 1.385–3 to inverted entities or foreign-parented multinationals. Any two highly-related domestic corporations that compute federal tax liability on a separate basis have similar incentives to use purported debt to create federal tax benefits without having meaningful non-tax effects if one of the domestic corporations has taxable income and the other does not, for example due to net operating loss carryovers. Moreover, while an impetus for the regulations is the ease with which related-party debt instruments can be used to create significant federal tax benefits, the final and temporary regulations are narrowly focused on purported debt instruments that are issued to a controlling corporate shareholder (or person related thereto) and that do not finance new investment in the operations of the issuer. In developing regulations under section 385, the Treasury Department and the IRS have determined that, when these factors are present, it is appropriate to treat the debt instrument as reflecting a corporation-shareholder relationship rather than a debtor-creditor relationship across a broad range of circumstances.

Similarly, the final and temporary regulations do not adopt comments recommending an exception from § 1.385–3 for instruments for which the interest income is subject to U.S. tax because it is: (i) Paid to a U.S. corporation, (ii) effectively connected income of the lender, (iii) an amount subject to withholding for U.S. tax purposes, or (iv) subpart F income (within the meaning of section 952(a)). As explained in the preceding paragraph, the Treasury Department and the IRS have determined that, in the context of highly-related corporations (where the relatedness factor is also present), whether a purported debt instrument finances new investment is an appropriate determinative factor. Whether such factors are present is not dependent on the federal income tax treatment of payments on the instrument. Moreover, in all of the situations described in the comments in which an amount of interest is ''subject to'' U.S. tax, tax arbitrage opportunities would nonetheless arise if in fact the interest were not subject to tax at the full U.S. corporate tax rate and thus did not completely offset the related interest deduction. Since the rules apply only to payments between highly-related

parties, one would expect taxpayers to seek to utilize related-party debt in those circumstances, so that such a broad exception would be inconsistent with the underlying rationale for these rules. Further, an exception based on the U.S. tax consequences of payments with respect to the instrument would require annual testing of the effective tax rate with respect to the payment and re-testing for any post-issuance transfers of the debt instrument to assess the tax status of each transferee and the payments thereto. This requirement could result in instruments that might otherwise be treated as equity pursuant to § 1.385–3 switching between debt and equity classification from year to year, depending on how the payment was taxed. This generally would be inconsistent with the purpose of section 385, which is to characterize an instrument as debt or equity for all purposes of the Code, and would be difficult for the IRS and taxpayers to administer.

Comments also recommended that distributions that are subject to U.S. tax be excluded from the general rule and funding rule. Comments asserted that such distributions do not facilitate earnings stripping and therefore should not implicate the concerns targeted under the proposed regulations. For reasons similar to those cited above for why the rules do not include an exception when interest is subject to U.S. tax, the Treasury Department and the IRS decline to adopt these comments. The final and temporary regulations are intended to address debt instruments that do not finance new investment in the operations of the borrower. The consequences of a distribution or acquisition to the recipient, whether the transaction is taxed as a dividend (including as a result of withholding tax), return of basis, or gain, does not affect the determination whether a close-in-time borrowing financed new investment in the operations of the borrower.

Thus, in general, the application of the final and temporary regulations to a debt instrument does not depend on the status of the instrument's holder, except in the case where the holder and issuer of the instrument are both members of the same consolidated group. As discussed in the preamble to the proposed regulations, § 1.385–3 does not apply to instruments held by members of a consolidated group because the concerns addressed in § 1.385–3 generally are not present when the issuer's deduction for interest expense and the holder's corresponding interest income precisely offset on the consolidated group's single consolidated federal income tax return. Specifically, in addition to being reported on a single federal income tax return, the intercompany transaction rules of § 1.1502–13 operate to ensure that the timing, character, and other attributes of such items generally match for federal income tax purposes. For example, the ordinary character of a borrowing member's repurchase premium with respect to an intercompany obligation results in the lending member recognizing as ordinary income what otherwise would be treated as capital gain if the members were taxed on a separate entity basis.

However, as discussed in Part III.A.1 of this Summary of Comments and Explanation of Revisions, and in response to comments received, the final and temporary regulations reserve on their application with respect to debt issued by foreign issuers due to the potential complexity and collateral consequences of applying the regulations in this context where the U.S. tax implications are less direct and of a different nature. In addition, as discussed in Part III.B.2.b of this Summary of Comments and Explanation of Revisions, the final and temporary regulations do not generally apply to S corporations or non-controlled RICs and REITs. Even though these entities are domestic corporations that can compute federal tax liability on a separate basis from their C corporation subsidiaries, the general approach in the Code is to tax these entities at the shareholder, rather than the corporate, level. Accordingly, they do not raise the same type of concerns that underlie the final and temporary regulations.

3. Entities With Disallowed or Minimal Interest Expense

Some comments requested an exception for U.S. issuers that are already treated as paying disqualified interest under section 163(j) (noting that United States real property holding corporations (USRPHCs) in particular are often subject to such disallowance). Comments asserted that this would mitigate the concerns of the proposed regulations and proposed that an issuer paying disqualified interest be excluded from the scope of the regulations because further base erosion through related-party debt is not possible. Other comments stated that the rules should not apply to an entity with net interest income or only a de minimis amount of net interest expense.

The final and temporary regulations do not adopt the suggestion to exclude issuers with disqualified interest or issuers with low or no net interest expense because, as explained in Section A.1 of this Part V, the regulations are concerned about debt instruments that do not finance new investment, which does not depend on whether the borrower is excessively leveraged, has net interest income or expense, or is able to deduct its interest expense. The final and temporary regulations apply to distinguish debt from equity, whereas the rules under section 163(j) apply to all interest expense without the need to attribute interest to particular debt instruments. In addition, the disallowance under section 163(j) may vary from year to year, so that even if it were possible to trace interest limited under that section to a particular instrument, whether any particular instrument was so impacted would change from year to year. As discussed in Section A.1 of this Part V, annual retesting for purposes of an instrument's characterization would be inconsistent with the purpose of section 385 and would be difficult to administer. For these reasons, the Treasury Department and the IRS have determined that it would not be practical or administrable to create an exception under the final and temporary regulations based on whether interest has been disallowed under section 163(j).

Furthermore, in the case of issuers with low or no net interest expense, a number of other exceptions provided in the final and temporary regulations will achieve a similar result for some entities. For example, as described in Section G.1 of this Part V, the final and temporary regulations provide an exception for debt instruments issued by certain regulated financial issuers, for which interest income often offsets interest expense. In addition, the final and temporary regulations expand the $50 million threshold exception in the manner described in Section E.4 of this Part V so that all taxpayers can exclude the first $50 million of indebtedness that otherwise would be recharacterized under § 1.385–3. Finally, in order to further reduce compliance costs, the final and temporary regulations provide a broad exception to the funding rule for short-term debt instruments, as described in Section D.8 of this Part V, which generally applies to all non-interest bearing debt instruments as well as many other debt instruments that are short-term in form and substance. Similar to a net interest expense limitation, these new and expanded exceptions will, in combination, have the effect of exempting a number of entities with low net interest expense and will reduce the burden of complying with the final and temporary

regulations in cases where the U.S. tax interest is limited. *See also* Section D.9 of this Part V, which addresses a related comment requesting that the final and temporary regulations permit taxpayers to net indebtedness ''receivables'' and ''payables'' for purposes of the funding rule.

4. Limiting Interest Deductibility Without Reclassifying Interests

Comments also suggested addressing the policy concerns underlying the regulations by issuing guidance that more closely conforms to concepts used in section 163(j), which limits the deduction for interest on certain indebtedness in a taxable year. Section 385 authority differs fundamentally from section 163(j) because, rather than limiting interest deductions in a particular year, section 385 addresses the treatment of certain interests in a corporation as stock or indebtedness. While rules limiting interest deductions from excessive related-party indebtedness might address the broader policy concerns described in this preamble and in the notice of proposed rulemaking, Congress did not delegate such authority under section 163(j) to the Secretary. Accordingly, the final and temporary regulations are not intended to resolve the tax preference for using related-party debt to finance investment. Instead, the final and temporary regulations are more narrowly focused on the question of whether purported debt instruments issued to a controlling corporate shareholder (or a person related thereto) that do not finance new investment in the operations of the issuer reflect a corporation-shareholder relationship or a debtor-creditor relationship for purposes of the Code. The Treasury Department and the IRS have determined that this question is appropriately addressed under section 385 and, accordingly, that it is appropriate to treat such debt instruments generally as stock for federal tax purposes.

5. Group Ratio Test

One comment suggested that the regulations under § 1.385–3 include an exception to the extent the issuing member's net indebtedness does not exceed its relative share of the expanded group's third-party indebtedness. The comment noted that such a rule would be consistent with legislative proposals made by the Treasury Department to modify the interest expense disallowance rules under section 163(j).

The Treasury Department and the IRS decline to adopt this recommendation. While reference to an expanded group's third-party indebtedness could be part of a comprehensive solution to address the tax incentives to use related-party debt to create excessive leverage, as discussed in this Section A.1 of this Part V, the final and temporary regulations are more narrowly focused on purported debt instruments that do not finance new investment. The Treasury Department and the IRS have determined that, when this factor, along with the relatedness factor, is present, the purported debt instrument should be treated as stock without regard to whether the issuer is over-leveraged, whether by reference to the expanded group's third-party indebtedness or some other ratio. Furthermore, a member's relative share of the expanded group's third-party indebtedness generally would fluctuate every year as the group's income statement or balance sheet changes. An exception that varied based on such a ratio would therefore require that instruments that otherwise might be treated as equity pursuant to § 1.385–3 instead switch between debt and equity classification from year to year, depending on the group's ratio for that year. As discussed in Section A.1 of this Part V, annual retesting for purposes of an instrument's characterization would be inconsistent with the purpose of section 385, and would be difficult for the IRS and taxpayers to administer.

6. Multi-Factor Analysis

Some comments suggested that the regulations adopt a multi-factor debt-equity analysis similar to that traditionally undertaken by courts. The Treasury Department and the IRS decline to adopt a multi-factor approach to § 1.385–3. As discussed in Part II.A of this Summary of Comments and Explanation of Revisions, section 385 authorizes the Secretary to prescribe dispositive factors for determining the character of an instrument with respect to particular factual situations. Further, Congress enacted section 385 to resolve the confusion created by the multi-factor tests traditionally utilized by courts, which produced inconsistent and unpredictable results. *See* S. Rep. No. 91–552, at 138 (1969). The Treasury Department and the IRS have determined that it is necessary and appropriate to provide a clear rule regarding the characterization of issuances of purported debt instruments that do not finance new investment in the operations of the issuer. In contrast, recommendations for a multi-factor approach to address debt instruments that do not finance new investment could result in increased uncertainty for taxpayers, administrative difficulties for the IRS, and unpredictable case law.

7. Consistency With Base Erosion and Profit Shifting Outputs

Some comments claimed that the proposed regulations were inconsistent with the ''best practice'' recommendations that were developed as part of the G20 and Organisation for Economic Co-operation and Development's (OECD) Base Erosion and Profit Shifting (BEPS) project under Action Item 4 (*Limiting Base Erosion Involving Interest Deductions and Other Financial Payments*). The report from that project recommended that countries adopt limitations on interest deductions that incorporate general group ratio and fixed ratio rules. The Treasury Department and the IRS have concluded that the final and temporary regulations are entirely consistent with the final report for Action Item 4, which recommends in paragraph 173 that, in addition to the group ratio and fixed ratio rules, countries consider introducing domestic rules to address when ''[a]n entity makes a payment of interest on an ''artificial loan,'' where no new funding is raised by the entity or its group.'' Consistent with the Action Item 4 report, the final and temporary regulations provide targeted rules to address this concern.

Some comments also noted that the recharacterization of debt instruments as equity instruments under the proposed regulations would result in a significant increase in the number of hybrid instruments, contrary to the United States' endorsement of Action Item 2 (*Neutralise the effects of hybrid mismatch arrangements*) of the BEPS project, which recommended rules for neutralizing the effects of hybrid mismatch arrangements. The comments also noted that foreign countries could apply the BEPS hybrid mismatch rules to deny foreign interest deductions with respect to debt instruments issued by a foreign entity to a U.S. parent that were treated as stock under the proposed regulations, which could increase the foreign tax credits claimed by the U.S. parent.

The Treasury Department and the IRS do not agree that the final and temporary regulations are inconsistent with the goal of Action Item 2, which is to neutralize the tax effects of hybrid instruments that otherwise would create income that is not subject to tax in any jurisdiction, rather than to establish an international consensus on the treatment of particular instruments as debt or equity. Furthermore, because the final and temporary regulations reserve on their application to foreign issuers, hybrid instruments arising under the final and temporary regulations should

not result in other jurisdictions applying the hybrid mismatch rules described in Action Item 2, which generally apply only to instruments giving rise to a deduction in the issuer's jurisdiction with no corresponding inclusion in the lender's jurisdiction.

B. Treatment as Stock for Purposes of the Code

1. In General

Comments requested clarification as to the extent to which an interest treated as stock under the proposed regulations is treated as stock for all federal tax purposes. The Treasury Department and the IRS have determined that no further clarification is needed on this point. Consistent with the proposed regulations, the final and temporary regulations generally provide that an instrument treated as stock under the final and temporary regulations is treated as stock for all federal tax purposes. However, as further discussed in Section B.2 of this Part V, the final and temporary regulations provide that a debt instrument that is treated as stock under § 1.385–3 is not treated as stock for purposes of section 1504(a).

Comments requested an alternative approach under which, to the extent a debt instrument is treated as stock under the regulations, equity treatment would apply solely for purposes of disallowing interest deductions under section 163, but the debt instrument would not be treated as stock for all other purposes of the Code. Other comments recommended that the proposed rules should not recharacterize a debt instrument to the extent that a taxpayer elects not to deduct interest otherwise allowable under section 163 with respect to a particular debt instrument. The Treasury Department and the IRS have not adopted these recommended approaches because, although section 385 authorizes the Secretary to prescribe rules to determine whether an interest in a corporation is treated as stock or indebtedness, neither section 385 nor section 163 authorizes a broad rule that disallows an interest deduction under section 163 with respect to an instrument that is otherwise treated as indebtedness.

Comments also observed the potential for uncertainty or adverse results under the proposed regulations, particularly proposed § 1.385–3, with respect to the following particular Code provisions and requested additional guidance or relief. In many cases, the recommended solution was a limited exception from equity treatment for a recharacterized instrument for purposes of the particular Code provision.

- *Section 246.* Comments noted that payments on a hybrid instrument (equity for federal income tax purposes, but debt for non-tax purposes) that affords the holder creditor rights may not qualify for the dividends received deduction under section 243. *See* section 246(c); Rev. Rul. 94–28 (1994–1 C.B. 86) (concluding that the holding period of such an instrument was reduced under section 246(c)(4)(A), which reduces the holding period for periods in which the taxpayer has an option to sell, or is under a contractual obligation to sell, the stock).
- *Section 305.* Comments requested clarification regarding the application of section 305 to a debt instrument recharacterized as stock. For example, a comment requested clarification regarding the application of section 305(c) to amounts that would represent accrued interest but for the recharacterization, which could result in a constructive distribution to the instrument holder. A comment also recommended that the final and temporary regulations provide that an interest reclassified as preferred stock should not cause section 305(c) to apply as a result of any discount resulting from the fact that the interest was issued with a stated interest rate that is less than a market rate for dividends on preferred stock.
- *Sections 336(e) and 338.* A comment requested clarification regarding the qualification for, and results stemming from, asset sales that are deemed to occur when an election is made under section 336(e) or section 338. The comment posited a buyer making a section 338(g) election with respect to its purchase of a foreign target corporation, and certain of the foreign target's foreign subsidiaries, each of which is either the holder or issuer of an instrument that would have been recharacterized under proposed § 1.385–3. The comment posed a series of questions, including whether the ''old'' and ''new'' entities are respected as unrelated or treated as successors, and how the recharacterized instruments affect calculations required under section 338.
- *Section 368.* Comments expressed concern that a debt instrument that is recharacterized as stock would constitute a discrete class of nonvoting stock for purposes of determining control under section 368(c), which could cause a transaction to fail to satisfy the control requirement of numerous nonrecognition provisions. *See* Rev. Rul. 59–259 (1959–2 C.B. 115) (holding that control within the meaning of section 368(c) requires ownership of 80 percent of the total number of shares of each class of nonvoting stock). One comment observed that a debt instrument recharacterized as stock could also affect whether the continuity of interest requirement for reorganizations in § 1.368–1(e) is satisfied. Because continuity of interest is determined by reference to the value of the proprietary interests of the target corporation, a debt instrument that is treated as target stock and that is redeemed for cash as part of the reorganization would dilute the percentage of acquirer stock in relation to total consideration. *See* § 1.368–1(e)(1)(ii).
- *Section 382.* Comments observed that the recharacterization of an instrument could increase an existing shareholder's ownership of a loss corporation or result in the creation of a new shareholder for purposes of section 382 testing. In addition, a corresponding decrease in ownership could occur when a recharacterized debt instrument is retired. These transactions could cause an owner shift or ownership change within the meaning of section 382(g), which could limit the ability of a loss corporation (or loss group) to utilize losses of the issuing entity.
- *Section 1503.* Comments observed that recharacterized debt instruments could be treated as applicable preferred stock for purposes of section 1503(f)(3)(D), which could result in a member of a consolidated group losing the ability to utilize the group's losses or credits.
- *Section 7701(l).* Comments expressed concern that an instrument that is treated as stock could be subject to the fast-pay stock rules of § 1.7701(l)–3, and observed that transactions involving fast-pay stock are listed transactions under Notice 2000–15 (2000–1 C.B. 826), thus imposing additional reporting requirements and penalties for noncompliance.
- *Section 1.861–12T(f).* One comment questioned whether treating purported indebtedness as stock would have consequences under § 1.861–12T(f), which provides that, for purposes of apportioning expenses under an asset method for purposes of section 904(d), in the case of any asset in connection with which interest expense accruing at the end of the taxable year is capitalized, deferred, or disallowed, the adjustment or fair market value is reduced by the principal amount of the indebtedness the interest on which is so capitalized, deferred, or disallowed.
- *Provisions relating to hedging transactions.* Comments expressed

concern that an interest treated as stock under the final and temporary regulations would be ineligible for purposes of applying various hedging provisions in the Code and regulations that apply to debt instruments but not stock. *See, e.g.*, §§ 1.954–2(a)(4)(ii), 1.988–5, and 1.1275–6.

Some comments suggested that the final and temporary regulations exercise the authority in section 351(g)(4) in order to treat any debt instrument that is treated as stock under the section 385 regulations as not stock for purposes of the control test in section 368(c) and other tests that are based on the ownership of stock. Section 351(g)(4) provides that the Secretary may prescribe such regulations as may be necessary or appropriate to carry out the purposes of section 351(g) and sections 354(a)(2)(C), 355(a)(3)(D), and 356(e), as well as to prescribe regulations, consistent with the treatment under those sections, for the treatment of nonqualified preferred stock under other provisions of the Code. Some comments interpreted this authority broadly to authorize the Secretary to treat instruments treated as stock under section 385 as debt for all other purposes of the Code when the context suggested that the instruments were not being used to achieve federal tax benefits.

The final and temporary regulations retain the approach of the proposed regulations under which related-party indebtedness treated as stock by application of § 1.385–3 is treated as stock for all federal tax purposes, with one exception with respect to section 1504 that is discussed in Section B.2 of this Part V. As discussed in Section A of this Part V, when a purported debt instrument issued to a highly-related corporation does not finance new investment in the operations of the issuer, the Treasury Department and the IRS have determined that it is appropriate to treat the purported debt instrument as stock for all federal tax purposes. Moreover, the issues described in the comments listed in this Section B.1 of this Part V generally do not arise uniquely as a result of the application of the final and temporary regulations but, rather, arise whenever purported debt instruments are characterized as stock under applicable common law. Several of these issues relate to longstanding uncertainties within those particular provisions, which are beyond the scope of the final and temporary regulations.

In addition, the final and temporary regulations provide new and broader exceptions than the proposed regulations, including an expanded $50 million threshold exception, the expanded group earnings exception, and the new qualified short-term debt exception. These exceptions are intended to accommodate ordinary course loans and distributions with the result that the final and temporary regulations focus on non-ordinary course transactions. Taking these exceptions into account, taxpayers generally will have the ability to avoid issuing debt instruments that will be treated as stock under § 1.385–3, and therefore to avoid the ancillary issues described in the comments that are associated with recharacterization as stock. Accordingly, the Treasury Department and the IRS have determined that the final and temporary regulations do not need to provide additional guidance, or additional exceptions, with respect to the specific scenarios described above, which also arise under the common law when purported debt instruments are treated as stock.

2. Limited Exception From Treatment as Stock: Section 1504(a)

Comments recommended that debt instruments treated as stock under the final and temporary regulations be treated as stock described in section 1504(a)(4), which is not treated as stock for purposes of the ownership requirements of section 1504(a). The recommended rule would prevent the recharacterization of a covered debt instrument issued by a member of a consolidated group under § 1.385–3 from causing deconsolidation of the member.

Section 1504(a)(4) provides that, for purposes of section 1504(a), the term ''stock'' does not include certain preferred stock commonly referred to as ''plain vanilla preferred stock.'' Specifically, section 1504(a)(4) provides that for purposes of section 1504(a), the term ''stock'' does not include any stock that meets four technical requirements: (i) The stock is not entitled to vote, (ii) the stock is limited and preferred as to dividends and does not participate in corporate growth to any significant extent, (iii) the stock has redemption and liquidation rights that do not exceed the issue price of the stock (except for a reasonable redemption or liquidation premium), and (iv) the stock is not convertible into another class of stock.

Comments observed that, in many instances, a debt instrument treated as stock as a result of § 1.385–3 will qualify as section 1504(a)(4) stock; in particular, because the terms of such instrument often will be legally limited and preferred as to payments and will not participate in corporate growth to any significant extent. However, comments observed that in some circumstances a debt instrument treated as stock under § 1.385–3 will not qualify as section 1504(a)(4) stock because, for example, the instrument is deemed reissued at a premium or discount or is convertible into another class of stock. Comments noted that section 1504(a)(5) provides that the Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of section 1504(a), including by treating stock as not stock for purposes of that subsection.

The final and temporary regulations adopt the recommendation that debt instruments treated as stock under the final and temporary regulations should be treated as not stock for purposes of section 1504(a). This treatment is consistent with the statutory policy of treating stock that has certain legal features similar to debt as not stock for purposes of section 1504(a). The legislative history of section 1504(a)(5) indicates that Congress intended for the Secretary to use that authority to carry out the purposes of section 1504(a), including by treating certain stock that otherwise could cause members of an affiliated group to disaffiliate, as not stock. *See* H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 831, 834 (1984). Accordingly, pursuant to the authority under section 1504(a)(5)(A), the final and temporary regulations provide that a debt instrument that is treated as stock under § 1.385–3 and that would not otherwise be described in section 1504(a)(4), is not treated as stock for purposes of determining whether a corporation is a member of an affiliated group under section 1504(a).

3. Allocation of Payments With Respect to Bifurcated Instruments

Comments requested guidance concerning the allocation of payments to an instrument that is partially recharacterized as stock. For example, if USS borrows $100x with, which is treated as funding a distribution of $50x, and no exception applies, half of the debt instrument would be treated as stock. If USS makes a $5x coupon payment with respect to the purported debt instrument, the proposed regulations did not specify the manner in which the payment would be allocated between the portion of the instrument treated as stock and the portion treated as debt.

Comments suggested the issuer should be permitted to determine the allocation of payments with respect to the portions of a bifurcated instrument. Comments also stated that, if an issuer

fails to specifically allocate the payment, the payment should be allocated first to the debt portion of the instrument because such an allocation comports with general rules of corporate law. Other comments noted the possibility of allocating the payments on a pro rata basis.

The final and temporary regulations provide that a payment with respect to an instrument partially recharacterized as stock that is not required to be made pursuant to the terms of the instrument, for example a prepayment of principal, may be designated by the issuer as being with respect to the portion recharacterized as stock or to the portion that remains treated as indebtedness. If no such designation is made, the payment is treated as made pro rata to the portion recharacterized as stock and to the portion that remains treated as indebtedness.

The Treasury Department and the IRS decline to accept the recommendation to provide similar optionality for payments that are required to be made pursuant to the terms of the agreement. In that situation, the Treasury Department and the IRS are of the view that, because the instrument will provide for payments with respect to the entire instrument, it is appropriate to treat those payments as made pro rata with respect to the portion recharacterized as stock and to the portion that remains treated as indebtedness.

4. Repayments Treated as Distributions

Several comments recommended that the final and temporary regulations include rules to address ''cascading'' recharacterizations; that is, situations in which the recharacterization of one covered debt instrument could lead to deemed transactions that result in the recharacterization of one or more other covered debt instruments in the same expanded group. Comments generally addressed two different scenarios. The first scenario involved payments made by the issuer with respect to recharacterized instruments. Those payments would be treated as distributions on stock for purposes of the funding rule, which could result in one or more of the issuer's other covered debt instruments being treated as stock. Those transactions are addressed in this Section B.4. The second scenario involved the treatment of the lending member with respect to acquisitions of instruments treated as stock, which could also result in the recharacterization of covered debt instruments issued by the lending member. This second scenario is addressed in Section B.5 of this Part V.

Regarding the first set of transactions, comments noted that, under the proposed regulations, a repayment of a debt instrument recharacterized as stock is treated as a distribution for purposes of the funding rule, and as such may cause a recharacterization of other debt instruments under the funding rule. Comments requested that the final and temporary regulations prevent this by providing that repayments or distributions with respect to recharacterized stock be disregarded for purposes of the funding rule. For the reasons set forth below, the final and temporary regulations do not adopt this request.

Section 1.385–3(f)(4) of the proposed regulations defined a distribution as any distribution made by a corporation with respect to its stock. Under the proposed regulations, a debt instrument treated as stock under § 1.385–3 was generally treated as stock for all purposes of the Code. As a result, a payment with respect to a recharacterized debt instrument was treated as a distribution for purposes of the funding rule. Comments asserted that the interaction of these rules resulted in duplicative recasts. For example, assume that a foreign parent corporation (FP) wholly owns a U.S. subsidiary (S1). FP lends $100x to S1 in exchange for Note A (transaction 1), and within 36 months, S1 distributes $100x of cash to FP (transaction 2), resulting in Note A being recharacterized as stock under proposed § 1.385–3(b)(3)(ii)(A). Then, S1 repays the entire $100x principal amount of Note A (transaction 3), which is treated as a distribution, including for purposes of the funding rule because Note A is treated as stock. Next, within 36 months after transaction 3, FP again lends $100x to S1 in exchange for Note B (transaction 4). The proposed regulations would treat Note B as funding the deemed distribution in transaction 3. Therefore, as a result of transaction 3 and transaction 4, Note B is recharacterized as stock under proposed § 1.385–3(b)(3)(ii)(A).

Comments asserted that this result is duplicative because both Note A and Note B are treated as stock. The Treasury Department and the IRS do not agree with this assertion, and as a result the final and temporary regulations do not provide for a different result. In this series of four transactions, on a net basis S1 has distributed $100x to FP and has outstanding a $100x loan from FP (Note B). If the final and temporary regulations adopted the comment and did not treat transaction 3 as resulting in a distribution for purposes of the funding rule, then Note B would not be recharacterized as stock even though the series of transactions results in a funded distribution.

The Treasury Department and the IRS decline to adopt this comment because the funding rule could be circumvented if the repayment of a note that is treated as stock were not treated as a distribution. Applying the comment's requested change to the facts above, the repayment of Note A would redeem that particular instrument, which could then be replaced with Note B in transaction 4, putting the parties in an economically similar position but avoiding the application of § 1.385–3.

One comment did not dispute the successive recharacterizations of Note A and Note B for the funding rule, but argued that the successive recasts nonetheless resulted in duplicative income inclusions, since each repayment would result in a dividend to the extent of current and accumulated earnings and profits. The Treasury Department and the IRS did not revise the final and temporary regulations for this comment because the potential for multiple dividend inclusions is a consequence of the subchapter C rules that treat distributions with respect to stock (including certain redemptions) as being made first out of the corporation's current and accumulated earnings and profits to the extent thereof, rather than a result specific to the application of § 1.385–3.

On the other hand, to prevent inappropriate duplication under the funding rule in fact patterns like the preceding example, § 1.385–3(b)(6) of the final regulations clarifies that once a covered debt instrument is recharacterized as stock under the funding rule, the distribution or acquisition that caused that recharacterization cannot cause a recharacterization of another covered debt instrument after the first instrument is repaid. Thus, the distribution in transaction 2 that caused the recharacterization of Note A cannot cause a recharacterization of another covered debt instrument. For a discussion of a coordination rule that supersedes this non-duplication rule during the transition period while covered debt instruments that otherwise would be recharacterized as stock are not treated as stock, see Section B.2 of Part VIII of this Summary of Comments and Explanation of Revisions.

5. Iterative Recharacterizations

The second set of cascading transactions addressed by comments involves a type of iterative recharacterization. Specifically, comments noted that when a debt instrument is recharacterized as stock

under the proposed regulations, the holder of the instrument is treated as acquiring stock of an expanded group member instead of indebtedness. If that holder were itself funded, the recharacterized instrument could, in turn, cause a recharacterization of the holder's own borrowing. For example, assume that P is the parent of an expanded group, and directly owns all of the stock of S1 and S2. If P loaned $100x to S1, S1 loaned $100x to S2, and S2 distributed $100x to P, S1's loan to S2 would be recharacterized as stock under the funding rule, and S1's acquisition of the S2 instrument would be treated as an acquisition of S2 stock that would cause S1's loan from P to be treated as stock under the funding rule. Comments expressed concern that an initial recharacterization could thus lead to a multitude of recharacterized instruments throughout the expanded group.

To address this concern, comments recommended an exception to the funding rule when, during the per se period described in proposed § 1.385–3(b)(3)(iv)(B), a funded member makes an advance to a second expanded group member, and that advance to the second expanded group member is characterized as stock of the second expanded group member under § 1.385–3. Comments stated that this series of transactions can occur frequently when the first funded member makes and receives advances frequently, particularly in connection with cash pooling and cash pool headers (as described in Section D.8 of this Part V), and thus could spread the recharacterizations throughout the cash pooling arrangement.

The Treasury Department and the IRS expect that the changes adopted in the final and temporary regulations limiting the application of § 1.385–3 to domestic issuers and providing a broad exception for short-term indebtedness, including deposits with a qualified cash pool header, should substantially address the concerns regarding iterative recharacterizations of covered debt instruments. Nonetheless, in response to comments, the final and temporary regulations include a limited exception to the funding rule for certain acquisitions of expanded group stock that result from the application of § 1.385–3, which include not only covered debt instruments that are recharacterized as expanded group stock under the funding rule, but also acquisitions of stock of an expanded group partner and a regarded owner under the rules described in Sections H.4 and 5 of this Part V. If this new exception applies, in the example above, S1's loan to S2 would still be treated as stock under the funding rule, but S1's acquisition of the S2 instrument would not be treated as an acquisition of S2 stock that would cause S1's loan from P to be treated as stock under the funding rule.

The Treasury Department and the IRS intend for this exception to address the concern raised in comments about unintentional serial recharacterizations. Therefore, this exception does not apply if the acquisition of deemed stock by means of the application of the funding rule is part of a plan or arrangement to prevent the application of the funding rule to a covered debt instrument.

6. Inadvertent Recharacterization

Comments noted that, in many instances, a borrower could trigger the application of the funding rule through simple inadvertence or genuine mistake (for example, incorrectly estimating earnings and profits despite reasonable effort). In addition, a taxpayer that is unaware that a debt instrument within the expanded group is treated as stock under § 1.385–3 could engage in transactions that result in unanticipated ancillary consequences.

One comment offered the following example: FP wholly owns both FS and USS1, and USS1 wholly owns both USS2 and USS3. In year 1, FS loans $10x to USS2. Later in year 1, USS2 distributes $10x to USS1 and, either through a simple mistake or a good faith but erroneous belief that an exception to recharacterization applies, the expanded group fails to take into account the treatment of the USS2 note as stock under § 1.385–3. Subsequently, in a transaction intended to qualify under section 351, USS1 contributes the stock of USS3 to USS2. Because FS holds recharacterized stock in USS2, USS1 fails to satisfy the section 368(c) control requirement of section 351(a) and is thus subject to tax on any unrealized gain in the USS3 stock.

Comments also included examples in which the inadvertent failure caused a termination of a consolidated group or of a special tax status of the issuer (for example, failure to qualify as a REIT). Comments requested that an issuer be permitted to cure the inadvertent recharacterization within a reasonable period after becoming aware of the correct treatment of the instrument under the final and temporary regulations. One proposal suggested that the issuer be permitted to eliminate the debt by cancellation or repayment within a specified time period, with such elimination presumably considered retroactive to the issuance. A similar proposal requested that an issuer be permitted to cure an instrument recharacterized by the funding rule by making an equity contribution sufficient to offset any reduction in net equity, regardless of whether the recharacterized instrument remains outstanding. As discussed in Part IV.A.3.c of this Summary of Comments and Explanation of Revisions, comments also suggested expanding the scope of the reasonable cause exception in proposed § 1.385–2(c)(1) to apply to instruments recharacterized under the documentation rules by adopting a more lenient standard than those used in § 301.6724–1, that is, the presence of significant mitigating factors with respect to a failure or a failure arising from events beyond the control of the members of the expanded group.

The Treasury Department and the IRS decline to adopt the recommendation to provide a general remediation rule that would allow certain taxpayers to mitigate the ancillary consequences of issuing stock beyond the specific and limited exceptions for certain iterative recharacterizations discussed in Section B.5 of this Part V and certain qualified contributions discussed in Section E.3.b of this Part V because of concerns about administering the regulations and concerns about providing taxpayers a right, but not an obligation, to retroactively change the character of a transaction. Moreover, the Treasury Department and the IRS have determined that the significant scope changes to the final and temporary regulations, including the narrowing of the regulations to only apply to covered debt instruments, the addition of several new exceptions to § 1.385–3, the expansion of existing exceptions to § 1.385–3, and the explicit treatment of recharacterized stock as not stock for purposes of section 1504(a) will reduce the instances of, and mitigate the effects of, inadvertent recharacterizations under the final and temporary regulations.

7. Hook Stock

One comment observed that the proposed regulations would increase the instances in which a debt instrument issued by a corporation would be treated as stock held by a direct or indirect subsidiary, commonly referred to as hook stock. The comment recommended that the regulations provide rules to avoid the creation of hook stock. The final and temporary regulations do not generally adopt this recommendation. The Treasury Department and the IRS have determined that consideration of whether a debt issuance finances new investment, in the context of related

parties, are appropriate determinative factors with respect to debt-equity characterization across a broad range of circumstances. However, as discussed in Section E.2.a of this Part V, the final and temporary regulations expand the subsidiary stock issuance exception in proposed § 1.385–3(c)(3) into a new ''subsidiary stock acquisition exception'' that excludes from the general rule and funding rule certain acquisitions of existing stock from a majority-controlled subsidiary, which eliminates one type of transaction that otherwise would have the effect of creating hook stock. However, outside of the specific exceptions discussed in Section E of this Part V, the Treasury Department and the IRS have determined that special rules are not warranted when an issuer's direct or indirect subsidiary holds an interest that would be treated as stock under the final and temporary regulations.

8. Income Tax Treaties

This section addresses comments received related to concerns regarding the impact of the proposed regulations on the application of the income tax treaties to which the United States is a party.

a. Limitation on Benefits (LOB) Article

In order to qualify for treaty benefits on U.S. source income, a resident of a treaty partner must satisfy all of the requirements set forth in the applicable treaty, including the requirement that the resident satisfy the Limitation on Benefits'' (LOB) article, if any, of the applicable treaty. Among other requirements, several LOB tests require that the resident of the treaty partner meet certain vote-and-value thresholds for stock ownership by certain qualified persons or equivalent beneficiaries. Some comments noted that, by recharacterizing debt into non-voting stock, the proposed regulations could cause a foreign corporation that previously satisfied a stock ownership threshold to no longer qualify for treaty benefits because of a dilution of the value of its stock owned by certain qualified persons or equivalent beneficiaries.

The comments concerning LOB qualification arise in the context of foreign issuers claiming treaty benefits on U.S. source income. Many of the comments acknowledged that not applying the regulations to foreign issuers would alleviate these concerns. Accordingly, these comments are addressed by the decision to reserve on the application of the final and temporary regulations to foreign issuers.

b. Character of Payments

Some comments noted that if the proposed regulations applied to recharacterize purported debt instruments as equity for all purposes of the Code, it would change the tax treatment of payments made by U.S. issuers to foreign persons that qualify for benefits under U.S. tax treaties. Comments expressed concern that purported payments of interest and repayments of principal would be treated as dividend payments, the taxation of which would be governed by the dividends article of U.S. tax treaties, which generally result in withholding at a higher rate (including a 15 percent rate in the case of dividends paid to a beneficial owner that does meet certain direct ownership thresholds) than withholding on interest. Comments argued that the definition of ''dividends'' in U.S. tax treaties should not encompass payments made under instruments that are recharacterized as equity under § 1.385–3.

The final and temporary regulations generally treat purported debt instruments as equity for all purposes of the Code, which often will result in payments under the instrument being treated as dividends, including for purposes of applying U.S. tax treaties. Treating the recharacterized instrument as giving rise to dividends is consistent with the manner in which U.S. tax treaties generally define the term ''dividends'' as ''[i]ncome from shares or other rights, not being debt-claims, participating in profits, as well as income that is subject to the same taxation treatment as income from shares under the laws of the Contracting State of which the company making the distribution is a resident.'' The 1996, 2006, and 2016 U.S. Model tax treaties, as well as the OECD Model Tax Convention, all contain similar language. Because the treaty defines the term to include any ''income that is subject to the same taxation treatment as income from shares,'' and because, under the final and temporary regulations and other applicable Code provisions, U.S. law generally treats a payment with respect to an instrument recharacterized as equity as a dividend from shares for all purpose of the Code, dividend treatment is consistent with the terms of U.S. tax treaties. Further, if the treaty does not define the term dividends, the domestic law of the country applying the treaty generally prevails, unless the context otherwise requires.

c. Associated Enterprises

Comments suggested that the proposed regulations conflict with the arm's length principle incorporated in Article 9 (Associated Enterprises) of U.S. tax treaties because a result of recharacterizing debt into equity is a denial of deductions for interest payments even though those payments were made on arm's length terms. Comments raised similar concerns with respect to section 482 and the arm's length principle outside of the treaty context, asserting that characterizing a purported debt instrument as stock based on another transaction occurring during the per se period was inconsistent with the arm's length principle. The Treasury Department and the IRS have determined that these comments mischaracterize the operation of Article 9 as well as section 482. Although Article 9 governs the appropriate arm's length terms (that is, pricing and profit allocation) for transactions entered into between associated enterprises, the arm's length principle reflected in Article 9 and section 482 is not relevant for delineating the transaction that is subject to the arm's length principle. Thus, for example, the arm's length principle may apply to determine the appropriate rate of interest charged on a loan, but it would not apply to the classification in the first instance of whether an instrument is debt or equity, which is a determination made under the relevant domestic law of the jurisdiction that is applying the treaty. Under federal income tax law, the characterization of transactions, including determining debt versus equity, is not determined by reference to the arm's length standard. *See* § 1.482–2(a)(1) and (a)(3)(i). Furthermore, as discussed in Section B.8.b of this Part V, an instrument recharacterized as equity under § 1.385–3 will result in payments being treated as dividends, including for purposes of U.S. tax treaties. Therefore, the arm's length principle incorporated in Article 9 does not conflict with the characterization of a purported debt instrument of a U.S. issuer as equity under § 1.385–3.

d. Non-Discrimination

Several comments asserted that the proposed regulations implicate the non-discrimination provisions of U.S. tax treaties. These comments assert that the non-discrimination article generally prevents the United States from denying a deduction for interest paid to a resident of a treaty partner where interest paid to a U.S. resident under the same conditions would be deductible.

The Treasury Department and the IRS disagree that the final and temporary regulations raise discrimination concerns. The regulations apply broadly to U.S. issuers and would recharacterize purported debt instruments as equity under specified conditions that apply equally regardless of the residence of the payee. Although debt issued by a member of a U.S. consolidated group to another member of the group is not subject to recharacterization under these rules, the recharacterization does not depend on whether the lender is a U.S. or foreign person, but on whether the lender files (or is required to file) a consolidated return with the issuer. For example, debt issued by a non-consolidated domestic corporation to another non-consolidated domestic corporation is subject to § 1.385–3 to the same extent as debt issued to a foreign corporation that is unable to consolidate with the domestic corporate issuer. The consolidation (or other similar) rules of both the United States and other treaty countries, which are generally limited to domestic affiliates, contain numerous special rules that are generally understood not to raise discrimination concerns. *See, e.g.,* paragraph 77 of Commentary on Article 24 of the OECD Model Convention with Respect to Taxes on Income and on Capital. Therefore, the final and temporary regulations do not implicate the non-discrimination provisions of Article 24 (Non-discrimination) of U.S. treaties.

C. Exchange Transactions That Are Subject to § 1.385–3(b)

1. Overview

The general rule under proposed § 1.385–3(b)(2) treated as stock any debt instrument issued by a member of an expanded group to another member of the same expanded group in one of three transactions: (i) In a distribution; (ii) in exchange for the stock of a member of the expanded group, other than pursuant to certain identified exempt exchanges; and (iii) in exchange for property in an internal asset reorganization, but only to the extent that, pursuant to the plan of reorganization, an expanded group shareholder receives the debt instrument with respect to its stock in the transferor corporation. The funding rule under proposed § 1.385–3(b)(3) generally treated as stock any debt instrument issued by a funded member in exchange for property that was treated as funding one of the three transactions described in the general rule.

The distributions and acquisitions described in the three prongs of the general rule and funding rule are referred to in this Part V as distributions and acquisitions, unless otherwise indicated or the context otherwise requires. Separately, unless otherwise indicated or the context otherwise requires, for purposes of this Part V, acquisitions described in the second prong of the general rule and funding rule are referred to as ''internal stock acquisitions,'' and acquisitions described in the third prong of the general rule and funding rule are referred to as ''internal asset reorganizations.''

The preamble to the proposed regulations explained the policy concerns underlying the three transactions described in proposed § 1.385–3(b)(2). In describing concerns involving distributions of indebtedness, the preamble first noted that courts have closely scrutinized situations in which indebtedness is owed in proportion to stock ownership to determine whether a debtor-creditor relationship exists in substance. This is consistent with the relatedness factor in section 385(b)(5). The preamble also cited case law that has given weight to the lack of new investment when a closely-held corporation issues indebtedness to a controlling shareholder but receives no new investment in exchange. In addition, the preamble stated that the distribution of indebtedness typically lacks a substantial non-tax business purpose. With respect to debt instruments issued for stock of a member of the expanded group, the preamble noted that these transactions are (i) similar in many respects to distributions of indebtedness and therefore implicate similar policy concerns, (ii) could serve as a ready substitute for distributions of notes if not addressed, and (iii) frequently have limited non-tax significance. Finally, with respect to debt instruments issued in connection with internal asset reorganizations, the preamble explained that such transactions can operate similar to internal stock acquisitions as a device to convert what otherwise would be a distribution into a sale or exchange transaction without having any meaningful non-tax effects.

Several comments requested that the second and third prongs of the general rule and funding rule be narrowed or eliminated. The comments stated that such transactions are not economically or otherwise similar to a distribution of a note and thus should not be subject to the rules. Comments distinguished a distribution of debt, which reduces the value in corporate solution, from a stock acquisition or asset reorganization, which typically incorporates an exchange of value for value. Other comments suggested replacing the second and third prongs of the general rule and funding rule with an anti-abuse rule. In contrast, one comment suggested that the general rule should be broadened to include any transaction having a similar effect to the transactions described in the proposed regulations.

As explained in the remainder of this Part V.C, after considering the comments, the Treasury Department and the IRS, with one exception described in Section C.3.c of this Part V, continue to view the transactions described in the second and third prongs of proposed § 1.385–3(b)(2) and (b)(3) as sufficiently economically similar to distributions such that they should be subject to the same rules and should not be reduced to an anti-abuse rule or excluded altogether. Accordingly, the final and temporary regulations retain the second and third prongs of proposed § 1.385–3(b)(2) and (3) with the modifications described in this Part V.C in response to comments received.

2. Definitions of Distribution and Property

One comment recommended that the final and temporary regulations specifically define the term distribution. The proposed regulations defined the term distribution as any distribution by a corporation with respect to the distributing corporation's stock, and the final and temporary regulations retain that definition.

A comment also recommended that the final and temporary regulations clarify the definition of the term property for purposes of the funding rule in the context of an exchange described in the second and third prongs of the funding rule. Consistent with the proposed regulations, the final and temporary regulations define the term property by reference to section 317(a). The comment asserts that it is not clear how the statement in section 317(a) that the term property does not include stock of a distributing corporation should be interpreted in the context of an exchange of property for stock or assets described in the second and third prongs of the funding rule. The Treasury Department and the IRS have determined that there is no need to clarify the term property in this context. The second prong of the funding rule applies to certain acquisitions of expanded group stock by a covered member in exchange for property other than expanded group stock (rendering moot the relevance of the reference in section 317(a) to stock

of the distributing corporation). The third prong of the general rule addresses acquisitions of certain assets, and includes no specific requirement regarding property exchanged by the acquirer.

The remainder of this Part V.C responds to comments regarding the scope of the exchange transactions that are included in the second and third prongs of the general rule and funding rule.

3. Acquisitions of Expanded Group Stock

The second prongs of the general rule and funding rule apply to certain acquisitions of expanded group stock in exchange for a debt instrument or in exchange for property, respectively. These rules apply both to acquisitions of expanded group stock other than by issuance (existing stock) and to acquisitions of expanded group stock by issuance (newly-issued stock).

a. Acquisitions of Existing Stock in General

The Treasury Department and the IRS continue to view a transfer of property (including through the issuance of a debt instrument) to a controlling shareholder (or a person related to a controlling shareholder) in exchange for existing expanded group stock as having an economic effect that is similar to a distribution. In general, a distribution with respect to stock occurs when there is a transfer of property from a corporation to its shareholder in the shareholder's capacity as such—that is, other than in a value-for-value exchange. Although an acquisition of existing expanded group stock from a controlling shareholder (or a person related to a controlling shareholder) may, in form, be a value-for-value exchange, it generally does not change the ultimate ownership of the corporation whose stock is acquired (target). Furthermore, although neither the corporation that acquires the stock (the acquirer) nor the target experiences a standalone reduction in its assets, the combined capital of the acquirer and the target is decreased by the value transferred to the selling shareholder (in other words, by the value of the ''sale'' proceeds). Thus, similar to a distribution with respect to stock, the transaction effects a distribution of value from the acquirer to the selling shareholder when the post-transaction acquirer and target are considered together. As noted in the preamble to the proposed regulations, viewing the acquirer and target on a combined basis in this context is consistent with the enactment of section 304, which reflects Congress's recognition that a purchase of affiliate stock generally has the effect of a distribution with respect to stock. *See* S. Rep. No. 83–1622 at 46 (1954).

For the foregoing reasons, and the reasons discussed in the preamble to the proposed regulations, the Treasury Department and the IRS have determined that acquisitions of existing expanded group stock should continue to be included in the general rule and funding rule. However, as discussed in Section C.3.c of this Part V, in response to comments, the final and temporary regulations provide a new exception for certain acquisitions of existing expanded group stock by a member from its majority-owned subsidiary.

b. Acquisitions of Newly-Issued Stock

The proposed regulations applied to two categories of acquisitions of newly-issued stock: (i) Acquisitions of newly-issued stock from a member that has direct or indirect control of the acquiring member (hook stock); and (ii) acquisitions of newly-issued stock from a member that does not have direct or indirect control of the acquiring member (non-hook stock). While comments generally acknowledged the similarity between acquisitions of newly-issued hook stock and distributions, several comments asserted that acquisitions of newly-issued non-hook stock are not economically similar to a distribution and thus should be excluded from the second prongs of the general rule and funding rule. One comment recommended an exclusion for acquisitions of affiliate stock by issuance as long as such stock was acquired pursuant to arm's length terms.

Under the proposed regulations, acquisitions of newly-issued stock, whether hook-stock or non-hook stock, were described in the second prongs of the general rule and funding rule. However, solely for purposes of the funding rule, the proposed regulations provided an exception for certain acquisitions of newly-issued stock in a majority-owned subsidiary (subsidiary stock issuance exception), whereby an acquisition of the stock in the subsidiary was exempt from the funding rule if, for the 36-month period immediately following the issuance, the acquirer held, directly or indirectly, more than 50 percent of the total voting power and value of the stock. For this purpose, indirect ownership was determined applying the principles of section 958(a) without regard to whether an intermediate entity is foreign or domestic.

Comments requested that the subsidiary stock issuance exception be expanded to apply to any acquisition of newly-issued non-hook stock, regardless of whether the acquirer owned a majority interest in the issuer following the acquisition. Comments reasoned that an acquisition of non-hook stock, unlike an acquisition of hook stock or existing stock described in section 304, is not economically similar to a distribution because (i) the acquisition is not described in a dividend provision of the Code, (ii) the acquiring member's equity value is not reduced by reason of the acquisition, and (iii) in contrast to transactions that are described in section 304, the combined value of the acquirer and the issuer is not reduced by reason of the acquisition.

The final and temporary regulations do not adopt this comment. As a result, the second prongs of the general rule and funding rule continue to apply to acquisitions of newly-issued stock when the acquirer owns, directly or indirectly, only a minority interest in the issuer of the stock. Such acquisitions are economically similar to a distribution in that the acquirer diverts capital from its operations to an affiliate controlled, directly or indirectly, by the acquirer's ultimate shareholder in exchange for a minority interest in the affiliate. In the context of highly-related corporations, holding a minority interest in an affiliate generally lacks meaningful non-tax consequences, and such an interest could be structured for tax avoidance purposes. Accordingly, the Treasury Department and the IRS have determined that, if such transactions were excluded from the second prong of the funding rule, they would become a ready substitute for distributions as a way to use purported debt instruments to produce significant federal tax benefits without financing new investment in the operations of the obligor. That is, if the second prong did not apply to such transactions, the purposes of the final and temporary regulations could be avoided by having the obligor divert the proceeds of the purported financing to the common parent through the transfer of those proceeds to the common parent's majority-owned subsidiary.

c. Acquisitions of Existing Stock From a Majority-Owned Subsidiary

Comments requested that the subsidiary stock issuance exception be extended to apply to an expanded group member's acquisition of existing stock in another expanded group member from the acquiring expanded group member's majority-owned subsidiary. Thus, for example, comments requested that an acquisition by a first-tier wholly owned subsidiary (S1) of the stock of a third-tier wholly owned subsidiary (S3)

from a second-tier wholly owned subsidiary (S2) in exchange for property be excluded from the second prong of the funding rule.

The Treasury Department and the IRS have determined that an acquisition of existing stock, like an acquisition of newly-issued non-hook stock from a majority-owned subsidiary, does not implicate the same policy concerns as other transactions described in the second prongs of the general rule and funding rule when the acquiring member owns more than 50 percent of the stock in the selling member. Specifically, an acquisition of existing stock from a majority-owned subsidiary, like an acquisition of newly-issued stock from a majority-owned subsidiary, generally is not economically similar to a distribution because the consideration provided to the seller is indirectly controlled by the acquirer through its majority interest in the seller. In contrast, if the acquirer does not, directly or indirectly, own more than 50 percent of the seller after the acquisition, the acquisition has the same potential for making the sale proceeds available to the common parent as when funds are transferred in exchange for newly-issued stock that is a minority interest. Accordingly, the final and temporary regulations expand the subsidiary stock issuance exception to include acquisitions of existing stock from a majority-owned subsidiary under the same conditions applicable to acquisitions of newly-issued non-hook stock from a majority-owned subsidiary, and refer to the expanded exception as the subsidiary stock acquisition exception. The specific requirements of the subsidiary stock acquisition exception are discussed in Section E.2.a of this Part V.

d. Acquisitions of Stock in Exchange for a Debt Instrument

Comments recommended that the subsidiary stock issuance exception be expanded to cover acquisitions of the stock of a controlled subsidiary described in the general rule (for example, when an expanded group member contributes its note to a majority-owned subsidiary for additional stock), based on the view that a transaction described in the general rule is economically similar to a transaction described in the funding rule and thus should receive similar treatment under § 1.385–3. The Treasury Department and the IRS agree with this recommendation. In general, the funding rule is designed to stop taxpayers from achieving in multiple steps what the general rule prohibits from being accomplished in one step. Accordingly, the final and temporary regulations provide that an acquisition of expanded group stock (both existing stock and newly issued stock) from a majority-controlled subsidiary in exchange for the acquirer's note qualifies for the exception on the same terms as a funded acquisition.

4. Acquisitions of Expanded Group Assets Pursuant to a Reorganization

Comments also asserted that the transactions described in the third prongs of the general rule and funding rule are not economically similar to a distribution and therefore should not be subject to proposed § 1.385–3. The preamble to the proposed regulations stated that the third prongs of the general rule and funding rule were included because the issuance of a debt instrument in an internal asset reorganization is similar in many respects to the issuance of a debt instrument to make a distribution or to acquire expanded group stock. For the same reasons described in the preamble to the proposed regulations, the Treasury Department and the IRS continue to view the transfer of ''other property'' in certain internal asset reorganizations as having an economic effect that is similar to a distribution or an internal stock acquisition. As discussed in Section C.3.a of this Part V, a distribution with respect to stock generally is a transfer of value from a corporation to its shareholder in its capacity as such and therefore other than in a value-for-value exchange. A corporation obtains a similar result when, as part of an acquisitive asset reorganization, the corporation (acquirer) issues a debt instrument or transfers other property in exchange for the assets of a highly-related affiliate (target), which in turn, distributes the debt instrument or other property to the common shareholder with respect to its target stock. In such a transaction, the combined pre-acquisition capital of the acquirer and the target is decreased to the extent of the value of the non-stock consideration received by the common shareholder in exchange for its target stock. Accordingly, similar to a distribution with respect to stock, the transaction effects a distribution of value from the combined entity to the common shareholder.

Congress acknowledged that an asset reorganization between highly-related parties can have the effect of distributing value to a common shareholder when it provided in section 356(a)(2) that ''other property'' received by the common shareholder in exchange for its target stock generally is treated as a dividend to the extent of earnings and profits. The premise of section 356(a)(2) is that, when a shareholder exchanges its stock in one controlled corporation for property of equal value from another controlled corporation, the property represents an extraction of value from the combined entity consisting of the two controlled corporations to the common shareholder. For the same reason, the Treasury Department and the IRS have determined that an internal asset reorganization in which a member of the expanded group receives property described in section 356 has an economic effect that is similar to a distribution. Thus, the final and temporary regulations continue to include internal asset reorganizations within the third prongs of the general rule and funding rule.

Other comments recommended the withdrawal of the third prongs of the general rule and funding rule based on an asserted inconsistency with the ''boot-within-gain'' rule in section 356(a)(2). Under section 356(a)(1), an exchanging shareholder is required to recognize gain equal to the lesser of the gain realized in the exchange or the amount of money or other property received by the shareholder. If the exchange has the effect of a distribution of a dividend, then section 356(a)(2) provides that all or part of the gain recognized by the exchanging shareholder is treated as a dividend to the extent of the shareholder's ratable share of the corporation's earnings and profits. Under the ''boot-within-gain'' rule, dividend treatment under section 356(a)(2) is limited by the gain in the shareholder's stock in the transferor corporation. Comments asserted that, by converting a debt instrument that would constitute other property into stock, the third prong of the general rule effectively achieves a result that the Treasury Department and the IRS could not otherwise accomplish under section 356(a)(2) because payments of interest and principal made on the recharacterized debt instrument generally would be characterized as dividend income to the extent of the earnings and profits of the issuing corporation, without regard to the gain in the shareholder's stock in the transferor corporation. Accordingly, comments recommended that the Treasury Department and the IRS withdraw the third prongs of the general rule and funding rule. Alternatively, comments recommended that the final and temporary regulations include a coordination rule that would effectively preserve the effect of section 356(a)(2), without specifying how this rule would operate.

The Treasury Department and the IRS decline to adopt this recommendation. Section 385 provides specific authority to treat certain interests in a corporation as stock, and this express grant of authority extends to the treatment of such interests as stock for all purposes of the Code. The Treasury Department and the IRS have exercised this grant of authority to treat a debt instrument as stock when the debt instrument does not finance new investment in the operations of the issuer. In addition, as discussed in this Part V, whether new investment has been financed does not depend on whether the amount transferred to the controlling shareholder (or person related thereto) is treated as a dividend, return of basis, or gain.

5. Acquisitions of Expanded Group Assets Not Pursuant to a Reorganization

One comment questioned why the regulations apply to an acquisition of expanded group stock or an acquisition of business assets pursuant to an internal asset reorganization, but not to an acquisition of business assets not in connection with a reorganization, including through the acquisition of a disregarded entity. The Treasury Department and the IRS have determined that an acquisition of business assets in a non-reorganization transaction is not sufficiently similar to a distribution to be covered by § 1.385–3. In a non-reorganization transaction, the selling member continues as an entity separate and distinct from the acquiring member following the transaction, and the common shareholder receives no property with respect to its stock in either entity. As a result, both on a standalone and combined basis, the pre-equity value of the entities does not decrease as a result of the transaction. Moreover, the property transferred by the acquiring member to the selling member is used to acquire assets that augment the business of the acquiring member. This is in contrast to property transferred by an acquiring member to acquire newly-issued non-hook stock in exchange for a minority interest in an affiliate the ownership of which generally lacks meaningful non-tax consequences.

One comment recommended that the final and temporary regulations clarify the treatment of the use of a note to acquire stock in a disregarded LLC. Because equity in a disregarded LLC is disregarded, the final and temporary regulations are not revised to address this comment.

6. Acquisitions of Existing Expanded Group Stock or Expanded Group Assets Pursuant to a Reorganization That Do Not Result in Dividend Income

Comments recommended an exemption for an acquisition subject to section 304 or 356(a)(2) to the extent the transaction results in sale or exchange treatment (for example, due to insufficient earnings and profits).

The Treasury Department and the IRS decline to adopt this recommendation. Under § 1.385–3, a purported debt instrument that does not finance new investment in the issuer is not respected as debt. An issuance of a purported debt instrument does not finance new investment of the issuer to the extent a transaction has the effect of distributing the proceeds of the debt instrument to another member of the expanded group. The amount of dividend or gain recognized by an expanded group member in the transaction in which the instrument is issued or in a transaction that has the effect of transferring the proceeds is not relevant for determining whether the debt instrument financed new investment or, instead, merely introduced debt without having meaningful non-tax effects.

D. Funding Rule

1. Lack of Identity Between the Lender and a Recipient of the Proceeds of a Distribution or Acquisition

The funding rule under the proposed regulations treated as stock a debt instrument that was issued by a corporation (funded member) to another member of the funded member's expanded group in exchange for property with a principal purpose of funding a distribution or acquisition described in the three prongs of the funding rule. The proposed regulations included a non-rebuttable presumption that a principal purpose to fund such an acquisition or distribution existed if the expanded group debt instrument was issued by the funded member during the period beginning 36 months before the funded member made the distribution or acquisition and ending 36 months after the distribution or acquisition.

Comments recommended several limitations on the funding rule, including limiting the funding rule to a rule that addresses only circular transactions that are economically equivalent to transactions subject to the general rule by requiring that the lender be the recipient of the proceeds of the distribution or acquisition. Thus, for example, a comment indicated that, if FP owned USP and FS, the funding rule should apply when USP borrows $100x from FP and distributes $100x to FP, but should not apply when USP borrows $100x from FS and distributes $100x to FP, unless FP also transferred funds to FS.

In the context of commonly-controlled corporations, the Treasury Department and the IRS have determined that there is not a sufficient economic difference to justify different treatment when the proceeds of a loan from one expanded group member are used to fund a distribution to, or acquisition from, that same member versus another expanded group member. First, and most significantly, in the example described in the preceding paragraph, a borrowing from FS and a distribution to FP has the same economic effect with respect to USP as a distribution by USP of a debt instrument to FP. In both cases, debt is added to USP without a commensurate increase in the amount of capital invested in USP's operations.

Moreover, in the context of commonly-controlled corporations, there is insufficient non-tax significance to the lack of identity between the lender and the recipient of the proceeds of the distribution or acquisition to justify treating the two series of transactions differently. In this context, there can be considerable flexibility regarding the expanded group member used to lend funds to another member, since the lending member may itself be funded by other members of the group. Furthermore, an expanded group member that receives the proceeds of a distribution or economically similar transaction can transfer those proceeds to other entities in the group, for example, through distributions to a common controlling parent, which in turn can re-transfer the funds. Because of the ability to transfer funds around a multinational group, the choice of which entity will be a counterparty to a borrowing or transaction that is economically similar to a distribution may not have meaningful non-tax significance. Comments also suggested that this flexibility could be addressed through a second set of rules that would consider the extent to which the lender was itself funded by another member of the group and the extent to which the proceeds of a distribution or other economically similar transaction were transferred to the lender.

After considering the comments, the Treasury Department and the IRS decline to adopt these recommendations. The burden that would be required to essentially replicate the per se funding rule with respect to both the lender and the recipient of the proceeds of the funded distribution or acquisition in order to

prevent such transactions from being used to avoid the purposes of the final and temporary regulations would far outweigh any policy justification for treating the two types of transactions differently, which, as explained in this Section D.1 of this Part V, is not compelling.

2. Per Se Application of the Funding Rule

a. Overview

Several comments noted that the per se funding rule in the proposed regulations would be overinclusive in certain fact patterns and treat a purported debt instrument as equity even though the taxpayer could demonstrate as a factual matter that the funding was used in the taxpayer's business rather than to make a distribution or acquisition. These comments recommended that the regulations adopt a tracing approach to connect a funding with a distribution or acquisition by the funded member, including by actual tracing or by presumptions and other factors. Multiple comments suggested eliminating the per se funding rule entirely. Other comments recommended that the per se funding rule be altered or shortened. The range of suggestions included:

- Eliminate the per se funding rule and rely solely on a principal purpose test;
- Limit the per se funding rule to abusive transactions, such as those that lack a business purpose, or to expressly enumerated transactions;
- Replace the per se funding rule with a ''but-for'' standard;
- Replace the per se funding rule with a rule that would trace loan proceeds;
- Replace the per se funding rule with a facts-and-circumstances test subject to a rebuttable presumption (such as that contained in the disguised sale rules in § 1.707–3(c)) or series of rebuttable presumptions; and
- Retain the 36-month periods, but apply a rebuttable presumption in the first and last 12 months.

In general, these comments suggested that the final and temporary regulations adopt a more subjective rule that would take into account particular facts and circumstances and allow taxpayers to demonstrate that an alternative source of cash or other property funded the distribution or acquisition and that the borrowed funds were put to a different use, rather than an objective rule based solely on whether a related-party borrowing and a distribution or acquisition both occur during a certain time interval.

After considering these comments, the Treasury Department and the IRS have determined that it is appropriate to retain the per se funding rule to determine whether a debt instrument has funded a distribution or acquisition that occurs during the 36-month period before and after the funding transaction (the per se period). The final and temporary regulations reorganize the funding rule as (i) a per se funding rule addressing covered debt instruments issued by a funded member during the per se period; and (ii) a second rule that addresses a covered debt instrument issued by a funded member outside of the per se period with a principal purpose of funding a distribution or acquisition, determined based on all the facts and circumstances (principal purpose test). This reorganization is intended to clarify the purpose of the per se test and is not intended to be a substantive change.

Section D.2.b of this Part V explains why the Treasury Department and the IRS have determined that retaining the per se funding rule is justified. Section D.2.c of this Part V discusses the stacking rules that are necessitated by any approach based on fungibility. Section D.2.d of this Part V responds to comments regarding the length of the per se period. Section D.2.e of this Part V describes the principal purpose test.

b. Retention of Per Se Funding Rule

The general rule in § 1.385–3(b)(2) addresses a distribution or acquisition in which a purported debt instrument is issued in the distribution or acquisition itself, for example, a distribution of indebtedness. In contrast, the funding rule in § 1.385–3(b)(3) addresses multi-step transactions in which a related-party debt instrument is issued for cash or property to fund a distribution or acquisition. The proposed regulations provided a principal purpose test to determine whether the indebtedness funded the distribution or acquisition in a multi-step transaction. However, the preamble to the proposed regulations also observed that money is fungible and that it is difficult for the IRS to establish the principal purposes of internal transactions. In this regard, the preamble cited the presence of intervening events that can occur between the steps, for example, other sources of cash such as free cash flow generated from operations, which could obscure the connection between the borrowing and the distribution or acquisition. For this reason, the proposed regulations included the per se funding rule based on a 36-month forward-and-back testing period.

The Treasury Department and the IRS continue to be of the view that, because money is fungible, an objective rule is an appropriate way to attribute a distribution or acquisition, in whole or in part, to a funding. The preamble to the proposed regulations emphasized the evidentiary difficulties that the IRS would face if the regulations relied exclusively on a purpose-based rule. Some comments suggested that a rebuttable presumption (such as the one contained in § 1.707–3(c)) that would require a taxpayer to overcome a presumption arising upon specified events by clearly establishing facts and circumstances to the contrary could address these difficulties.

After considering these comments, the Treasury Department and the IRS have determined that, even with the benefit of a rebuttable presumption, a purpose-based rule that required tracing sources and uses of funds would present significant administrative challenges for the IRS. In particular, taxpayers potentially could purport to rebut the presumption by creating self-serving contemporaneous documentation that ''earmarks'' the proceeds of related-party borrowings for particular purposes and attributes distributions and acquisitions to other sources of funds.

More fundamentally, however, because money is fungible, a taxpayer's particular purpose for a particular borrowing is largely meaningless. This is particularly true with respect to a large, active operating company (or group of operating companies that file a consolidated return) with multiple sources and uses of funds. Because of the fungibility of money, using loan proceeds for one purpose frees up funds from another source for another use. For instance, funding a distribution or acquisition with working capital could necessitate borrowing from a related party in order to replenish depleted working capital. For this reason, the Treasury Department and the IRS view tracing as having limited economic significance in the context of transactions involving indebtedness.

The concept of using mechanical rules to account for the fungibility of money from debt is well established: Several provisions of the Code and regulations relating to allocation of interest expense are premised on the idea that, with certain narrow exceptions, money is fungible and therefore debt funding cannot be directly traced to particular activities or assets. *See* § 1.861–9T(a) (''The method of allocation and apportionment for interest . . . is based on the approach that, in general, money is fungible and that interest expense is attributable to

all activities and property regardless of any specific purpose for incurring an obligation on which interest is paid''); *see also* section 864(e)(2) (requiring allocation and apportionment of interest expense on the basis of assets); § 1.882–5 (allocation of interest expense based on assets for purposes of determining effectively connected income); section 263A(f)(2)(A)(ii) (allocating interest that is not directly attributable to production expenditures under avoided cost principles). These provisions are based on the assumption that, due to the fungibility of money, a taxpayer's earmarking of the proceeds of a borrowing for any particular purpose is inconsequential for U.S. tax purposes.

Accordingly, the Treasury Department and the IRS have determined that it is necessary and appropriate to treat a covered debt instrument as financing a distribution or acquisition, regardless of whether the issuer associates the proceeds with a particular distribution or acquisition or with another use. As a result, the final and temporary regulations do not adopt recommendations to rely exclusively on a purpose-based tracing rule, including one based on a rebuttable presumption in favor of the IRS, an anti-abuse rule, or other multi-factor approach. In addition to the previously discussed evidentiary and economic reasons, a tracing, burden-shifting, or multi-factor approach would create significant uncertainty for both the IRS and taxpayers in ascertaining whether a borrowing should be considered to have funded a distribution or acquisition.

In adopting a per se funding rule based on the fungibility of money, the Treasury Department and the IRS recognize that all outstanding debt, regardless of how much time has transpired between the issuance and the distribution or acquisition, could be treated as funding a distribution or acquisition. This is the case for other fungibility-based rules under the Code and regulations, which typically apply to all outstanding debt and do not depend on when the debt was issued. *See, e.g.,* sections 263A(f)(2)(A)(ii) and 864(e)(2). Nevertheless, the Treasury Department and the IRS have determined that it is appropriate to limit the application of the per se funding rule to testing distributions or acquisitions made within a specified period to the debt issuance. Using a fixed per se period that is linked to the date of the debt issuance should address the majority of cases where purported debt is used to create federal tax benefits without having meaningful non-tax effects, since most such transactions seek to achieve these benefits immediately upon debt issuance. Such a rule also provides certainty so that taxpayers can determine the appropriate characterization of the debt instrument within a fixed period after it is issued, and need not redetermine their liability for prior taxable years. *See also* § 1.385–3(d)(1)(ii) (treating a covered debt instrument subject to the funding rule due to a later distribution as a deemed exchange on the date of the distribution and not the issuance). Furthermore, the retention of the principal purpose test, described in Section D.2.e of this Part V, ensures that the rules appropriately apply to transactions occurring outside the per se period that intentionally seek to circumvent the per se funding rule.

A comment also suggested that the final and temporary regulations adopt a ''but-for'' standard under which a distribution or acquisition would be treated as funded by a purported debt instrument only if the distribution or acquisition would not have been made ''but for'' a funding. This comment cited proposed § 1.956–4(c)(3) (REG–155164–09), which used a similar formulation to address whether a distribution by a foreign partnership to a related U.S. partner is connected to a funding of that partnership by a related CFC for purposes of section 956. Specifically, proposed § 1.956–4(c)(3) contains a special rule for determining a related partner's share of a foreign partnership's obligation when the foreign partnership distributes the proceeds of the obligation to the related partner and the partnership would not have made the distribution ''but for'' a funding of the partnership through an obligation held or treated as held by a CFC.

The Treasury Department and the IRS view a ''but-for'' standard in this context as similar in effect to a subjective tracing approach, in that a ''but-for'' test would require an inquiry into what a taxpayer would have chosen to do in the absence of the funding. Therefore, a ''but-for'' test contains the same shortcomings as a subjective tracing rule and does not adequately account for the fungibility of money. Alternatively, a ''but-for'' test could, in certain circumstances, function like a taxpayer-favorable stacking rule that would attribute a distribution or acquisition to a related-party borrowing only if there were no other sources of funding for the transaction. Significantly, the ''but-for'' approach in the proposed section 956 regulations operates only to increase the amount that otherwise would be allocated to a U.S. partner under the general aggregate approach of the regulations. That is, in the context of the proposed regulations under section 956, the ''but-for'' test is an anti-abuse backstop to a general rule that otherwise takes into account the fungibility of money and allocates the liabilities of a partnership pro rata based on the partner's interests in the partnership. Because the ''but-for'' test in the proposed section 956 regulations functions only as a backstop to a general rule that is based on the fungibility of money, the Treasury Department and the IRS considered the taxpayer-favorable stacking assumption implicit in the ''but-for'' test to be acceptable in that context. In contrast, if the final and temporary regulations under section 385 were to adopt a ''but-for'' test as the operative rule in lieu of a per se funding rule, a taxpayer could avoid the application of § 1.385–3 entirely by demonstrating the presence of other sources of cash, notwithstanding that the cash obtained through a related-party borrowing facilitated a distribution or acquisition by allowing those other sources of cash to support other uses.

c. Stacking Rules

Using a fungibility approach to attribute distributions and acquisitions to covered debt instruments necessitates stacking rules for attributing uses of funds to sources of funds. Some comments asserted that the per se funding rule under the proposed regulations represents an anti-taxpayer stacking provision. One comment suggested that, to the extent a per se funding rule is appropriate due to the fungibility of money, the per se funding rule necessarily should treat a distribution or acquisition as funded pro rata by all sources of free cash flow. For example, if an entity generated $500x of free cash flow from operating its business and borrowed $100x from another member of the entity's expanded group, and, during the per se period the entity made a subsequent distribution of $100x, the comment suggested that only one-sixth of the $100x should be treated as funded by the borrowing. Other comments noted that the proposed regulations included taxpayer-unfavorable stacking because they always treated a distribution or acquisition as funded by a related-party borrowing without regard to whether there were new contributions to capital or third-party borrowing during the per se period.

The final and temporary regulations adopt several new and expanded exceptions described in Sections E, F, and G of this Part V. These exceptions represent taxpayer-favorable stacking rules that, in the aggregate, significantly reduce the extent to which distributions and acquisitions are attributed to

related-party borrowings. This exception-based approach to stacking is significantly more administrable than a pro rata approach, which would necessitate a constant recalculation of the relative amounts of funding from various sources.

In response to comments suggesting that distributions and acquisitions should be attributed first to free cash flow, or to the cumulative earnings and profits of a member, before being attributed to related-party borrowings, the final and temporary regulations treat distributions and acquisitions as funded first from earnings and profits accumulated during a corporation's membership in an expanded group. *See* Section E.3.a of this Part V (which includes a discussion of why earnings and profits are the better measure for tax purposes). In response to comments suggesting that distributions and acquisitions should be attributed to new contributed capital received by a member before its related-party borrowings, the final and temporary regulations treat distributions and acquisitions as funded next from capital contributions received from other members of the expanded group within the per se period but before the end of the taxable year of the distribution or acquisition. *See* Section E.3.b of this Part V. In response to comments suggesting that certain borrowings should not be treated as funding distributions and acquisitions, the final and temporary regulations include a broad exception from the funding rule for short-term debt instruments, which effectively are treated as financing the short-term liquidity needs of the issuer rather than distributions and acquisitions. *See* Section D.8.c of this Part V. Accordingly, after taking into account the various exceptions provided, the final and temporary regulations generally (i) exclude certain short-term debt instruments from funding any distributions or acquisitions, (ii) exclude certain distributions and acquisitions from being funded by any type of debt instrument, (iii) treat any remaining distributions and acquisitions as funded by new equity capital, and (iv) only then treat any remaining distributions and acquisitions as funded by any remaining related party borrowings.

Some comments suggested that the final and temporary regulations should treat any remaining distributions and acquisitions as funded first by unrelated-party debt, rather than funded first by covered debt instruments. The Treasury Department and the IRS decline to adopt this recommendation. The Treasury Department and the IRS have determined that it is appropriate to treat any remaining distributions and acquisitions as funded first by related-party debt, because the nature of unrelated-party lending imposes a real cost to the borrower through interest expense and other costs. This real cost from unrelated-party borrowing can be justified only if the issuer will use the borrowed funds to achieve a return that is greater than the interest expense and other costs from the unrelated-party borrowing. On the other hand, a borrowing among highly-related parties, such as between members of an expanded group, has no net cost to the borrower and the lender. Because the related-party borrower and lender have a complete (or near complete) identity of interests, the related-party borrowing imposes no similar economic cost on the borrower. Indeed, the pre-tax return with respect to a related-party borrowing can be zero, or even less than zero, and the borrowing can still achieve a positive after-tax return when the related party lender's interest income is taxed at a lower effective tax rate than the related-party borrower's effective tax benefit from interest deductions. This is true whether the related-party lender is a U.S. corporation or a foreign corporation. In addition to interest and other costs, an unrelated-party lender may impose restrictive covenants or other legal and contractual restrictions that affect the borrower's business, including restrictions on the issuer's ability to distribute the proceeds from the unrelated-party debt that a related-party lender may not impose. For these reasons, it is appropriate to treat any remaining distributions and acquisitions as funded first by related-party debt, before treating those remaining distributions and acquisitions as funded by unrelated-party debt.

d. Retention of the 36-Month Testing Periods

Several comments suggested that, if the regulations continue to take a per se approach, the testing period should be significantly shortened. For example, comments recommended testing periods of 24 months, 18 months, 12 months, or 6 months. After consideration of these comments, the Treasury Department and the IRS have determined that it continues to be appropriate to use 36-month testing periods.

As explained in Section D.2.b of this Part V, the Treasury Department and the IRS have determined that, because money is fungible, an objective set of rules using a fixed time period and various stacking rules is the most administrable approach to determine whether a debt instrument funded a distribution or acquisition. The Treasury Department and the IRS have considered several factors in determining that the 36-month testing periods in the proposed regulations should be retained, rather than adopting one of the recommendations for a shorter period.

Many of the comments requesting a shorter testing period were concerned primarily about compliance burdens that would be imposed if the per se funding rule applied to ordinary course transactions that occur with a high frequency. These concerns are mitigated by the addition and expansion of numerous exceptions described in Sections D.8, E, F, and G of this Part V, which substantially narrow the scope of the per se funding rule in the final and temporary regulations. In particular, as discussed in Section D.8 of this Part V, short-term debt instruments that finance short-term liquidity needs that arise frequently in the ordinary course of business are excluded from the scope of the funding rule in the final and temporary regulations. This change substantially reduces the compliance burden of applying the per se funding rule during the 36-month testing periods. In addition, as discussed in Section E.3 of this Part V, the final and temporary regulations only take into account distributions and acquisitions that exceed increases to the issuer's equity while the issuer was a member of the same expanded group from: (i) Earnings and profits accumulated after the proposed regulations were published and, (ii) certain contributions to capital that occurred during the 36-month period preceding the distribution or acquisition or during the taxable year in which the distribution or acquisition occurred. Thus, the funding rule in the final and temporary regulations is focused on non-ordinary course covered debt instruments and extraordinary distributions and acquisitions.

Taking into account the implications of the narrower scope of § 1.385–3 with respect to the issues raised by comments regarding the 36-month testing periods, the Treasury Department and the IRS have determined that it is appropriate to continue to attribute distributions and acquisitions that exceed the relevant earnings and profits and capital contributions to non-ordinary course related-party borrowings that were made 36 months before or after the distribution or acquisition and that remain outstanding at the time of the distribution or acquisition. The Treasury Department and the IRS have determined that 36 months is a reasonable testing period that appropriately balances the need for an

administrable rule and the fact that transactions involving indebtedness are inextricably linked due to the fungibility of money. Furthermore, the Treasury Department and the IRS are concerned that, if a shorter testing period was used, such as a 24-month forward-and-backward testing period, taxpayers could find it worthwhile to engage in funding transactions by waiting 24 months after the issuance of debt before conducting the second transaction, and that the principal purpose test described in Section D.2.e of this Part V, which is more difficult for the IRS to administer, would not be a sufficient deterrent in this circumstance.

The use of a 36-month testing period for this purpose is consistent with, and in some cases shorter than, other testing periods that the IRS has experience administering in which facts and circumstances potentially observable by the IRS provide an inadequate basis to establish the relationship between two events or transactions. *See, e.g.,* section 172(b)(1)(D) and (g)(2) (treating certain interest deductions from indebtedness in the year of a corporate equity reduction transaction (CERT) and the following two tax years as per se attributable to the CERT, in lieu of tracing interest to specific transactions); section 302(c)(2)(A)(ii) (10-year period for determining whether shareholder has terminated their interest for purposes of applying section 302(a) to a redemption); section 2035(a) (treating gifts made three years before the decedent's death as included in the decedent's gross estate); § 1.1001–3(f)(3) (disregarding modifications occurring more than five-years apart when determining if multiple modifications are significant); *see also* § 1.7874–8T(g)(4) (36-month look-back period for determining when to account for prior acquisitions).

Although some comments asserted that the per se funding rule should be modeled on the two-year presumption rule in § 1.707–3(c), the Treasury Department and the IRS have determined that the disguised sale rules under § 1.707–3(c) address a different policy in the context of transactions between a partner and partnership (regardless of the level of ownership), whereas the final and temporary regulations address transactions between highly-related corporations. In this case, the Treasury Department and the IRS have determined that a 36-month testing period is more appropriate, taking into account in particular the tax consequences associated with corporate indebtedness and the high degree of relatedness of the parties.

For these reasons, the final and temporary regulations retain a 36-month testing period as the per se period.

e. Principal Purpose Test

Because of the mechanical nature of the per se funding rule, the Treasury Department and the IRS are concerned that taxpayers may seek to intentionally circumvent the rule to achieve economically similar results even though the funding occurs outside of the per se period. Therefore, the final and temporary regulations provide that a covered debt instrument that is not issued during the per se period is treated as funding a distribution or acquisition to the extent it is issued by a funded member with a principal purpose of funding the distribution or acquisition. This determination is made based on all of the relevant facts and circumstances.

3. Predecessors and Successors

Under the proposed regulations, references to a funded member included a reference to any predecessor or successor of such member. The proposed regulations defined the terms predecessor and successor to "include" certain persons, without specifically stating whether other persons could be treated as predecessors or successors in certain instances. Comments requested additional clarity concerning the scope of the definition of predecessor and successor through an exclusive enumeration of entities that may be considered predecessors or successors.

In response to comments, the final and temporary regulations replace "include" with "means" in the definitions of predecessor and successor, thereby limiting the transactions that create predecessor or successor status to those explicitly provided.

Comments recommended that a funded member be treated as making a distribution or acquisition that is made by a predecessor or successor only to the extent that the transaction creating the predecessor-successor relationship occurs during the per se period determined with respect to the distribution or acquisition. For example, assume USS1 makes a distribution of $10x to an expanded group member in year 1. USS2, also an expanded group member that is not consolidated with USS1, borrows $10x from an expanded group member in year 2. In year 10, USS1 merges into USS2 in an asset reorganization. Comments suggested that the proposed regulations arguably would treat USS2's year 2 note as stock because USS1 is a predecessor to USS2, and the year 2 funding occurred within the 72-month period determined with respect to the year 1 distribution. One comment suggested that the predecessor or successor rule only apply in this context if there was a principal purpose to avoid the regulations.

In response to comments, the final and temporary regulations provide that, for purposes of the per se funding rule, a covered debt instrument that is otherwise issued by a funded member within the per se period of a distribution or acquisition made by a predecessor or successor is not treated as issued during the per se period with respect to the distribution or acquisition unless both (i) the covered debt instrument is issued by the funded member during the period beginning 36 months before the date of the transaction in which the predecessor or successor becomes a predecessor or successor and ending 36 months after the date of the transaction, and (ii) the distribution or acquisition is made by the predecessor or successor during the same 72-month period. If the funding and the distribution or acquisition do not both occur during the 72-month period with respect to the transaction that created the predecessor-successor relationship, the covered debt instrument is not treated as funding the distribution or acquisition under the per se funding rule. In that case, however, the principal purpose test may still apply to treat the covered debt instrument as funding the distribution or acquisition.

Comments questioned the application of the predecessor and successor rules when a funded member and either its predecessor or successor are members of different expanded groups. One comment recommended that a funded member be treated as making a distribution or acquisition made by a predecessor or successor only to the extent that the distribution or acquisition was to a member of the same expanded group as the funded member. Similarly, comments requested that the regulations clarify that a corporation ceases to be a predecessor or successor to a funded member when the corporation and the funded member cease to be members of the same expanded group.

In response to comments, the final and temporary regulations provide that the distributing corporation and controlled corporation in a distribution that qualifies under section 355 cease to have a predecessor and successor relationship as of the date that the corporations cease to be members of the same expanded group. Similarly, a seller in a transaction to which the subsidiary stock acquisition exception

applies ceases to be a successor of the acquirer as of the date that the corporations cease to be members of the same expanded group. *See* Section E.2.a of this Part V for the new terminology. However, any distribution or acquisition made by a predecessor or successor of a corporation up to the date that the predecessor or successor relationship is terminated may be treated as funded by a debt instrument issued by the corporation after that date.

Comments requested that the terms predecessor and successor not include the distributing or controlled corporation in a divisive reorganization described in section 368(a)(1)(D) undertaken pursuant to a distribution under section 355, regardless of whether distributing and controlled remain members of the same expanded group. The comments asserted that the requirements of section 355 provide sufficient safeguards to protect the concerns underlying the proposed regulations (specifically, that a taxpayer would undertake a divisive reorganization with a principal purpose of avoiding the regulations), such that it is not necessary to treat the distributing and controlled corporations as predecessors and successors. For example, the active trade or business requirement and business purpose requirement of section 355 limit the ability for taxpayers to engage in tax-motivated transactions, although comments did acknowledge that these restrictions could be overcome in some circumstances.

The final and temporary regulations do not adopt this recommendation because the Treasury Department and the IRS continue to be concerned about the ability of taxpayers to issue indebtedness that does not fund new investment in connection with a reorganization that qualifies under sections 355 and 368(a)(1)(D). As discussed in Section D.6 of this Part V, the Treasury Department and the IRS have determined that distributions that qualify for nonrecognition under section 355, whether or not preceded by a reorganization, should not be subject to the funding rule because the requirements of that provision—in particular, the active trade or business requirement and the device limitation—indicate that the stock of a controlled corporation is likely not fungible property. However, these safeguards do not adequately limit the amount of liquid assets that the distributing corporation can transfer to the controlled corporation pursuant to the plan of reorganization or before the spin is contemplated in the case of straight section 355 distributions. Moreover, section 355 includes no prohibition against a post-spin distribution by the controlled corporation to its common shareholder with the distributing corporation. As a result, the proceeds of a borrowing by the distributing corporation can easily be transferred to a controlled corporation, which proceeds can then be distributed by the controlled corporation or used in a transaction with similar economic effect.

One comment suggested that the predecessor and successor rules limit the extent to which multiple corporations may be treated as successors with respect to the same debt instrument issued by a funded member. The comment proposed that, in the event that a funded member has multiple successors (for example, by reason of multiple transfers of property to which the subsidiary stock acquisition exception described in Section E.2.a of this Part V applies), the successors, collectively, should only be successors up to the aggregate amount of debt instruments of the funded member outstanding at the time of the transactions that created the successor relationships. The comment further suggested that, if the recommendation were accepted, an ordering rule may be appropriate to treat multiple successors as successors to the funded member based on a ''first in time'' principle.

The final and temporary regulations do not adopt the recommendation, because the Treasury Department and the IRS have determined that limiting the extent to which one or more corporations are successors to a funded member based on the member's outstanding related-party debt is inconsistent with the funding rule outside the predecessor-successor context. As discussed in Section D.2 of this Part V, under either test of the funding rule—the per se funding rule or the principal purpose test—a covered debt instrument can be treated as funding a distribution or acquisition notwithstanding that the instrument is issued subsequent to the distribution or acquisition. In contrast, limiting successor status to the funded member's debt outstanding at the time of the transaction that creates the successor relationship would preclude a later issued covered debt instrument from being treated as funding a distribution or acquisition that precedes it. For instance, if a funded member, at a time that it has no covered debt instrument outstanding, transfers property to a subsidiary in a transaction described in the subsidiary stock acquisition exception, under the proposed limitation the subsidiary would not be a successor to the funded member, and thus any distribution or acquisition by the subsidiary would not be treated as funding a covered debt instrument of the funded member issued thereafter but within the per se period. On the other hand, if, instead of transferring property to the subsidiary, the funded member made a distribution or acquisition itself, a subsequent issuance by the funded member of a covered debt instrument within the per se period would be treated as funding the distribution or acquisition under the per se funding rule. The Treasury Department and the IRS have determined that a distribution or acquisition by a predecessor or successor of a funded member should not be treated more favorably than a distribution or acquisition by the funded member itself. Furthermore, because the final and temporary regulations do not adopt the recommendation, no ordering rule is necessary for purposes of determining predecessor or successor status in the context of multiple predecessors or successors.

Comments also requested clarification regarding the interaction of the predecessor and successor rules and the multiple instrument rule, which provides that when two or more covered debt instruments may be treated as stock under the per se funding rule, the covered debt instruments are tested based on the order in which they were issued, with the earliest issued covered debt instrument tested first. Specifically, comments raised the concern that, under one interpretation of the proposed regulations, a distribution or acquisition that is treated as funded by a covered debt instrument of a covered member could be re-tested and treated as funded by an earlier-in-time debt instrument of another member if and when the first covered member acquires the other member in a reorganization.

To address the foregoing concerns, the final and temporary regulations provide that, except as provided in § 1.385–3(d)(2) (regarding covered debt instruments treated as stock that leave the expanded group), to the extent a distribution or acquisition is treated as funded by a covered debt instrument, the distribution or acquisition may not be treated as funded by another covered debt instrument and the covered debt instrument may not be treated as funding another distribution or acquisition. This non-duplication rule clarifies that a distribution or acquisition that is treated as funded by a covered debt instrument that is treated as stock by reason of § 1.385–3(b) is not re-tested under the multiple instrument

rule because of the existence of an earlier-in-time covered debt instrument of the corporation's predecessor or successor, when the transaction that created the predecessor-successor relationship occurs after the first-mentioned covered debt instrument was already treated as stock.

4. Straddling Expanded Groups

Multiple comments recommended that the final and temporary regulations provide an exception for when a funded member is funded within the per se period with respect to a distribution or acquisition, but the funding and the distribution occur in different expanded groups. For example, P1 and S are members of the P1 expanded group. P1 owns all the stock of S, which distributes $100x to P1 in year 1. In year 2, P1 sells all the stock of S to unrelated P2, a member of the P2 expanded group. In year 3, P2 loans $100x to S. The comments asserted that the borrowing and distribution by S do not implicate the policy concerns addressed by the funding rule because of the intervening change in its expanded group. Moreover, comments asserted that it would be difficult for P2 to determine the treatment of its loan to S as debt or equity without substantial due diligence with respect to the distribution history of S.

The final and temporary regulations adopt the recommendation by providing an exception to the per se funding rule, which generally applies when (i) a covered member makes a distribution or acquisition that occurs before the covered member is funded; (ii) the distribution or acquisition occurs when the covered member's expanded group parent is different than the expanded group parent when the covered member is funded; and (iii) the covered member and the counterparty to the distribution or acquisition (the ''recipient member'') are not members of the same expanded group on the date the covered member is funded. For this purpose, a recipient member includes a predecessor or successor or one or more other entities that, in the aggregate, acquire substantially all of the property of the recipient member. If the requirements of this exception are satisfied, the covered debt instrument is not treated as issued within the per se period with respect to the earlier distribution. However, the principal purpose test may still apply so that, if the debt instrument is actually issued with a principal purpose of funding the distribution or acquisition, the debt instrument would be treated as stock under the funding rule.

Comments also addressed a similar scenario in which the covered member and the recipient member are members of one expanded group (prior expanded group) at the time of the distribution or acquisition and both parties join a different expanded group (subsequent expanded group) before the covered member is funded by either the recipient member or another member of the subsequent expanded group. Some of the comments recommended that the funding rule, or at least the per se rule, not apply in this situation because the borrowing from the subsequent expanded group cannot have funded the distribution or acquisition that occurred in the prior expanded group. Comments also recommended a similar exception to the funding rule when the steps are reversed, such that the covered member issues a covered debt instrument to another member of the prior expanded group, and the distribution or acquisition occurs in the subsequent expanded group that includes both the funding and funded members.

The final and temporary regulations do not adopt these recommendations. The Treasury Department and IRS expect that any burden on taxpayers to determine the history of loans originated in the prior expanded group would not be as significant as any burden to determine the distribution and acquisition history in a prior expanded group (that is, when the distribution or acquisition occurs in the prior expanded group, and the funding occurs in the subsequent expanded group). The Treasury Department and the IRS have determined that, when the distribution or acquisition occurs in the same expanded group that includes the funding and funded members, it is appropriate to apply the per se funding rule to the distribution or acquisition. Finally, the Treasury Department and the IRS are concerned that an exception for this type of transaction could lead to transactions in which taxpayers transfer subsidiaries between different expanded groups to accomplish what they could not accomplish absent such transactions.

5. Transactions Described in More Than One Paragraph

Proposed § 1.385–3(b)(3)(iii) provided that if all or a portion of a distribution or acquisition by a funded member is described in more than one prong of the funding rule, the funded member is treated as engaging in only a single distribution or acquisition for purposes of applying the funding rule. One comment questioned the application of this rule to a payment of boot in a reorganization where both the acquiring corporation and the target corporation in the reorganization have outstanding covered debt instruments.

In response to this comment, § 1.385–3(b)(3)(ii) clarifies that, in the case of an internal asset reorganization, to the extent an acquisition by the transferee corporation is described in the third prong of the funding rule, a distribution or acquisition by the transferor corporation is not also described in the funding rule. Accordingly, in the case of a reorganization in which both the transferor corporation and the transferee corporation have outstanding covered debt instruments, the reorganization is treated as a single transaction and a payment of boot in the reorganization is treated as a single acquisition by the transferee corporation for purposes of the funding rule. *See* Sections E.3.a.iv (regarding the application of reductions to certain internal asset reorganizations) and E.6.b (regarding the general coordination rule applicable to internal asset reorganizations) of this Part V.

6. Certain Nontaxable Distributions

Comments recommended that the funding rule not apply to liquidating distributions described in section 332. Comments further recommended that the final and temporary regulations treat the 80-percent distributee in a section 332 liquidation as a successor to the liquidating corporation. Comments requested, in the alternative, that if a section 332 distribution is treated as a distribution for purposes of the funding rule, the final and temporary regulations should clarify whether any resulting recharacterized instruments are taken into account in determining whether the liquidation satisfies the 80-percent ownership test under section 332.

One comment recommended that, if an expanded group member distributes assets in a section 331 liquidation to a shareholder that assumes a liability of the liquidated corporation, the liquidated corporation should not be treated as making a distribution for purposes of the funding rule to the extent of the assumed liabilities. The comment reasoned that, in substance, the shareholder purchased assets from the liquidating corporation. Consequently, the comment concluded that a distribution should be treated as occurring under these circumstances only to the extent the value of the distributed assets exceeds the amount of liabilities assumed.

In response to the comments, the final and temporary regulations include an exception to the funding rule for a distribution in complete liquidation of a funded member pursuant to a plan of liquidation. This exception does not distinguish between a liquidation that

qualifies under section 332 and a liquidation that occurs under section 331. In the case of a liquidation that qualifies under section 332, the acquiring corporation is treated as a successor to the liquidated corporation for purposes of the funding rule.

Comments also requested an exclusion from the funding rule for distributions of stock under section 355 not preceded by a reorganization described in section 368(a)(1)(D) (a straight 355 distribution). The comment noted that in a straight 355 distribution, in contrast to a distribution of a debt instrument or a distribution of cash, the distribution of a controlled corporation must be motivated by one or more non-U.S. tax business purposes and both the distributing and controlled corporations must own historic, illiquid business assets. Moreover, the comment noted that the distributing corporation in a straight 355 distribution cannot have contributed borrowed funds to the controlled corporation; otherwise, the distribution would also qualify as a reorganization and be subject to a different rule that generally only treated the amount of boot or other property received in a distribution that qualifies under sections 355 and 368(a)(1)(D) as a distribution or acquisition for purposes of § 1.385–3(b).

In response to comments, the final and temporary regulations provide an exception to the funding rule for a straight section 355 distribution. As discussed in Section D.2.a of this Part V, the per se approach is retained by the final and temporary regulations due, in large part, to the fungibility of money and thus the difficulty of tracing the proceeds of a borrowing to a distribution. The Treasury Department and the IRS have concluded that, due to the heightened requirements for qualification under section 355 (for example, device limitation, business purpose requirement, and active trade or business requirement), the stock of a controlled corporation should not be viewed as fungible property. Furthermore, the Treasury Department and the IRS have determined that section 355 distributions should be subject to the same treatment under the final and temporary regulations as section 355 distributions that are preceded by a reorganization under section 368(a)(1)(D), because a distribution of stock described in section 355 has the same economic effect whether or not preceded by a reorganization. In that regard, the final and temporary regulations provide that a distributing corporation and a controlled corporation in a section 355, whether or not in connection with a reorganization described in section 368(a)(1)(D), are predecessor and successor to each other for purposes of the funding rule.

One comment requested that distributions described in section 305(a) (stock distributed with respect to stock not included in gross income) be excluded from the funding rule because the shareholders do not realize income and the distributing corporation's net worth does not decrease. The final and temporary regulations do not directly address transactions to which section 305(a) applies because a distribution of the stock of a corporation made by such corporation is not a distribution of property as defined for purposes of § 1.385–3, and thus is not addressed by the funding rule.

7. Secondary Purchases

One comment requested confirmation that an expanded group member's secondary purchase of a debt instrument issued by a member of its expanded group is not an issuance of a debt instrument described in the funding rule. The comment further recommended that the deemed issuance of a debt instrument from one expanded group member to another expanded group member under § 1.108–2(g) should be disregarded for purposes of the funding rule. The Treasury Department and the IRS have determined that no further clarification is necessary in this area. Consistent with the proposed regulations, § 1.385–3(b)(3) of the final regulations provides that the funding rule applies to a covered debt instrument issued by a covered member to a member of an expanded group, and thus the funding rule generally does not apply to secondary market purchases. However, to the extent that any other Code section or regulation deems a debt instrument to be issued by a covered member to a member of its expanded group, that issuance could, absent an exception, be an issuance described in § 1.385–3(b)(3).

8. Ordinary Course Exception, Cash Pooling, and Short-Term Instruments

a. Proposed Regulations and General Approach

The proposed regulations provided that an ordinary course debt instrument is not subject to the per se funding rule. Proposed § 1.385–3(b)(3)(iv)(B)(*2*) defined an ordinary course debt instrument as a debt instrument that arises in the ordinary course of the issuer's trade or business in connection with the purchase of property or the receipt of services, but only to the extent that it reflects an obligation to pay an amount that is currently deductible by the issuer under section 162 or currently included in the issuer's cost of goods sold or inventory, and provided that the amount of the obligation outstanding at no time exceeds the amount that would be ordinary and necessary to carry on the trade or business of the issuer if it was unrelated to the lender.

Proposed §§ 1.385–3 and 1.385–4 did not include special rules for debt instruments that are issued in the ordinary course of managing the cash of an expanded group. However, the preamble to the proposed regulations requested comments on the special rules that might be needed with respect to cash pools, cash sweeps, and similar arrangements for managing the cash of an expanded group.

The comments regarding the ordinary course exception and the need for an exception to address common cash-management techniques overlap considerably. Accordingly, Section D.8 of this Part V addresses both topics. In general, comments indicated that it would be burdensome to apply the per se funding rule to any frequently recurring transactions, including both ordinary course business transactions between affiliates that involve a short-term extension of credit as well as debt instruments that arise in the context of companies that participate in arrangements with other expanded group members that are intended to optimize, on a daily basis, the amount of working capital required by the group. Comments also observed that the risk that such extensions of credit would be used for tax-motivated purposes, such as funding a distribution, is very low and does not justify the burdens that would be imposed if companies had to track these transactions and deal with the complexity that would follow if such routine extensions of credit were recharacterized into equity. Far less uniform were the recommendations for how to address the concerns expressed in the comments.

As described in Section D.8.c of this Part V, the Treasury Department and the IRS have determined that the ordinary course exception should be an element of a broader exception that also covers certain other short-term loans, including debt instruments that arise in the context of a cash-management arrangement. In many cases the types of transactions covered by the ordinary course exception are in substance similar to the transactions that are facilitated by the short-term liquidity that is extended under a cash-management arrangement. For example, an expanded group member may

purchase inventory from an affiliate in exchange for a trade payable or using cash obtained by an extension of credit from a third group member. The Treasury Department and the IRS have determined that it is not appropriate to create a tax preference for either form of the transaction. Accordingly, the temporary regulations adopt a broad exception from the funding rule for qualified short-term debt instruments that is intended to address the comments' concerns regarding the ordinary course exception as well as the broader need for an exception to facilitate short-term cash management arrangements.

b. Overview of Comments Received

i. Expansion of Exception to Additional Instruments

Numerous comments requested that the ordinary course exception be expanded to apply to a wider range of debt instruments. These comments ranged from narrow requests to expand the list of items that might be acquired in the ordinary course of a taxpayer's business from another group member to broad requests for an exception that covers any short-term loan, including for cash.

Some comments questioned the requirement for a debt instrument to be issued for goods and services in order to qualify for the ordinary course exception, stating that the ordinary course exception otherwise would not cover many regular business expenses, including some expenses deductible as trade or business expenses under section 162. Comments specifically noted that the ordinary course exception would not apply to instruments issued as payment for a rent or royalty due to a related party for the use of assets (including intangible assets) used in a trade or business because such payments are not in exchange for goods or services. Other comments recommended that the ordinary course exception apply to transactions involving expenses that are currently deductible or creditable under other sections of the Code, including payments (or loans to finance payments) of expenses creditable or deductible under section 41 (allowing a credit for increasing research activities), section 164 (allowing a deduction for state and local taxes), and section 174 (allowing a deduction for certain research and development expenses). Separately, comments requested that transactions involving expenses that are deferred or disallowed under a provision of the Code (for example, section 267) should nonetheless qualify for the ordinary course exception.

Comments also recommended that the ordinary course exception apply to transactions involving expenses that are required to be capitalized or amortized. Along these lines, comments recommended that loans issued in exchange for certain business property, such as operating assets or tangible personal property used in a trade or business, be treated as ordinary course debt instruments.

ii. Facts and Circumstances

Comments suggested that the ordinary course exception should apply broadly under a facts-and-circumstances test. Under one articulation of a facts-and-circumstances test proposed in a comment, the ordinary course exception would apply to any debt instrument issued for services or property in the conduct of normal business activities on appropriate terms unless the facts establish a principal purpose of funding a general rule transaction. The comment noted several instances in which such a test would apply more broadly than the test in the proposed rule, including certain issuances by securitization vehicles and dealers and issuances and modifications of intercompany debt by a distressed corporation in connection with an agreement with third-party creditors.

iii. De Minimis Loans

Comments recommended that the ordinary course exception apply to all loans under a de minimis threshold. Suggestions for a de minimis threshold included $1 million per obligation or $5 million per entity.

iv. Working Capital Loans

Numerous comments suggested an ordinary course exception or other safe harbor that would apply based on a determinable financial metric, such as current assets, current assets less cash and cash equivalents, annual expenses, or annual cost of goods sold. Representative examples of this approach include: An exception for aggregate loans below 150 percent of the closing balance of current assets of the borrower as of its most recent financial statements; an exception for aggregate loans less than annual expenses; an exception for aggregate loans less than certain annual expenses related to ordinary course transactions, such as payroll and cost of goods sold; an exception for loans up to a certain percentage of the book value of gross assets; and an exception for any debt instrument with a principal amount less than the average principal amount of all expanded group debt instruments issued by expanded group members (including the borrower) in the prior 36 months, increased by a specific percentage to account for growth. One comment noted in particular that any safe harbor should not apply to the extent the borrower held unrestricted cash or cash equivalents available to pay for the goods or services. A comment also noted that the measurement of any specific financial metric used as the basis of an exception (for example, current assets) could be determined over a period, such as a trailing three-year average (or other period). Another comment noted that an exception based on a financial metric that is fixed in time may not work well because (i) if the metric is based on a specific balance sheet date, that date may not be representative of the working capital requirements at other times, such as during a peak season, and (ii) if the metric is based on the time of issuance of the debt instrument and that date is not a balance sheet date, it may not be knowable.

Other comments recommended that all short-term debt instruments and all non-interest bearing debt instruments should qualify for an exception.

v. Net Interest Expense

A comment requested an exception for cash pooling arrangements that do not give rise to net interest expense in the United States, determined on a taxable year basis. For a discussion of comments regarding exceptions based on net interest generally, see Section A of this Part V.

vi. Cash Pooling Arrangements

Comments noted that the preamble to the proposed regulations explicitly stated that the ordinary course exception ''is not intended to apply to intercompany financing or treasury center activities.'' Several comments requested reconsideration of this restriction because businesses often use a treasury center or other cash-management arrangement (such as a cash pool) to finance ordinary course transactions of group members, as well as for intercompany netting programs, centralized payment systems, foreign currency hedging, and bridge financing. Accordingly, comments requested that financing of routine transactions qualify for the ordinary course exception, regardless of whether such financing is provided by a treasury center or other cash-management arrangement. Comments also requested that debt instruments issued in connection with netting, clearing-house, and billing center arrangements be treated as

ordinary course debt instruments whether or not conducted through a treasury center.

The comments suggested defining a new entity such as a treasury center or qualified cash pool and treating loans to and from the entity as ordinary course debt instruments. Some comments suggested defining a treasury center by reference to § 1.1471–5(e)(5)(i)(D), which generally applies to an entity that manages working capital solely for members of its expanded affiliated group (as defined in section 1471(e)(2) and the regulations thereunder). An alternative proposal defined a qualified cash pool as any entity with a principal purpose of managing the funding and liquidity for members of the expanded group. However, some comments recommending such an approach acknowledged that some companies provide long-term financing for non-ordinary course transactions through an internal treasury center, and thus noted that loans to and from the qualified entity could be subject to reasonable restrictions on duration.

Comments also expressed concern that recharacterization of a debt instrument in the context of a cash-management arrangement could result in a multitude of cascading recharacterizations, particularly in situations where a cash pool header makes and receives a substantial number of loans. Comments indicated that cash pools typically process many transactions in a single business day, with one comment stating that the company's cash pool processed over a million transactions in a year. For a summary of comments concerning iterative effects (including comments raising similar concerns outside the context of cash pool) and the final and temporary regulation's approach to mitigate those effects, see Section B.5 of this Part V.

The comments suggesting relief by reference to a cash pool header, treasury center, or similar entity (including an unrelated entity, such as a third party bank facilitating a notional cash pool) also requested that the exception provide that instruments issued by and to such entity be respected and not subject to recharacterization under the anti-conduit rules of § 1.881–3 or similar doctrines.

c. Short-Term Debt Instruments

In order to facilitate non-tax motivated cash management techniques, such as cash pooling or revolving credit arrangements, as well as ordinary course short-term lending outside a formal cash-management arrangement, the temporary regulations adopt an exception from the funding rule for qualified short-term debt instruments. The temporary regulations do not adopt a general exemption for all loans issued as part of a cash-management arrangement because, as comments acknowledged, such arrangements can provide long-term financing to expanded group members.

Under the temporary regulations, a covered debt instrument is treated as a qualified short-term debt instrument, and consequently is excluded from the scope of the funding rule, if the covered debt instrument is a short-term funding arrangement that meets one of two alternative tests (the specified current assets test or the 270-day test), or is an ordinary course loan, an interest-free loan, or a deposit with a qualified cash pool header. The Treasury Department and the IRS expect that the exception for qualified short-term debt instruments generally will prevent the treatment as stock of short-term debt instruments issued in the ordinary course of an expanded group's business, including covered debt instruments arising from financing provided by a cash pool header pursuant to a cash-management arrangement. Furthermore, these tests generally rely on mechanical rules that will provide taxpayers with more certainty, and be more administrable for the IRS, as compared to a facts-and-circumstances approach that was suggested by some comments.

i. Short-Term Funding Arrangement

A covered debt instrument that satisfies one of two alternative tests—the specified current assets test or the 270-day test—constitutes a qualified short-term debt instrument. These alternative tests are intended to exclude covered debt instruments issued as part of arrangements, including cash pooling arrangements, to meet short-term funding needs that arise in the ordinary course of the issuer's business. An issuer may only claim the benefit of one of the alternative tests with respect to covered debt instruments issued by the issuer in the same taxable year.

To satisfy the specified current assets test, two requirements must be satisfied. First, the rate of interest charged with respect to the covered debt instrument must be less than or equal to an arm's length interest rate, as determined under section 482 and the regulations thereunder, that would be charged with respect to a comparable debt instrument of the issuer with a term that does not exceed the longer of 90 days and the issuer's normal operating cycle.

Second, a covered debt instrument is treated as satisfying the specified current assets test only to the extent that, immediately after the covered debt instrument is issued, the issuer's outstanding balance under covered debt instruments issued to members of the issuer's expanded group that satisfy any of (i) the interest rate requirement of the specified current assets test, (ii) the 270-day test (in the case of a covered debt instrument that was issued in a prior taxable year in which the issuer claimed the benefit of the 270-day test), (iii) the ordinary course loan exception, or (iv) the interest-free loan exception, does not exceed the amount expected to be necessary to finance short-term financing needs during the course of the issuer's normal operating cycle. For purposes of determining an issuer's outstanding balance, in the case of an issuer that is a qualified cash pool header, the amount owed does not take into account the qualified cash pool header's deposits payables. (These debt instruments are eligible for a separate exception described in Section D.8.c.iv of this Part V.) Additionally, the amount owed by any other issuer is reduced by the issuer's deposits receivables from a qualified cash pool header, but only to the extent of amounts owed to the same qualified cash pool header that satisfy the interest rate requirement of the specified current assets test or that satisfy the requirements of the 270-day test (if the covered debt instrument was issued in a prior taxable year).

The issuer's amount of short-term financing needs is determined by reference to the maximum of the amounts of specified current assets reasonably expected to be reflected, under applicable financial accounting principles, on the issuer's balance sheet as a result of transactions in the ordinary course of business during the subsequent 90-day period or the issuer's normal operating cycle, whichever is longer. For this purpose, specified current assets means assets that are reasonably expected to be realized in cash or sold (including by being incorporated into inventory that is sold) during the normal operating cycle of the issuer, but does not include cash, cash equivalents, or assets that are reflected on the books and records of a qualified cash pool header. Thus, for example, the specified current assets test allows a covered debt instrument that is used to finance variable operating costs and that is expected to be repaid from sales during the course of a normal operating cycle to be considered a qualified short-term debt instrument. Consistent with the exclusion of a qualified cash pool header's deposits payables from consideration under the specified current assets test, specified current

assets do not include assets that are reflected on the books and records of a qualified cash pool header.

The applicable accounting principles to be applied for purposes of the specified current assets test, including for purposes of determining specified current assets reasonably expected to be reflected on the issuer's balance sheet, are financial accounting principles generally accepted in the United States (GAAP), or an international financial accounting standard, that is applicable to the issuer in preparing its financial statements, computed on a consistent basis. The reference to a normal operating cycle also is intended to be interpreted consistent with the meaning of that term under applicable accounting principles. Under GAAP, the normal operating cycle is the average period between the commitment of cash to acquire economic resources to be resold or used in production and the final realization of cash from the sale of products or services that are, or are made from, the acquired resources. For example, in the course of a normal operating cycle, a retail firm would commit cash to buy inventory, convert the inventory into accounts receivable, and convert the accounts receivable into cash. However, if the issuer has no single clearly defined normal operating cycle, then the issuer's normal operating cycle is determined based on a reasonable analysis of the length of the operating cycles of the multiple businesses and their sizes relative to the overall size of the issuer.

The reference to a financial accounting-based concept of current assets in the specified current assets test is consistent with comments that recommended an exception or safe harbor based on a determinable financial metric. The Treasury Department and the IRS have determined that, among the many potential metrics recommended in comments, the approach in the current assets test most appropriately achieves the goal of providing an administrable exception for variable funding needs during the course of a normal operating cycle. The reference to the amounts of specified current assets that are ''reasonably expected'' to be reflected on the balance sheet is intended to address concerns expressed by comments that any metric based on an amount reported on a prior balance sheet should be increased, for example, to 150 percent of such reported amount, in order to account for growth and seasonal needs that may not be reflected on the balance sheet date. The reference to the maximum of these amounts is intended to refer to the day on which the issuer is reasonably expected to hold the highest level of specified current assets during the designated period. Such reference is not intended to suggest the upper bound of the range of assets that might reasonably be expected to be held on any particular day. The reference to specified current assets in the ordinary course of business is intended to exclude extraordinary transactions that could affect the short-term balance sheet.

As an alternative to the specified current assets test, a covered debt instrument may also constitute a qualified short-term debt instrument by satisfying the 270-day test. The 270-day test generally provides taxpayers an opportunity to qualify for the short-term debt instrument exception when the specified current assets test provides limited relief due to circumstances unique to the issuer, such as when an issuer has a relatively small amount of current assets and comparatively large temporary borrowing needs. The 270-day test reflects consideration of comments that requested, for example, an exception for loans of up to 180 days or an exception based on the issuer's number of days of net indebtedness during the year.

For a covered debt instrument to satisfy the 270-day test, three conditions must be met. First, the covered debt instrument must have a term of 270 days or less or be an advance under a revolving credit agreement or similar arrangement, and must bear a rate of interest that is less than or equal to an arm's length interest rate, as determined under section 482 and the regulations thereunder, that would be charged with respect to a comparable debt instrument of the issuer with a term that does not exceed 270 days. Second, the issuer must be a net borrower from the lender for no more than 270 days during the taxable year of the issuer, and in the case of a covered debt instrument outstanding during consecutive taxable years, the issuer may be a net borrower from the lender for no more than 270 consecutive days. In determining whether the issuer is a net borrower from a particular lender for this purpose, only covered debt instruments that satisfy the term and interest rate requirement and that are not ordinary-course loans (described in Section D.8.c.ii of this Part V) or interest-free loans (described in Section D.8.c.iii of this Part V) are taken into account. A covered debt instrument with respect to which an issuer claimed the benefit of the specified current assets test in a prior year could meet these conditions and be taken into account for this purpose as a borrowing. Third, a covered debt instrument will only satisfy the 270-day test if the issuer is a net borrower under all covered debt instruments issued to any lender that is a member of the issuer's expanded group that otherwise would satisfy the 270-day test, other than ordinary course loans and interest-free loans, for 270 or fewer days during a taxable year.

The temporary regulations provide that an issuer's failure to satisfy the 270-day test will be disregarded if the taxpayer maintains due diligence procedures to prevent such failures, as evidenced by having written policies and operational procedures in place to monitor compliance with the 270-day test and management-level employees of the expanded group having undertaken reasonable efforts to establish, follow, and enforce such policies and procedures.

ii. Ordinary Course Loans

The temporary regulations generally broaden the ordinary course exception in the proposed regulations to provide that a covered debt instrument constitutes a qualified short-term debt instrument because it is an ordinary course loan if it is issued as consideration for the acquisition of property other than money, in the ordinary course of the issuer's trade or business. In contrast to the proposed regulations, the temporary regulations provide that, to constitute an ordinary course loan, an obligation must be reasonably expected to be repaid within 120 days of issuance. The Treasury Department and the IRS have determined that, based on comments received, this term limitation, in conjunction with the addition of the new alternatives for satisfying the qualified short-term debt instrument exception, will accommodate common business practice with respect to trade payables while providing both the IRS and taxpayers with increased certainty.

In response to comments received on the ordinary course exception, the ordinary course loan element of the exception for qualified short-term debt instruments is broadened so as to no longer be limited to payables with respect to expenses that are currently deductible by the issuer under section 162 or currently includible in the issuer's cost of goods sold or inventory. Although comments requested an expansion to cover debt instruments issued for rents or royalties, such debt instruments are already outside the scope of the funding rule because the funding rule applies solely to debt instruments issued in exchange for property. For this reason, the ordinary course exception in the temporary

regulations also does not apply to a debt instrument issued in connection with the receipt of services.

iii. Interest-Free Loans

In response to comments recommending that all non-interest bearing debt instruments should qualify for an exception, the temporary regulations provide that a covered debt instrument constitutes a qualified short-term debt instrument if the instrument does not provide for stated interest or no interest is charged on the instrument, the instrument does not have original issue discount (as defined in section 1273 and the regulations thereunder), interest is not imputed under section 483 or section 7872 and the regulations thereunder, and interest is not required to be charged under section 482 and the regulations thereunder. *See, e.g.,* § 1.482–2(a)(1)(iii) (providing that interest is not required to be charged with respect to an intercompany trade receivable in certain circumstances).

iv. Deposits With a Qualified Cash Pool Header

Covered members making deposits with a qualified cash pool header pursuant to a cash-management arrangement may maintain net deposits with the qualified cash pool header under circumstances that otherwise would not allow the qualified cash pool header (which is an issuer of covered debt instruments in connection with its deposits payable) to qualify for the qualified short-term debt instrument exception with respect to the deposit, for instance due to the length of time the deposits are maintained with the cash pool. In response to comments requesting a specific exception for cash pool headers, the temporary regulations provide that a covered debt instrument is a qualified short-term debt instrument if it is a deposit payable by a qualified cash pool header and certain other conditions are met. In particular, the covered debt instrument must be a demand deposit received by a qualified cash pool header pursuant to a cash-management arrangement. Additionally, the deposit must not have a purpose of facilitating the avoidance of the purposes of § 1.385–3 or § 1.385–3T with respect to a qualified business unit (as defined in section 989(a) and the regulations thereunder) (QBU) that is not a qualified cash pool header.

A qualified cash pool header is defined in the temporary regulations as a member of an expanded group, controlled partnership, or QBU described in § 1.989(a)–1(b)(2)(ii) that is owned by an expanded group member, that has as its principal purpose managing a cash-management arrangement for participating expanded group members, provided that an amount equal to the excess (if any) of funds on deposit with the expanded group member, controlled partnership, or QBU (header) over the outstanding balance of loans made by the header (that is, the amount of deposits it receives from participating members minus the amounts it lends to participating members) is maintained on the books and records of the cash pool header in the form of cash or cash equivalents or invested through deposits with, or acquisition of obligations or portfolio securities of, persons who are not related to the header (or in the case of a header that is a QBU described in § 1.989(a)–1(b)(2)(ii), the QBU's owner) within the meaning of section 267(b) or section 707(b). The Treasury Department and the IRS expect that the qualified cash pool header's expenses of operating the cash-management arrangement (for example, hedging costs) will be paid out of its gross earnings on its cash management activities rather than from funds on deposit.

A cash-management arrangement is defined as an arrangement the principal purpose of which is to manage cash for participating expanded group members. Based on comments received, the regulations provide that managing cash includes borrowing excess funds from participating expanded group members and lending such funds to other participating expanded group members, foreign exchange management, clearing payments, investing excess cash with an unrelated person, depositing excess cash with another qualified cash pool header, and settling intercompany accounts, for example through netting centers and pay-on-behalf-of programs.

d. Other Potential Exceptions

i. General Rule Exception

Comments recommended that the ordinary course exception apply to the funding rule generally rather than applying solely for purposes of the per se funding rule. A few comments recommended that the ordinary course exception apply to both the general rule and funding rule.

The Treasury Department and the IRS have determined that it is appropriate for the exception applicable to qualified short-term debt instruments, including debt instruments issued to acquire property in the ordinary course of a trade or business, to apply to all aspects of the funding rule because it is relatively unlikely that short-term financing would be used to fund a distribution or acquisition. Moreover, in the event that such short-term financing was issued with a principal purpose of avoiding the purposes of § 1.385–3 or § 1.385–3T, the anti-abuse rule at § 1.385–3(b)(4) may apply.

The Treasury Department and the IRS are not persuaded, however, that the transactions described in the general rule occur in the ordinary course of business. Accordingly, the suggestion to extend the ordinary course exception to general rule transactions is not accepted. However, certain specific exceptions to the general rule are provided for particular ordinary course transactions that were identified in the comments. See, for example, the exception discussed in Section E.2.b of this Part V for purchases of affiliate stock for purposes of paying stock-based compensation to employees, directors, and independent contractors in the ordinary course of business.

ii. De Minimis Loans

The final and temporary regulations do not adopt the recommendation to exempt de minimis loans. The Treasury Department and the IRS have determined that the threshold exception that applies to the first $50 million of aggregate issue price of covered debt instruments held by members of the expanded group that otherwise would be treated as stock under § 1.385–3 is an appropriate de minimis rule that will apply in addition to the exception for short-term debt instruments described in Section D.8.c of this Part V.

iii. Notional Pooling or Similar Arrangements

The temporary regulations do not specifically address the treatment of loans made through a notional cash pool or a similar arrangement including, for example, whether such loans would be treated for federal tax purposes as being made between expanded group members under conduit principles or other rules or doctrines. As noted in Part IV.B.2.c of this Summary of Comments and Explanation of Revisions, however, in some circumstances a notional cash pool may be treated as a loan directly between expanded group members applying federal tax principles. To the extent that notional pooling or similar arrangements give rise to loans between expanded group members for federal tax purposes, the final and temporary regulations, including the qualified short-term debt instrument exception, would apply to such loans in the same manner that they apply to loans made in form between expanded group members.

9. Exceptions To Allow Netting Against Other Receivables

Comments recommended that the amount of a member's debt instruments subject to the funding rule be limited to the excess of its related-party loan payables over its related-party loan receivables. Comments asserted that, in particular, such a rule would mitigate the impact of the final and temporary regulations on a cash pool header that receives deposits from, and makes advances to, participants in a cash pool arrangement, in particular with respect to the potential iterative consequences, which are discussed in detail in Section B.5 of this Part V. More broadly, this recommendation equates to a request for an exception from the funding rule for an amount of loans payable up to the amount of related-party loan receivables held by a funded member.

The temporary regulations, in effect, implement this recommendation with respect to short-term intercompany receivables and payables to varying degrees in the context of the funding rule. As discussed in Section D.8 of this Part V, the temporary regulations include an exception for qualified short-term debt instruments that allows taxpayers to disregard such qualified short-term debt instruments when applying the funding rule. In addition to special rules treating ordinary course loans and interest-free loans as qualified short-term debt instruments, a debt instrument that is part of a short-term funding arrangement is considered a qualified short-term debt instrument if it satisfies one of two mutually exclusive tests: The specified current assets test or the 270-day test. Both of the alternative tests, in effect, allow some netting of short-term receivables and payables. Significantly, the specified current assets test provides an exception for short-term borrowing up to a limit determined by reference to specified current assets, effectively permitting netting of short-term borrowing against short-term assets, including accounts receivables. Additionally, that limit, applied to short-term loans from a qualified cash pool header, is increased by certain deposits the borrower has made to the qualified cash pool header, which effectively permits the borrower to net amounts on deposit with the qualified cash pool header against borrowings from the qualified cash pool header.

Additionally, with respect to a qualified cash pool header, the temporary regulations treat an amount that is on deposit with the cash pool header, which may persist for a longer term, as a qualified short-term debt instrument. A qualified cash pool header, in effect, is permitted to net its long- and short-term receivables arising from its lending activities pursuant to a cash management arrangement against those deposit payables.

However, the Treasury Department and the IRS decline to adopt a more general netting rule. The exceptions described above for qualified short-term debt instruments operate by excluding altogether from the funding rule an amount of short-term loans based on circumstances that exist at the time the loan is issued. This approach is administrable and reaches appropriate results in the context of short-term debt instruments. Administering a rule based on netting outside of this context would be difficult because of the potential variations in loans (including different terms, currencies, or interest rates) and could result in a covered debt instrument switching between debt and equity on an ongoing basis, depending on the terms of other loans.

E. Exceptions From § 1.385–3 for Certain Distributions and Acquisitions and the Threshold Exception

The proposed regulations included three exceptions to the application of the general rule and funding rule—the earnings and profits exception, the subsidiary stock issuance exception, and the $50 million threshold exception. Numerous comments were received regarding these exceptions, and many recommendations were made to further narrow the scope of the proposed regulations.

1. Overview of the Exceptions Under the Final and Temporary Regulations

The final and temporary regulations include two categories of exceptions that relate to distributions and acquisitions: (i) Exclusions described in § 1.385–3(c)(2), which include the subsidiary stock acquisition exception (the subsidiary stock issuance exception in the proposed regulations), the compensatory stock acquisition exception, and the exception to address the potential iterative application of the funding rule; and (ii) reductions described in § 1.385–3(c)(3), which are the expanded group earnings reduction and the qualified contribution reduction. The exceptions under § 1.385–3(c)(2) and (c)(3) apply to distributions and acquisitions that are otherwise described in the general rule or funding rule after applying the coordination rules in § 1.385–3(b). Except as otherwise provided, the exceptions are applied by taking into account the aggregate treatment of controlled partnerships described in § 1.385–3T(f).

An exception under § 1.385–3(c)(2) excludes a distribution or acquisition from the application of the general rule and funding rule. The Treasury Department and the IRS have determined that, based on comments received, the policy for including the second and third prongs of the general rule and funding rule does not apply to the transactions identified in § 1.385–3(c)(2).

An exception under § 1.385–3(c)(3) reduces the amount of a distribution or acquisition that can be treated as funded by a covered debt instrument under the general rule and funding rule. In contrast to an exclusion, each reduction is determined by reference to an attribute of a member—expanded group earnings and qualified contributions—rather than to a particular category of transactions, and thus is available to reduce the amount of any distribution or acquisition by the member. The Treasury Department and the IRS have determined that a member's distributions and acquisitions, to the extent of its expanded group earnings and qualified contributions, should be treated as funded by its new equity capital rather than by the proceeds of a related-party borrowing for purposes of the general rule and funding rule. To the extent the amount of a distribution or acquisition is reduced, the amount by which one or more covered debt instruments can be recharacterized as stock under the general rule or funding rule by reason of the distribution or acquisition is also reduced.

The exclusions and reductions of § 1.385–3(c)(2) and (3) operate independently of any exclusion with respect to the definition of covered debt instrument described in § 1.385–3(g)(3) as well as the exclusion of qualified short-term debt instruments from the funding rule. Therefore, to the extent an exception applies to a distribution or acquisition, either (i) the distribution or acquisition is treated as not described in the general rule or funding rule (in the case of an exclusion) or (ii) the amount of the distribution or acquisition subject to the general rule or funding rule is reduced (in the case of a reduction). However, the application of an exception in § 1.385–3(c)(2) or (3) with respect to a distribution or acquisition does not affect whether any covered debt instrument, including one issued in the distribution or acquisition itself, can be treated as funding another distribution or acquisition under the funding rule. Thus, to the extent a covered debt instrument is not treated as stock by reason of the application of

an exception to a distribution or acquisition, the covered debt instrument remains available to be treated as funding another distribution or acquisition. *See* Section E.6 of this Part V for the treatment under the funding rule of debt instruments that are issued in a distribution or acquisition that, absent an exclusion or reduction under § 1.385–3(c)(2) or (3), would be subject to the general rule.

An exception under § 1.385–3(c)(2) applies to distributions or acquisitions before an exception under § 1.385–3(c)(3). A distribution or acquisition to which an exclusion applies is not treated as described in the general rule or funding rule, whereas a reduction applies to reduce the amount of a distribution or acquisition described in the general rule or funding rule. To the extent an exclusion exempts a distribution or acquisition from the general rule or funding rule, no amount of the expanded group earnings or qualified contributions of a covered member are used.

A third type of exception, the $50 million threshold exception described in § 1.385–3(c)(4), applies to covered debt instruments that otherwise would be treated as stock under § 1.385–3(b) because they are treated as funding one or more distributions or acquisitions, after taking into account the exclusions and reductions. The threshold exception overrides the general consequences of § 1.385–3(b) for the first $50 million of debt instruments that otherwise would be treated as stock under the general rule and funding rule. A distribution or acquisition treated as funded by a covered debt instrument under § 1.385–3(b) is still treated as funded by a covered debt instrument notwithstanding the application of the threshold exception. As a result, the distribution or acquisition cannot be ''matched'' with another covered debt instrument to cause additional recharacterizations under the funding rule.

2. Exclusions Under the Final and Temporary Regulations

a. Exclusion for Certain Acquisitions of Subsidiary Stock

i. Overview

Proposed § 1.385–3(c)(3) provided an exception, the subsidiary stock issuance exception, to the second prong of the funding rule. The subsidiary stock issuance exception applied to an acquisition of stock of an expanded group member (the issuer) by a funded member (the transferor), provided that, for the 36-month period immediately following the issuance, the transferor held, directly or indirectly, more than 50 percent of the total combined voting power of all classes of stock of the issuer entitled to vote and more than 50 percent of the total value of the stock of the issuer. For this purpose, indirect ownership was determined by applying the principles of section 958(a) without regard to whether an intermediate entity is foreign or domestic. If the transferor ceased to meet the ownership requirement at any time during the 36-month period, then on the date that the ownership requirement ceased to be met (cessation date), the exception ceased to apply and the acquisition of expanded group stock was subject to the funding rule. The proposed regulations also provided that, if the exception applied to an issuance, the transferor and the issuer would be treated as predecessor and successor but only with respect to any debt instrument issued during the per se period with respect to the issuance and only to the extent of the fair market value of the stock issued in the transaction.

ii. New Terminology

As discussed in Section C.3.c of this Part V, the final and temporary regulations expand the subsidiary stock issuance exception to include acquisitions of existing stock of an expanded group member from a majority-owned subsidiary (for example, acquisitions of existing stock of a second-tier subsidiary from a majority-owned first tier subsidiary of the acquiring expanded group member) under the same conditions applicable to acquisitions of newly-issued stock. To reflect these changes, in the final and temporary regulations: The ''subsidiary stock issuance exception'' is renamed ''subsidiary stock acquisition exception''; the ''transferor'' is renamed ''acquirer''; and the ''issuer'' is renamed ''seller.'' For the remainder of this Part, the terminology of the proposed regulations is used to describe the rules of the proposed regulations, and comments thereon. The terminology of the final and temporary regulations is used in responses to the comments, as well as to describe the provisions of the final and temporary regulations.

iii. Holding Period Requirement

Comments asserted that the 36-month holding period requirement for the subsidiary stock issuance exception would unnecessarily restrict post-issuance restructuring unrelated to, and unanticipated at the time of, the issuance. For this reason, comments recommended that the regulations adopt a control requirement that incorporates the principles of section 351, under which the holding period requirement would be satisfied if the transferor controlled the issuer immediately after the issuance and all transactions occurring pursuant to the same plan as the issuance. Comments asserted that, if this recommendation were adopted, the regulations could retain the 36-month holding period as a safe harbor.

The Treasury Department and the IRS agree that transactions motivated by business exigencies that are unforeseen at the time of the acquisition should not generally result in the inapplicability of the subsidiary stock acquisition exception with respect to the acquisition. Therefore, the final and temporary regulations provide that the exception applies if the acquirer controls the seller immediately following the acquisition and does not relinquish control of the seller pursuant to a plan that existed at the time of the acquisition. For this purpose, the acquirer is presumed to have had a plan to relinquish control of the seller at the time of the acquisition if the transferor relinquishes control of the seller within the 36-month period following the acquisition. This presumption may be rebutted by facts and circumstances that clearly establish that the loss of control was not contemplated at the time of the acquisition and that avoiding the purposes of § 1.385–3 or § 1.385–3T was not a principal purpose for the subsequent loss of control.

In contrast to the proposed regulations, the final and temporary regulations do not provide that the subsidiary stock acquisition exception ceases to apply upon the cessation date. Instead, if the acquirer loses control of the seller within the 36-month period following the acquisition pursuant to a plan that existed at the time of the acquisition, the subsidiary stock acquisition exception would be treated as never having applied to the expanded group stock acquisition.

iv. Cessation of Expanded Group Relationship

Comments requested clarification on the application of the subsidiary stock issuance exception if the transferor and issuer cease to be members of the same expanded group before the end of the 36-month holding period. Comments recommended that the subsidiary stock issuance exception continue to exempt an issuance if the transferor and issuer cease to be members of the same expanded group in the same transaction in which the transferor's ownership in the issuer is reduced to be at or below 50 percent. Comments also recommended that, if the transferor and issuer cease to be members of the same

expanded group, the predecessor and successor status of the transferor and issuer should also cease for purposes of applying the per se funding rule.

As discussed in Section E.2.a.iii of this Part V, the final and temporary regulations eliminate the fixed holding period requirement of the proposed regulations. However, the issue could still arise if the loss of control and the cessation of common expanded group membership occur pursuant to a plan that existed at the time of the acquisition. For example, assume P borrows from a member of the same expanded group, and then, within 36 months of the funding, contributes property to S in exchange for S stock with the intent of selling 100 percent of the stock of S to an unrelated person. In this example, P loses control of S pursuant to a plan that existed at the time of the acquisition of S stock, but that loss of control occurs in the same transaction that causes P and S to cease to be members of the same expanded group.

The Treasury Department and the IRS have determined that a transaction that results simultaneously in a loss of control and a disaffiliation of the seller and acquirer does not achieve a result that is economically similar to a distribution because in that situation no property is made available, directly or indirectly, to a common shareholder of the seller and the acquirer. Accordingly, the final and temporary regulations provide that a transaction that results in a loss of control is disregarded for purposes of applying the subsidiary stock acquisition exception if the transaction also results in the acquirer and the seller ceasing to be members of the same expanded group. For purposes of the preceding sentence, an acquirer and seller do not cease to be members of the same expanded group by reason of a complete liquidation described in section 331. Further, as discussed in Section D.3 of this Part V, the final and temporary regulations provide that the seller ceases to be a successor to the acquirer upon the date the seller ceases to be a member of the same expanded group as acquirer.

v. Indirect Ownership

One comment requested that the indirect ownership rules used for the subsidiary stock issuance exception be conformed to the indirect ownership rules used for other purposes of the section 385 regulations, such as the modified section 318 constructive ownership rules in § 1.385–1(c)(4) used to determine the composition of an expanded group. The final and temporary regulations retain the indirect ownership rules of section 958(a) as the proper measure of ownership for purposes of the subsidiary stock acquisition exception because the Treasury Department and the IRS have determined that the constructive ownership rules found in other provisions of the Code would not properly differentiate an acquisition of expanded group stock that does not have an economic effect similar to that of a distribution from one that does. As discussed in Section C.3.c of this Part V, the subsidiary stock acquisition exception is predicated on the view that the acquisition of newly-issued stock of a controlled direct or indirect subsidiary is not economically similar to a distribution because the property transferred in exchange for the stock remains indirectly controlled by the acquirer and, likewise, the transaction does not have the effect of making the property available to the ultimate common shareholder (that is, the property is not transferred ''out from under'' the acquirer). In this regard, constructive ownership (for instance, under section 318) is appropriate for determining whether a common shareholder controls each of two or more corporations, but is inappropriate for the limited purpose of determining whether stock or assets are indirectly owned by one of those corporations. Therefore, to effectuate the policy of the exception, indirect ownership for purposes of the subsidiary stock acquisition exception continues to be limited to indirect ownership within the meaning of section 958(a).

vi. Tiered Transfers

One comment requested that the regulations clarify the impact of certain transactions occurring after a funded member's transfer of property to a controlled subsidiary. For instance, assume that S1 contributed property to S2, its wholly-owned subsidiary, in exchange for S2 stock, and S2 subsequently contributed property to S3, its wholly-owned subsidiary, in exchange for S3 stock. The comment requested that the regulations clarify that S2's acquisition of S3 stock is not an acquisition of expanded group stock that affects the application of the subsidiary stock issuance exception to S1's initial transfer to S2.

The Treasury Department and the IRS have determined that the proposed regulations already properly provided for this result. As a result of an issuance described in the subsidiary stock issuance exception, the issuer (S2) becomes a successor to the transferor (S1) to the extent of the value of the expanded group stock acquired from the issuer, but only with respect to a debt instrument of the issuer issued during the per se period determined with respect to the issuance. If the issuer (S2) engages in another transaction described in the subsidiary stock issuance exception as a transferor, the acquisition of the stock of the expanded group member (the second issuer) would also not constitute an acquisition of expanded group stock by reason of the exception. Therefore, under a second application of the subsidiary stock issuance exception, the acquisition of the stock of S3 by the issuer (S2), a successor to the transferor (S1), is not treated as described in the second prong of the funding rule and thus cannot be treated as funded by a covered debt instrument issued by the transferor (S1). After the second issuance, the second issuer (S3) is a successor to both the first transferor (S1) and the first issuer (S2), which remains a successor to the first transferor (S1). The final and temporary regulations change the terminology, but do not change the result of the proposed regulations in this regard.

b. Exclusion for Certain Other Acquisitions of Expanded Group Stock, Including in Connection With Employee Stock Compensation, and Other Recommendations for Exceptions for Acquisitions Described in § 1.1032–3

Comments requested an exception from the funding rule for all transactions described in § 1.1032–3. Section 1.1032–3 generally applies to an acquisition by a corporation (acquiring entity) of the stock of its controlling parent (issuing corporation) for use as consideration to acquire money or other property (including compensation for services). Section 1.1032–3(b) addresses the transaction in the context of an acquiring entity that either does not make actual payment for the stock of the issuing corporation (§ 1.1032–3(b)(1)) or makes actual payment for the stock of the issuing corporation, but that actual payment is less than the fair market value of the issuing corporation stock that is acquired (§ 1.1032–3(b)(2)). In either case, to the extent the fair market value of the stock of the issuing corporation exceeds the value of the consideration provided by the acquiring entity, § 1.1032–3(b) deems a contribution of cash to the acquiring entity by the issuing corporation followed by a deemed purchase of stock of the issuing corporation by the acquiring entity. The majority of the comments on this issue recommended an exception from the funding rule to the extent that a purchase of expanded group stock was deemed to occur solely by reason of § 1.1032–3(b).

The final and temporary regulations provide relief for purchases of expanded group stock that are deemed to occur under § 1.1032–3(b) by adopting a separate recommendation to reduce the amount of distributions or acquisitions described in the general rule or funding rule by qualified contributions. As described in Section E.3.b of this Part V, qualified contributions include a deemed cash contribution under § 1.1032–3(b). Accordingly, after taking into account the new exception for qualified contributions, a deemed transaction under § 1.1032–3(b), regardless of how the acquiring corporation uses the stock of the issuing corporation, should not result in a ''net'' acquisition of expanded group stock for purposes of the funding rule. Therefore, the request for a specific exclusion for a deemed acquisition of expanded group stock under § 1.1032–3 is rendered moot by the new exception for qualified contributions.

Some comments also recommended an exception to the extent that the acquiring entity makes an actual payment for the stock of the issuing corporation that is conveyed to a person as consideration for services or an acquisition of assets. That actual payment could be in the form of cash, which could implicate the funding rule, or an issuance of a debt instrument, which could implicate the general rule. Several comments, however, specifically addressed this situation in the context of an acquisition of parent stock that will be transferred to an employee, director, or independent contractor for the performance of services. Comments asserted that the acquisition of newly-issued stock of a publicly-traded parent to compensate employees, whether in exchange for actual or deemed consideration, does not implicate the policy concerns of the proposed regulations because such transactions occur in the ordinary course of the group's business and for meaningful non-tax reasons (for example, reduced cost as compared to acquiring the shares from the public). One comment recommended an exception for the acquisition of the stock of an expanded group parent by another member of the group that is a dealer in securities (within the meaning of section 475(c)(1)) in the ordinary course of the dealer's business as a dealer in securities. A comment suggested that if the Treasury Department and the IRS are concerned about parent stock that is purchased for use in a transaction that resembles a reorganization, the exception could be limited to stock that is transferred to a person in connection with such person's performance of services as an employee, director, or independent contractor, or to a person as consideration for the acquisition of assets that will be used by the issuer in the issuer's trade or business.

As discussed in Section C.3.a of this Part V, by itself, an acquisition of expanded group stock by issuance in exchange for cash or a debt instrument has an economic effect that is similar to a distribution of the cash or note used to acquire the stock from the controlling parent. The Treasury Department and the IRS acknowledge that these concerns could be mitigated in certain circumstances, for example, when parent stock is conveyed to an unrelated person as consideration for services provided to a subsidiary or as consideration for an acquisition of assets for use in the ordinary course of a subsidiary's business. However, the Treasury Department and the IRS also are concerned that there has been significant abuse involving purchases of parent stock for use as consideration in other transactions, particularly in the context of acquisitions of control of another corporation or of substantially all of the assets of another corporation. This is the case regardless of whether the acquisition is of the stock or assets of a corporation and whether the counter-party is a related or unrelated person. *See, e.g.,* Notice 2006–85, 2006–2 C.B. 677; Notice 2007–48, 2007–1 C.B. 1428; § 1.367(b)–10.

Accordingly, the Treasury Department and the IRS have determined that, in response to comments, it is appropriate to provide an exception from the general rule and funding rule for acquisitions of expanded group stock in the two situations where comments have pointed out that it is common business practice to acquire controlling parent stock for use as currency in another transaction. Specifically, the final and temporary regulations provide an exclusion from the second prong of the general rule and funding rule to the extent the acquired expanded group stock is delivered to individuals in consideration for services rendered as an employee, a director, or an independent contractor. This exclusion applies to an acquisition of expanded group stock regardless of whether the acquisition is in exchange for actual property or deemed property under § 1.1032–3(b). To the extent parent stock is received in exchange for no consideration, the deemed contribution of cash used to purchase the stock under § 1.1032–3(b) may also constitute a qualified contribution as described in Section E.3.b of this Part V. The second situation, involving acquisitions by dealers in securities, is discussed in Section E.2.d of this Part V.

The Treasury Department and the IRS decline to adopt the recommendation for a broader exception that would apply whenever the acquiring member uses the acquired stock as currency in a subsequent acquisition because the Treasury Department and the IRS remain concerned about the potential for abuse outside of the scenarios identified in comments where the use of parent stock is common business practice. *See* § 1.385–3(h)(3) *Example 2.* Furthermore, taxpayers that wish to use parent stock as currency for other purposes have the flexibility to structure the transaction in ways that do not implicate the final and temporary regulations. For instance, the parent can provide the stock to its subsidiary in exchange for no consideration or, in the alternative, the parent can acquire the asset with its own stock and transfer the asset to the subsidiary.

c. Exclusion for Distributions and Acquisitions Resulting From the Application of Section 482

Comments requested that the regulations disregard distributions and contributions deemed to occur by virtue of other provisions of the Code or regulations, including distributions deemed to occur under § 1.482–1(g)(3) and adjustments made pursuant to Revenue Procedure 99–32, 1999–2 C.B. 296, and debt instruments and contributions deemed to occur under section 367(d). In response to these comments, the final and temporary regulations provide an exception from the funding rule for distributions and acquisitions deemed to occur as a result of transfer pricing adjustments under section 482. The Treasury Department and the IRS decline to include an exception for transactions deemed to occur under section 367(d) in the final and temporary regulations because the regulations are limited to U.S. borrowers.

d. Exclusions for Acquisitions of Expanded Group Stock by a Dealer in Securities

One comment recommended that the regulations provide an exception for stock issued by a member of an expanded group and subsequently acquired by a member of the same expanded group that is a dealer in securities (within the meaning of section 475(c)(1)) in the ordinary course of the dealer's business as a dealer in securities, provided that the dealer satisfies certain criteria in acquiring and holding the stock.

In response to the comments, the final and temporary regulations provide an exception for the acquisition of expanded group stock by a dealer in securities. Under § 1.385–3(c)(2)(iv), the acquisition of expanded group stock by a dealer in securities (within the meaning of section 475(c)(1)) is not treated as described in the general rule or funding rule to the extent the expanded group stock is acquired in the ordinary course of the dealer's business of dealing in securities. This exception applies solely to the extent that (i) the dealer accounts for the stock as securities held primarily for sale to customers in the ordinary course of business, (ii) the dealer disposes of the stock within a period that is consistent with the holding of the stock for sale to customers in the ordinary course of business, taking into account the terms of the stock and the conditions and practices prevailing in the markets for similar stock during the period in which it is held, and (iii) the dealer does not sell or otherwise transfer the stock to a person in the same expanded group, other than in a sale to a dealer that in turn satisfies the requirements of § 1.385–3(c)(2)(iv).

e. Exclusions for Certain Acquisitions of Affiliate Stock Resulting From the Application of the Funding Rule

The final and temporary regulations include an exception for iterative recharacterizations discussed in Section B.5 of this Part V.

3. Reductions Under the Final and Temporary Regulations

a. Reduction for Expanded Group Earnings and Profits

Proposed § 1.385–3(c)(1) provided that the aggregate amount of distributions and acquisitions described in the general rule and funding rule for a taxable year was reduced to the extent of the current year earnings and profits (as described in section 316(a)(2)) (the earnings and profits exception). The reduction under the earnings and profits exception was applied to each distribution and acquisition based on the order in which the distribution or acquisition occurred. The preamble to the proposed regulations explained that the earnings and profits exception was intended to accommodate ordinary course distributions and acquisitions and to provide taxpayers significant flexibility to avoid the application of the per se funding rule.

i. Earnings Period

Comments requested that the earnings and profits exception be expanded to include earnings and profits accumulated by a member in one or more taxable years preceding the current year. Comments noted that earnings and profits for the current year may be difficult or impossible to compute by the close of the year. Moreover, under certain circumstances, a member may not be permitted under local law to distribute earnings and profits for the year (for example, due to a lack of distributable reserves). Comments also asserted that, by taking into account only earnings and profits for the current year, the exception would inappropriately incentivize taxpayers to ''use or lose'' their earnings and profits through annual distributions. Also, comments noted that the current earnings and profits of a company do not necessarily represent a company's ability to pay ordinary course dividends, due to factors such as how earnings and profits are calculated and the amount of cash available from operations, and suggested that a longer period for the exception would mitigate the impact of these factors.

Recommendations varied regarding the period for which earnings and profits should be taken into account for purposes of the exception, ranging from the current year and the immediately preceding year to the current year and all prior years. In addition, some comments requested a grace period (for example, 75 days) after the close of the taxable year to make distributions or acquisitions that would relate back to the earning and profits with respect to the previous year. Some comments requested that the earnings and profits exception include earnings and profits accumulated before the release of the notice of proposed rulemaking on April 4, 2016. Others stated that earnings and profits for purposes of this exception should include only those accumulated in taxable years ending after that date. One comment recommended that the earnings and profits exception include all undistributed earnings and profits of a corporation accumulated since April 4, 2016, but limited to the period in which such corporation was a member of the expanded group of which it is a member at the time of a distribution or acquisition. Comments also requested that, if a cumulative measure of earnings and profits is adopted, any years in which a member had a deficit be disregarded, or, in the alternative, a member be permitted to distribute amounts at least equal to distributions from other members that themselves qualify for the earnings and profits exception, notwithstanding that the member has an accumulated deficit. In addition, comments requested that the earnings and profits exception include previously taxed income, and that, regardless of the period adopted, all previously taxed income be permitted to be distributed without implications under § 1.385–3, including previously taxed income accumulated before April 4, 2016. One comment suggested that the earnings and profits exception be eliminated, noting that only the threshold exception is needed.

The final and temporary regulations adopt the recommendation to take into account all earnings and profits accumulated by a corporation during its membership in an expanded group in computing the earnings and profits exception, provided that the earnings and profits were accumulated in taxable years ending after April 4, 2016 (the expanded group earnings reduction). The expanded group earnings reduction significantly expands the exception provided in the proposed regulations, but also appropriately limits the reduction to earnings and profits attributable to the period of a corporation's membership in a particular expanded group. The Treasury Department and the IRS decline to adopt a cumulative or fixed period approach that is not limited upon a change-of-control because either approach would create incentives for acquisitions of earnings-rich corporations for the purposes of avoiding these regulations by having such corporations use related-party debt to finance extraordinary distributions rather than new investment. Moreover, an approach that takes into account earnings and profits over a fixed period, regardless of its duration, implicates the same ''use or lose'' concern identified with respect to the exception in the proposed regulations, albeit delayed until the final year of the period. The Treasury Department and the IRS have determined that the expanded group earnings reduction appropriately balances concerns regarding the usefulness and administrability of the reduction with the purpose of providing an exception only for ordinary course distributions.

To effectuate this purpose, the final and temporary regulations provide that the aggregate amount of a covered member's distributions or acquisitions described in the general rule or funding rule in a taxable year during an expanded group period are reduced by the member's expanded group earnings account for the expanded group period. The expanded group period is the period during which the covered member is a member of an expanded group with the same expanded group parent. The expanded group earnings

account with respect to an expanded group period is the excess, if any, of the covered member's expanded group earnings during the period over the covered member's expanded group reductions during the period. The reduction for expanded group earnings applies to one or more distributions or acquisitions based on the order in which the distributions or acquisitions occur. The reduction occurs regardless of whether any distribution or acquisition would be treated as funded by a covered debt instrument without regard to the exception. The expanded group earnings reduction is applied to distributions and acquisitions by a covered member described in the general rule and funding rule before the reduction for qualified contributions discussed in Section E.3.b of this Part V.

Expanded group earnings are generally the earnings and profits accumulated by the covered member during the expanded group period computed as of the close of the taxable year without regard to any distributions or acquisitions by the covered member described in §§ 1.385–3(b)(2) and (b)(3)(i). Thus, for example, if a covered member distributes property to a member of the member's expanded group, the covered member's expanded group earnings are not decreased by the amount of the property because the distribution is described in the funding rule, even assuming the distribution reduces the covered member's accumulated earnings and profits under section 312(a). However, if, for example, a covered member distributes property to a shareholder that is not a member of the member's expanded group, so that the transaction is not described in the funding rule, the distribution generally decreases the covered member's expanded group earnings to the extent that the accumulated earnings and profits are decreased under section 312(a).

Expanded group reductions are the amounts by which acquisitions or distributions described in the general rule or funding rule were reduced by reason of the expanded group earnings reduction during the portion of the expanded group period preceding the taxable year. As discussed in the preceding paragraph, a distribution or acquisition described in the general rule or funding rule does not reduce a covered member's expanded group earnings. However, the same distribution or acquisition, to the extent the amount of the distribution or acquisition is reduced under the expanded group earnings reduction in the taxable year, increases the covered member's expanded group reductions for the succeeding year, and thereby decreases the covered member's expanded group earnings account on a go-forward basis.

The Treasury Department and the IRS decline to adopt the recommendation to extend the earnings and profits reduction to take into account earnings and profits accumulated before the release of the notice of proposed rulemaking. The proposed regulations included only current year earnings and profits for the earnings and profits exception. Accordingly, the earnings and profits taken into account under the proposed regulations were limited to those accumulated in a taxable year ending on or after April 4, 2016. The expanded group earnings reduction provides taxpayers with significantly more flexibility than the proposed regulations to avoid the application of § 1.385–3 with respect to ordinary course distributions and acquisitions. Moreover, the Treasury Department and the IRS are concerned that allowing a corporation to distribute all of its historic earnings and profits would facilitate related-party borrowing to fund extraordinary distributions and acquisitions. Although allowing a corporation to accumulate, and later distribute, earnings and profits for taxable years ending after April 4, 2016, could also facilitate extraordinary distributions, the Treasury Department and the IRS have concluded that, on balance, it is preferable to avoid the incentives that would follow from creating a ''use or lose'' attribute. These incentives are not applicable with respect to taxable years ending before April 4, 2016. For similar reasons, dividends from other expanded group members are not taken into account in calculating expanded group earnings of a covered member unless attributable to earnings and profits accumulated in a taxable year of the distributing member ending after April 4, 2016 and during its expanded group period. For this purpose, dividends include deemed inclusions with respect to stock, including inclusions under sections 951(a) and 1293.

The final and temporary regulations do not adopt the recommendation to disregard a deficit in any taxable year in calculating a member's expanded group earnings. The Treasury Department and the IRS have determined that, by expanding the reduction with respect to a corporation to include all earnings and profits accumulated while the corporation was a member of the same expanded group, the expanded group earnings account appropriately reflects the amount of a corporation's new equity capital generated from earnings that is available to fund ordinary course distributions. Moreover, incorporating a ''nimble dividend'' concept into the expanded group earnings reduction would convert current year earnings and profits into a ''use or lose'' attribute if the covered member has an overall accumulated deficit, which is contrary to the policy of expanding the exception to include all earnings accumulated during an expanded group period.

The final and temporary regulations also do not adopt the recommendation to attribute to the prior year distributions and acquisitions that occur during a grace period following the close of that taxable year. The Treasury Department and the IRS have determined that a grace period is unnecessary because the cumulative approach of the expanded group earnings reduction significantly relieves the burden of computing the earnings and profits for the particular year of a distribution or acquisition.

Because the final and temporary regulations do not apply to foreign issuers (including CFC issuers), the regulations no longer implicate the concerns regarding distributions of previously taxed income.

ii. Ordering Rule

The proposed regulations provided that the earnings and profits exception applied to distributions or acquisitions in chronological order. Comments asserted that this ordering rule would place an undue premium on the sequence of distributions. For example, assume that P owns all the stock of S. In Year 1, S makes distributions to P consisting of (i) $50x cash (the funding rule distribution) and (ii) an S note with a $50x principal amount (the general rule distribution). S makes no other distributions or acquisitions during Year 1 and has not been funded by a debt instrument that is outstanding during Year 1. Under the proposed regulations, if S has $50x of earnings and profits for Year 1, whether the S note issued in the general rule distribution is recharacterized as stock would depend on the sequence of the distributions. If the funding rule distribution occurred first, the earnings and profits exception would reduce the amount of that distribution; however, because S has no debt instruments outstanding that can be treated as funding the distribution, the exception would provide no immediate benefit to S and P. Further, because the funding rule distribution would exhaust the earnings and profits of S for the taxable year, the earnings and profits exception would not reduce any amount of the general rule distribution, with the result that the S

note would be immediately recharacterized as stock under the general rule. On the other hand, if the general rule distribution occurred first, the amount of the general rule distribution would be reduced by the earnings and profits exception, which would immediately benefit S and P. In that case, because S has no debt instruments outstanding, the funding rule distribution would not cause the recharacterization of any debt instrument in the taxable year of the distribution even though no amount of the funding rule distribution would be reduced by the earnings and profits exception.

To address this concern, comments recommended that, if the aggregate amount of distributions or acquisitions by a member in a taxable year exceeds the amount of a member's earnings and profits, the earnings and profits exception should apply to reduce either a general rule transaction or a funding rule transaction that was preceded by a funding within the per se period, before being applied to reduce a funding rule transaction that is not preceded by a funding, regardless of the sequence of the transactions. In the alternative, comments recommended that the regulations provide taxpayers an election to determine the distributions or acquisitions to which the earnings and profits exception would apply.

The Treasury Department and the IRS agree that, in the absence of compelling administrability or policy reasons to the contrary, the sequencing of transactions between expanded group members within the same taxable year should not generally control the consequences of debt issuances. However, the Treasury Department and the IRS do not adopt either recommendation to address the significance of sequencing under the proposed regulations because, as discussed in Section E.6 of this Part V, the final and temporary regulations treat a covered member that issues a covered debt instrument in a distribution or acquisition as a funded member if that distribution or acquisition satisfies an exception described in § 1.385–3(c)(2) and (3), including the expanded group earnings reduction (the funded member rule). The funded member rule harmonizes the application of the expanded group earnings reduction with respect to general rule and funding rule transactions, thus substantially eliminating the importance of the sequence of the two types of transactions within a taxable year. Accordingly, the final and temporary regulations retain the ''first-in-time'' ordering rule of the proposed regulations for the expanded group earnings reduction. A similar ordering rule applies for purposes of the qualified contribution reduction described in Section E.3.b of this Part V.

iii. Alternate Metrics

Comments recommended that metrics other than earnings and profits be used as the basis for a taxpayer-favorable stacking rule. Suggestions included free cash flow from operations, as determined under GAAP; earnings before interest, taxes, depreciation and amortization (EBITDA); adjusted taxable income described in section 163(j)(6)(A); and other financial metrics under International Financial Reporting Standards (IFRS) or foreign country statutory accounting requirements. The Treasury Department and the IRS decline to adopt an alternate metric, and the final and temporary regulations retain earnings and profits as the basis for determining the amount of a distribution or acquisition treated as not funded by a covered debt instrument. The expanded group earnings reduction is intended to permit a member to make ordinary course distributions of its business earnings. In this regard, and most significantly, Congress established earnings and profits as the appropriate measure for federal tax purposes of whether a distribution represents a payment of the corporation's earnings or is a return of a shareholder's investment. In addition, using a metric such as adjusted taxable income described in section 163(j)(6)(A) or EBITDA would, over time, significantly overstate the ability of many members to make ordinary course distributions because such computations include no reduction for capital investment, interest, or taxes. Moreover, U.S. issuers are already familiar with, and required to compute, earnings and profits for general federal tax purposes, and establishing a requirement to use an alternate metric would add administrative complexity and compliance burden. For the foregoing reasons, the final and temporary regulations retain earnings and profits as the starting point for the expanded group earnings reduction.

Comments recommended an exception for ordinary course distributions based on the distribution history of the member. An exception for ordinary course distributions based on a distribution history would require an annual or other periodic averaging of distributions by a member. Because the Treasury Department and the IRS have determined that the cumulative approach to determining the expanded group earnings reduction is both more taxpayer-favorable and easier to administer than an approach based on distribution history, the final and temporary regulations reject this recommendation.

iv. Predecessors and Successors

Comments requested clarification regarding the application of the earnings and profits exception to predecessors and successors. Specifically, comments questioned whether a funding rule distribution or acquisition by a predecessor or successor with no earnings and profits nonetheless qualifies for the earnings and profits exception when the member with respect to which it is a predecessor or successor has earnings and profits.

In response to comments, the final and temporary regulations provide that, for purposes of applying the expanded group earnings reduction, as well as the qualified contribution reduction discussed in Section E.3.b of this Part V, with respect to a distribution or acquisition, references to a covered member do not include references to any corporation to which the covered member is a predecessor or successor. Accordingly, a distribution or acquisition by a predecessor or successor that is otherwise attributed to a funded member is reduced solely to the extent of the expanded group earnings and qualified contributions of the predecessor or successor that actually made the distribution or acquisition. The as-reduced amount of the distribution or acquisition is then attributed to the funded member, whose attributes are not available to further reduce the amount of the distribution or acquisition that may be treated as funded by a debt instrument of the funded member. The Treasury Department and the IRS have determined that sourcing distributions and acquisitions solely out of the relevant attributes of the distributing or acquiring member is more administrable and more consistent with the purpose of the reductions to permit ordinary course transactions not in excess of a member's new equity capital than an alternative approach such as calculating reductions by reference to the attributes of the other corporation in the predecessor-successor relationship or aggregating the attributes of both corporations.

In lieu of incorporating predecessor-successor concepts, the final and temporary regulations provide that a member that acquires the assets of another member in a complete liquidation described in section 332 or in a reorganization described in section 368 (whether acquisitive or divisive) succeeds to some or all of the acquired member's expanded group earnings

account. Similar provisions apply with respect to the qualified contribution reduction described in Section E.3.b of this Part V. This rule appropriately takes into account the enlarged dividend-paying capacity of a member that acquires the assets of another member pursuant to certain non-recognition transactions, and ensures that the expanded group earnings of a member are preserved and available for use after a reorganization, liquidation, or spin-off. Thus, while for purposes of applying the expanded group earnings reduction a reference to a member does not include a reference to a corporation to which the member is a predecessor or successor, the expanded group earnings account of a member may be determined, in whole or in part, by reference to the expanded group earnings account of a predecessor.

As discussed in Section D.5 of this Part V, the final and temporary regulations provide that a reorganization with boot, to the extent described in more than one prong of the funding rule, is treated as a single distribution or acquisition for purposes of the funding rule. The final and temporary regulations also provide that, for purposes of applying the expanded group earnings reduction, a distribution or acquisition that occurs pursuant to an internal asset reorganization is reduced by the expanded group earnings account of the acquiring member, after taking into account the expanded group earnings account it inherits form the target member. A similar provision applies to the qualified contribution reduction described in Section E.3.b of this Part V.

v. Additional Recommendations To Make the Exception More Administrable

Comments requested various safe harbors pursuant to which a taxpayer's determination of its earnings and profits would be respected if determined in good faith. One comment requested that the earnings and profits reflected on a timely filed tax return for an applicable taxable year be conclusively treated as the earnings and profits for such year, and any adjustments to earnings and profits for such year that arise out of an audit adjustment or amended tax return not be taken into account. A similar comment recommended that a taxpayer's determination of its earnings and profits be respected for purposes of applying the regulations, notwithstanding audit adjustments by the IRS, unless the determination was based upon a position for which accuracy-related penalties could be imposed under section 6662. Comments also requested that the exception apply with respect to distributions or acquisitions that do not exceed earnings and profits by more than a de minimis amount.

The final and temporary regulations do not adopt these suggestions. The Treasury Department and the IRS have determined that the expanded group earnings reduction in the final and temporary regulations provides taxpayers with far more latitude than under the proposed regulations to make ordinary course distributions while eliminating incentives to distribute earnings and profits in a particular year or every year. Because earnings and profits under the revised exception is not a ''use or lose'' attribute, taxpayers will be able to take a conservative approach to making distributions in any particular year. Accordingly, the Treasury Department and the IRS have determined that additional safeguards against taxpayer error are not warranted.

b. Reduction for Qualified Contributions

Numerous comments recommended that capital contributions to a member be netted against distributions or acquisitions by the member for purposes of applying proposed § 1.385–3(b)(2) and (b)(3)(ii) reasoning that, to the extent of capital contributions, a distribution does not reduce a member's net equity. For this purpose, some comments recommended a broad definition of a capital contribution to include any transfer of property in deemed or actual exchange for stock under section 1032, while other comments suggested that transfers of expanded group stock or a transfer of the assets of a member pursuant to an internal reorganization not be taken into account for purposes of the netting rule. Comments also differed on the period for which capital contributions should be taken into account. Some comments suggested that contributions for the entire per se period should be taken into account, even with respect to debt instruments that had already been recharacterized under § 1.385–3. One comment suggested taking into account contributions that occur after a debt instrument otherwise would be recharacterized but only to the extent that, as of that time, there was a plan to make the subsequent contributions during the remainder of the per se period. Other comments suggested narrower approaches, such as taking into account only the contributions made until the close of the taxable year in which the recharacterization otherwise would occur, or only those made in the per se period preceding the potential recharacterization. Some comments recommended that contributions from any member of the expanded group should be permitted to net against distributions or acquisitions made by another member, while other comments suggested a member-by-member approach to netting.

As discussed in Sections D.2.c and E.3.a.i of this Part V, the Treasury Department and the IRS have determined that it is appropriate to treat distributions or acquisitions as funded by new equity before related-party borrowings. Accordingly, the final and temporary regulations provide that a distribution or acquisition is reduced by the aggregate fair market value of the stock issued by the covered member in one or more qualified contributions (the qualified contribution reduction). A qualified contribution is a contribution of property (other than excluded property) to the covered member by any member of the covered member's expanded group in exchange for stock of the covered member during the qualified period. The qualified period generally means, with respect to a distribution or acquisition, the period beginning 36 months before the date of the distribution or acquisition, and ending 36 months after the date of the distribution or acquisition, subject to two limitations. First, the qualified period in no event ends later than the last day of the first taxable year that a covered debt instrument of the covered member would, absent the application of the qualified contribution reduction, be treated as stock or, if the covered member is an expanded group partner in a controlled partnership that is the issuer of the debt instrument, as a specified portion. Second, the qualified period is further limited to only include the covered member's expanded group period that includes the date of the distribution or acquisition.

Excluded property (that is, property the contribution of which does not give rise to a qualified contribution) includes expanded group stock and property acquired by a covered member in an internal asset reorganization. The Treasury Department and the IRS have determined that the acquisition of such assets in exchange for stock of a covered member should not be taken into account as increasing capital of the covered member that is available to make distributions for reasons similar to those discussed in Sections C.3 and C.4 of this Part V. In fact, if a covered member were given ''credit'' for contributions of expanded group stock, for example, the covered member could do in two steps (capital contribution of expanded group stock to the covered member followed by a distribution of a debt instrument by the covered member)

what the general rule would not permit it to do in one step (a covered member's purchase of that expanded group stock in exchange for a debt instrument).

Excluded property also includes a covered debt instrument issued by a member of the covered member's expanded group, property acquired by a covered member in exchange for a covered debt instrument issued by the covered member that is recharacterized under the funding rule, and a debt instrument issued by a controlled partnership of the expanded group of which a covered member is a member. The final and temporary regulations exclude covered debt instruments and debt instruments issued by a controlled partnership because the Treasury Department and the IRS are concerned that taxpayers could use such property to create non-economic qualified contributions before such indebtedness is treated as stock under § 1.385–3 or § 1.385–3T. Further, the final and temporary regulations exclude property acquired by a covered member in exchange for its own covered debt instrument that is treated as stock under the funding rule. This category of excluded property addresses the potential circularity of treating a contribution of property in exchange for a covered debt instrument that is treated as stock under the funding rule as a qualified contribution, which could reduce the amount of the distribution that caused the covered debt instrument to be treated as stock.

The final and temporary regulations also provide that qualified contributions do not include certain contributions to a covered member that do not have the effect of increasing the capital of the covered member that is available to make distributions (excluded contributions). The contributions that are entirely disregarded are contributions (i) from a member (controlled member) that the covered member controls (''upstream'' transfers), and (ii) from a corporation of which the covered member is a predecessor or successor or from a corporation controlled by that corporation. For purposes of the preceding sentence, control of a corporation means the direct or indirect ownership of more than 50 percent of the total combined voting power and more than 50 percent of the total value of the stock of a corporation applying the principles of section 958(a) without regard to whether an intermediate entity is foreign or domestic. If a contribution of property occurs before the covered member acquires control of the controlled member or before the transaction in which the corporation becomes a predecessor or successor to the covered member (transaction date), the contribution of property ceases to be a qualified contribution on the transaction date. If the contribution of property occurs within 36 months before the transaction date, the covered member is treated as making a distribution described in the funding rule on the transaction date equal to the amount by which any distribution or acquisition was reduced because the contribution of property was treated as a qualified contribution.

The final and temporary regulations also provide, more generally, that a contribution of property to a covered member is not a qualified contribution to the extent that the contribution does not increase the aggregate fair market value of the outstanding stock of the covered member immediately after the transaction and taking into account all related transactions, other than distributions and acquisitions described in the general rule and funding rule. Thus, for instance, a contribution to a covered member from a member in which the covered member owns an interest that represents less than 50 percent of the total combined voting power or value does not constitute a qualified contribution to the extent that the contribution does not increase the value of the covered member.

The final and temporary regulations generally take into account only contributions made during the per se period before the time that a debt instrument would be treated as stock. The Treasury Department and the IRS have determined that taking into account contributions after the taxable year in which a distribution or acquisition caused the recharacterization of a debt instrument would unduly increase the incidence of instruments switching between debt and equity treatment, leading to additional complexity and uncertainty for both the IRS and the taxpayer. However, in response to comments, the final and temporary regulations take into account contributions after a debt instrument would be treated as stock if the contribution occurs before the end of the taxable year in which such treatment begins. This rule allows taxpayers some ability to self-help for inadvertent distributions and acquisitions without implicating the same degree of uncertainty and administrability concerns that would occur if contributions in a subsequent taxable year were taken into account.

The Treasury Department and the IRS are concerned, however, that taxpayers could use capital contributions to frustrate the purposes of the final and temporary regulations. For example, a calendar-year taxpayer could take the position that a distribution of a note on January 1, pursuant to a plan to ''undo'' the recharacterization of the note that otherwise would apply by making a capital contribution on December 31, gives rise to interest deductions without funding new investment during the 364-day period preceding the contribution. Accordingly, the final and temporary regulations provide that property contributed to a covered member with a principal purpose of avoiding the purposes of § 1.385–3 or § 1.385–3T is excluded property, and thus does not give rise to a qualified contribution. As a result, in the example, the contribution on December 31 would not reduce the January 1 distribution or any subsequent distribution. This express limitation (as well as other targeted anti-abuse provisions, such as the limitation to the special exception to iterative recharacterization described in Section B.5 of this Part V) should not be interpreted to create a negative inference that the anti-abuse provision in § 1.385–3(b)(4) would not also have addressed such a transaction.

4. Threshold Exception

Proposed § 1.385–3(c)(2) provided that an expanded group debt instrument would not be treated as stock if, when the debt instrument is issued, the aggregate issue price of all expanded group debt instruments that otherwise would be treated as stock under the proposed regulations does not exceed $50 million (the threshold exception). The proposed regulations also provided that if the expanded group's debt instruments that otherwise would be treated as stock later exceed $50 million, then all expanded group debt instruments that, but for the threshold exception, would have been treated as stock were treated as stock, rather than only the amount that exceeds $50 million. Thus, the threshold exception in the proposed regulations was not an exemption of the first $50 million of expanded group debt instruments that otherwise would be treated as stock, but rather only provided an exception from the application of proposed § 1.385–3 for taxpayers that have not exceeded the $50 million threshold.

Comments suggested that the $50 million limitation should be increased, with the highest specific recommended threshold being $250 million. Comments also suggested that the threshold be based on a percentage of the issuer's or expanded group's assets, income, or another relevant financial metric. One comment recommended that the threshold exception be

determined by reference to the amount by which the issuer's interest expense exceeds interest income. Comments also suggested that the threshold exception should be applied separately with respect to each specific issuer (or a subset of an expanded group) or specific instrument, which would effectively increase the $50 million limitation.

The final and temporary regulations do not increase the amount of the threshold exception, or alter the basis for determining the exception except to include certain debt instruments issued by a controlled partnership that otherwise would be subject to the treatment described in Section H.4 of this Part V in the determination of whether the limitation has been surpassed. The scope revisions (discussed in Part III of the Background), the addition and expansion of exceptions for distributions and acquisitions otherwise described in § 1.385–3(b)(2) and (3) (discussed in Section E of this Part V), and the addition and expansion of exceptions for debt instruments otherwise subject to this section (discussed in Sections D.8 and F of this Part V) substantially reduce the number of instruments subject to recharacterization. These revisions are expected to limit the application of the rules to non-ordinary course transactions so that taxpayers will have the flexibility to avoid their application. Additionally, the final and temporary regulations do not adopt the recommendation to vary the threshold based on the size of the expanded group. The regulations are intended to address the use of related-party indebtedness that does not finance new investment. The comments do not establish, and the Treasury Department and the IRS have not ascertained, a policy justification for permitting larger expanded groups to issue more indebtedness that does not finance new investment, beyond the scaling that necessarily follows from the expanded group earnings reduction. Furthermore, the assets, income, and other financial attributes of an expanded group fluctuate, making it difficult for both taxpayers and the IRS to administer such a percentage-based threshold exception. Accordingly, the final and temporary regulations retain the $50 million threshold.

Additionally, comments suggested eliminating the so-called cliff effect by only recharacterizing instruments in excess of the threshold. Alternatively, comments suggested that the cliff effect apply at a second, higher threshold. In response to these comments, the final and temporary regulations eliminate the rule providing that the exception will not apply to any debt instruments once the $50 million threshold is exceeded. The final and temporary regulations instead provide that, to the extent that the $50 million threshold is exceeded immediately after a debt instrument would be treated as stock under § 1.385–3(b), only the amount of the debt instrument in excess of $50 million is treated as stock.

Comments also suggested revisions to the operation of the threshold exception. First, comments requested that an expanded group that exceeds the $50 million threshold due to reasonable cause be given a grace period (such as 90 days) to reduce the amount of outstanding debt instruments below the $50 million threshold. Second, comments recommended the use of an average quarterly amount outstanding to compute whether the $50 million threshold is exceeded. The final and temporary regulations do not adopt either of these recommendations. In light of the elimination of the cliff effect, the Treasury Department and the IRS have determined that neither a complex computation nor a special remediation rule is required or appropriate for the threshold exception. *See* Part B.6 of this Part V regarding the decision not to adopt a general remediation rule.

5. Requests for New Exceptions Not Adopted in the Final and Temporary Regulations

a. Post-Acquisition and Pre-Divestiture Restructuring

Comments requested an exception for debt instruments issued in connection with the post-merger integration of a previously unrelated target. Comments highlighted that a purchaser can generally fund an acquisition of an unrelated target company entirely with related-party indebtedness without implicating the regulations, but that the realignment of such acquisition indebtedness as part of the post-merger integration of the newly acquired entity, including its subsidiaries, implicates § 1.385–3. Moreover, comments asserted that transfers of stock and assets in exchange for debt are often the most practical method of realigning the stock and assets of a newly-acquired member for non-U.S. tax business reasons. Further, while the purchaser (or its subsidiaries) could acquire each target entity separately in fully debt-funded transactions that would not implicate § 1.385–3, comments asserted that such a transaction structure may be impractical due to regulatory or financing restrictions or the inability to negotiate such a transaction with an unrelated seller.

For the foregoing reasons, comments recommended that the regulations exempt debt instruments issued in exchange for expanded group stock pursuant to the integration of a newly-acquired member and its subsidiaries. Some comments suggested that an exception should apply to acquisitions from a member within one year of the member's acquisition from an unrelated person. One comment suggested that an exception should apply to acquisitions of newly-acquired members for 36 months after the acquisition. Another comment recommended an exception that would be limited to debt instruments issued by a member in exchange for the stock or assets of the new member with a principal amount equal to the amount of cash, notes, or rights to future payments received by the unrelated seller from members of the expanded group in the earlier acquisition.

Comments also recommended an exception for related-party indebtedness issued to acquire expanded group stock in connection with a plan to divest the acquiring member to unrelated persons. One comment suggested an exception for indebtedness issued by the departing member within 36 months of its divestiture, while other comments recommended an exception for any acquisitions of expanded group stock that occur pursuant to an integrated plan to dispose of the departing member. Another comment suggested that an acquisition of expanded group stock should not be described in the general rule or funding rule if the acquisition is part of a plan in which the acquirer, seller, and target cease to be members of the same expanded group.

The final and temporary regulations do not adopt an exception for debt instruments issued in connection with post-acquisition or pre-disposition restructuring. Such an exception would facilitate the use of related-party indebtedness to create significant federal tax benefits without financing new investment in the issuer. The incentives to create new related-party debt that does not finance new investment can be just as pronounced, if not more pronounced, in connection with post-acquisition restructuring or in preparation for a planned divestiture, since the new expanded group parent may have a different tax status that will allow the newly-configured group to use related-party debt to achieve significant federal tax benefits that were not possible before the acquisition or divestiture.

Moreover, the Treasury Department and the IRS do not view the close proximity of a third-party transaction as a basis for providing a special exception for the use of related-party debt in a transaction that does not finance new investment in the issuer. When an expanded group member acquires stock or assets from an unrelated third-party in exchange for cash or property, that acquisition is not described in the general rule or funding rule, even if the cash or property consideration is fully debt-funded by a related-party borrowing, because the acquisition from the unrelated third-party represents new investment in the issuer of the debt. The comments effectively recommend that, in the case of a recent acquisition, the final and temporary regulations extend this concept further to provide that subsequent transactions involving the recently-acquired members be provided a special exception. When those recently-acquired members issue related-party indebtedness to fund an internal stock acquisition or internal asset reorganization, the concerns set forth in Section C of this Part V about related-party debt that does not finance new investment in the issuer apply in a similar manner as in the case of transactions among old and cold expanded group members. Moreover, the Treasury Department and the IRS do not agree that because a transaction with a recently-acquired expanded group member could have been effectuated, hypothetically, with the unrelated third-party seller, the regulations should provide a special exception on the basis of this hypothetical transaction.

Similar concerns apply in the case of pre-divestiture planning. As for post-acquisition restructuring, the Treasury Department and the IRS do not view the close proximity to a subsequent third-party transaction as a basis for providing a special exception for related-party debt that does not finance new investment in the issuer.

Comments addressing pre-divestiture planning also observed that when a debt instrument is recharacterized close-in-time to the divestiture transaction with the unrelated third-party, the recharacterized debt instrument may be repaid immediately before the divestiture, which, as described in Part B.4 of this Section V, may result in a taxable sale or exchange. The Treasury Department and the IRS do not view the short duration of these instruments as changing the analysis in the preceding paragraph; however, as discussed in Part D.8 of this Section V, the temporary regulations adopt a broad exception to the funding rule for qualified short-term debt instruments that may overlap significantly with the types of short-duration debt instruments issued in anticipation of a divestiture transaction that are addressed in comments. As a result, the final and temporary regulations provide greater flexibility for issuances of debt instruments that are short term in form and in substance.

Comments requested other exceptions for certain restructuring transactions that are not undertaken in connection with a third-party transaction. One comment requested a same-country exception, which would apply to dispositions of stock or assets between expanded group members incorporated in the same country. The same comment requested an exception for internal stock acquisitions resulting in the acquired member joining the acquiring member's consolidated group or internal asset reorganizations in which the acquired member's assets are used by the acquirer in its business. A comment also requested that an internal asset reorganization be excepted if the taxpayer can demonstrate a business purpose for the reorganization.

The Treasury Department and the IRS decline to accept a broad exception for entity restructuring, because, as discussed in Sections C.3 and C.4 of this Part V, an internal stock acquisition and an internal asset reorganization with ''other property'' has an effect that is economically similar to a distribution regardless of whether the transaction is also supported by a non-U.S. tax business purpose. Moreover, the regulations do not generally prohibit a taxpayer from restructuring its operations; they only deny the undue federal tax benefit from the use of indebtedness in the restructuring to the extent it does not finance new investment.

b. Distributions of Non-Cash Assets

Comments recommended that distributions of ''old-and-cold,'' non-financial assets be excluded from the funding rule because such assets are not fungible and thus should not be treated as funded by a related-party borrowing. A comment suggested that the anti-abuse rule could adequately police distributions of property acquired with a principal purpose to avoid the regulations or acquired within a certain period before the distribution. For similar reasons, one comment recommended that the purchase of operating assets for a note should not be treated as a funding that can be matched with a distribution or acquisition.

The Treasury Department and the IRS decline to adopt this recommendation because a distribution of old-and-cold non-financial assets presents similar policy concerns to those described in Section D.2 of this Part V concerning other distributions of cash and property by a funded member. As discussed in Section D.6 of this Part V, the final and temporary regulations exclude all distributions described in section 355, whether or not preceded by an asset reorganization, from the scope of the funding rule because the strict requirements of section 355 indicate that the stock of a controlled corporation is not fungible. There are no such safeguards with respect to taxable distributions of operating assets, which may be acquired by the distributing member with cash the day before the distribution and converted into cash by the recipient member the day after. Moreover, an acquisition of operating assets in exchange for a debt instrument is like any other debt-financed purchase, which frees up the cash that otherwise would be used in the acquisition for other uses by the issuer. For these reasons, the Treasury Department and the IRS have determined that transfers of old-and-cold operating assets should not be excepted from the funding rule, except in the narrow circumstance that the distribution qualifies for nonrecognition under section 355.

6. Application of the Funding Rule to Instruments Issued in General Rule Transactions That Qualify for an Exception

a. Treatment of the Issuer of a Covered Debt Instrument in a General Rule Transaction That Satisfies an Exception as a Funded Member

Comments expressed concern that a debt instrument issued in an internal stock acquisition or an internal asset reorganization that would be recharacterized under the general rule but for the application of the earnings and profits exception may nonetheless be recharacterized under the funding rule. Comments noted that a debt instrument issued in one of these transactions is, in fact, issued in exchange for property (namely, stock or assets). Therefore, absent a special rule that prevents the debt from being re-tested, the member that engages in the transaction has been funded and the debt instrument may be recharacterized if the member has made, or does make, another distribution or acquisition described in the funding rule during the per se period. Comments suggested that testing the same debt instrument under both the general rule and funding rule amounts to ''double jeopardy'' and recommended that the regulations provide that, if the earnings and profits

exception applies to reduce the amount of a transaction described in the second or third prong of the general rule, the issuing member should not be treated as a funded member for purposes of retesting the instrument under the funding rule.

The final and temporary regulations do not adopt this recommendation and instead provide that a member that issues a debt instrument in a general rule transaction that satisfies an exception under § 1.385–3(c)(2) or (3) is treated as a funded member with respect to the debt instrument for purposes of re-testing the instrument under the funding rule (the funded member rule). The Treasury Department and the IRS have determined that the so-called ''double jeopardy'' highlighted by comments, in fact, harmonizes the treatment of general rule acquisitions with funding rule acquisitions, and its elimination would create an undue preference in § 1.385–3 for general rule acquisitions over funding rule acquisitions. Moreover, the distribution of a debt instrument that qualifies for an exception implicates the same policy concerns, and thus the funded member rule applies to transactions described in all three prongs of the general rule.

As discussed in the preamble to the proposed regulations, a funding rule transaction achieves an economically similar outcome as a general rule transaction. In this regard, both a general rule and a funding rule transaction effect a distribution of the proceeds of a borrowing, except that the latter does in multiple steps what the former accomplishes in one. Therefore, to achieve symmetry between the two types of economically similar transactions, an exception that would exclude or reduce a distribution or acquisition described in the funding rule should only exclude or reduce the distributive or acquisitive element of a transaction described in the general rule.

To illustrate, if S issues a note in exchange for property from P and, during the per se period, acquires the stock of T from P, and the acquisition satisfies an exception in § 1.385–3(c)(2) or (3), the S note is not treated as stock by reason of the T stock acquisition. However, because the S note is treated as not having funded the T stock acquisition, the S note may still be treated as funding another distribution or acquisition that occurs within the per se period. If, however, S acquires the T stock directly from P in exchange for its own note and the acquisition satisfies an exception in § 1.385–3(c)(2) or (3), under the recommendation for eliminating ''double jeopardy,'' the S note would not be treated as stock by reason of the T stock acquisition and, moreover, the S note would not be subject to potential recharacterization under the funding rule if there is another distribution or acquisition during the per se period. Accordingly, under the recommendation, an exception intended solely to exclude or reduce a distribution or acquisition would effectively negate both the distributive element and the funding element of the transaction. Moreover, this recommendation would create divergent consequences as between transactions with the same economic effect—after both variations of the transaction, S has acquired the T stock and P holds an S note. To conform the application of the exceptions in § 1.385–3(c)(2) and (3) as between the S funding rule acquisition and the S general rule acquisition, the exceptions should apply solely to exclude or reduce the distributive aspect of the S general rule acquisition.

For the foregoing reasons, the final and temporary regulations provide that, to the extent an exception applies to exclude or reduce the amount of a distribution or acquisition described in the general rule, the debt instrument issued in the transaction is treated as issued by a member in exchange for property solely for purposes of applying the funding rule to the debt instrument and the member. The funded member rule addresses the sequencing concern with respect to the expanded group earnings reduction discussed in Section E.3.a.ii of this Part V. In the example provided in that section, S distributes $50x cash and a note with a $50x principal amount in a taxable year in which S has expanded group earnings of $50x. Under the funded member rule, if the general rule distribution is reduced by $50x under the expanded group earnings reduction, S is treated as having been funded by the issuance of the $50x note. As a result, the ordering of the distributions does not materially affect the consequences of the transactions under the final and temporary regulations—either (1) the funding rule distribution occurs first, the amount of the cash distribution is reduced by $50x, and the S note is recharacterized as stock under the general rule, or (2) the general rule distribution occurs first, the amount of the note distribution is reduced by $50x, S is treated as having been funded by the note, and the S note is recharacterized as stock under the funding rule by reason of the cash distribution. In either sequence of events, the S note is recharacterized as stock, whether by reason of the general rule or the funding rule.

b. Treatment Under the Funding Rule of a Covered Debt Instrument Issued in a General Rule Transaction That Satisfies an Exception

The proposed regulations provided that, to the extent a debt instrument issued in an internal asset reorganization is treated as stock under the general rule, the distribution of the debt instrument pursuant to the same reorganization is not also treated as a distribution or acquisition described in the funding rule (the ''general coordination rule''). One comment requested that the general coordination rule be expanded to provide that any transaction described in the general rule, regardless of whether such transaction results in the debt instrument being treated as stock, is not also treated as a distribution or acquisition described in the funding rule. The comment questioned, for example, whether the distribution of a covered debt instrument could be treated as a distribution of property for purposes of the funding rule if the debt instrument were not treated as stock by reason of the threshold exception of § 1.385–3(c)(4). The issue could also be implicated if the amount of a general rule acquisition in an internal asset reorganization is reduced by reason of an exception described in § 1.385–3(c)(3). To the extent that the amount of the acquisition is reduced by reason of an exception (for example, the expanded group earnings reduction), the covered debt instrument issued by the transferee corporation would be respected as indebtedness, and thus the distribution of the covered debt instrument by the transferor corporation to its shareholder pursuant to the plan of reorganization would be treated as a distribution of property described in the funding rule. Accordingly, absent an expansion of the general coordination rule, a single transaction with an economic effect similar to a distribution would be treated as two transactions subject to the general rule and funding rule.

The Treasury Department and the IRS adopt the recommendation to expand the general coordination rule to apply to all general rule transactions, regardless of whether the covered debt instrument issued in the transaction is treated as stock under the general rule. Accordingly, the final and temporary regulations provide that a distribution or acquisition described in the general rule is not also described in the funding rule. Moreover, the final and temporary regulations also provide that an

acquisition in an internal asset reorganization described in the general rule by the transferee corporation is not also a distribution or acquisition described in the funding rule by the transferor corporation. For purposes of the general coordination rule, whether a distribution or acquisition is described in the general rule is determined without regard the exceptions of § 1.385–3(c). Thus, in an internal asset reorganization to which an exception applies, the distribution of a respected debt instrument by the transferor corporation is not also tested as a distribution or acquisition described in the funding rule.

For a discussion of the general coordination rule applicable during the transition period, see Part VIII.B.2 of this Summary of Comments and Explanation of Revisions.

F. Exceptions From § 1.385–3 for Certain Debt Instruments

The final and temporary regulations limit the application of the general rule and funding rule by excluding certain debt instruments described in this Section F of this Part V from the definition of covered debt instruments. This Section F of this Part V also discusses other requests for exceptions that were not adopted.

1. Qualified Dealer Debt Instrument

Comments recommended that the regulations provide an exception for debt instruments acquired and held by a dealer in securities (within the meaning of section 475(c)(1)) in the ordinary course of its business as a dealer in securities. Similarly, comments recommended that the regulations provide an exception for debt instruments that would be excluded from being investments in U.S. property if entered into between a controlled foreign corporation and a United States shareholder under section 956(c)(2)(K), which covers securities acquired and held by a dealer in securities in the ordinary course of its business.

In response to these comments, the regulations provide an exception for the acquisition of debt instruments by a dealer in securities. Under § 1.385–3(g)(3)(i), a ''qualified dealer debt instrument'' is excluded from the definition of a covered debt instrument. A qualified dealer debt instrument is defined in § 1.385–3(g)(3)(ii) to mean a debt instrument issued to or acquired by an expanded group member that is a dealer in securities (within the meaning of section 475(c)(1)) in the ordinary course of the dealer's business of dealing in securities. This exception applies solely to the extent that (i) the dealer accounts for the debt instruments as securities held primarily for sale to customers in the ordinary course of business, (ii) the dealer disposes of the debt instruments (or the debt instruments mature) within a period of time that is consistent with the holding of the debt instruments for sale to customers in the ordinary course of business, taking into account the terms of the debt instruments and the conditions and practices prevailing in the markets for similar debt instruments during the period in which they are held, and (iii) the dealer does not sell or otherwise transfer the debt instruments to a person in the same expanded group, other than to a dealer that satisfies the requirements of the exception for qualified dealer debt instruments.

2. Instruments That Are Not In Form Debt

Proposed §§ 1.385–3 and 1.385–4 applied to any interest that would, but for those sections, be treated as a debt instrument as defined in section 1275(a) and § 1.1275–1(d). Consequently, the proposed regulations applied not only to debt in form, but also to any instrument or contractual arrangement that constitutes indebtedness under general principles of federal income tax law. One comment recommended that the funding rule apply solely to instruments that are, in form, debt instruments. The Treasury Department and the IRS decline to accept this recommendation because this would fail to take into account the substance of an arrangement that is otherwise treated as a debt instrument for federal tax purposes and create an inappropriate preference for debt instruments that are not in-form debt.

Comments also noted that, in certain cases, instruments (or deemed instruments) that are expressly treated as debt under other provisions of the Code and regulations should not be subject to recharacterization. The comments cited leases treated as loans under section 467; receivables and payables resulting from correlative adjustments under section 482; production payments under section 636; coupon stripping transactions under section 1286; and debt (or instruments treated as debt) described in section 856(m)(2), 860G(a)(1), or 1361(c)(5). Similarly, comments requested that the regulations disregard debt instruments deemed to occur under section 367(d).

The final and temporary regulations exclude from the definition of covered debt instruments: Production payments under section 636; REMIC regular interests (as defined in section 860G(a)(1)); instruments described in section 1286 (relating to coupon stripping transactions) unless such an instrument is issued with a principal purpose of avoiding the purposes of § 1.385–3 or § 1.385–3T; and leases treated as loans under section 467. The final and temporary regulations also provide an exception for debt instruments deemed to arise as a result of transfer pricing adjustments under section 482. The Treasury Department and the IRS decline to include an exception for payables deemed to occur under section 367(d) in the final and temporary regulations because the final and temporary regulations are limited to U.S. borrowers.

The final and temporary regulations do not provide an exception for debt described in section 1361(c)(5) because S corporations are not included in the definition of an expanded group in the final and temporary regulations. The final and temporary regulations also do not provide an exception for debt described in section 856(m)(2), which addresses certain non-contingent non-convertible debt securities held by a REIT that are not taken into account for one of the asset tests for qualified REIT status. The final and temporary regulations do not adopt this exception because the final and temporary regulations apply only to REITs that are controlled by expanded group members, and not parent-REITs. In this context, debt instruments described in section 856(m)(2) that are issued to other expanded group members may present similar policy concerns as those presented by other expanded group debt instruments.

One comment suggested that the funding rule should not apply to a deemed loan arising from a nonperiodic payment arising with respect to a notional principal contract. The comment noted that multinational enterprises frequently use intercompany swaps to allocate and manage interest rate and foreign currency risk. In some situations, one member of an expanded group may make a nonperiodic payment to another member of the expanded group that might be characterized as a loan under § 1.446–3T(g)(4). The comment asserts that it is unnecessary to apply the funding rule to deemed loans such as those that arise from a nonperiodic payment on a notional principal contract to achieve the policy goals of the proposed regulations.

The Treasury Department and the IRS decline to accept this recommendation, because it would not take into account the substance of an arrangement that is otherwise treated as a debt instrument for federal tax purposes. Moreover, the

regulations referred to in the comment are not currently in effect, and are not scheduled to take effect until after final and temporary regulations are issued. The regulations under § 1.446–3T(g)(4) have been the subject of extensive comment and are under active consideration. The Treasury Department and the IRS will consider whether it is necessary to coordinate the nonperiodic payment rules on swaps with section 385 when finalizing the regulations on notional principal contracts.

3. Significant Modifications and Refinancing

Comments suggested that a significant modification within the meaning of § 1.1001–3 should not implicate the funding rule because the debt instrument deemed issued as a result of such a modification should be treated as having been issued to retire the existing instrument instead of generating new proceeds that could fund distributions or acquisitions subject to § 1.385–3. However, one comment acknowledged that such an exception may be inappropriate in cases where the significant modification extends the term of the instrument. The comment stated that, in such a case, the modified debt could be viewed as essentially financing activities of the borrower for the extended term. Other comments recommended that a similar exception apply to an actual refinancing whereby a new debt instrument is issued and the proceeds are used to repay an old debt instrument. Comments recommended that the borrowing to refinance an existing debt instrument be considered used for the same purpose as the refinanced debt, and thereby be subject to the funding rule to the same extent as the refinanced debt instrument.

In response to comments, the final and temporary regulations provide that if a covered debt instrument is treated as exchanged for a modified covered debt instrument pursuant to § 1.1001–3(b), the modified covered debt instrument is treated as issued on the original issue date of the covered debt instrument. This special rule is limited to situations in which the modification, or one of the modifications, that results in the exchange (or deemed exchange) does not include (i) the substitution of an obligor on the covered debt instrument, (ii) the addition or deletion of a co-obligor on the covered debt instrument, or (iii) the material deferral of scheduled payments due under the covered debt instrument The special rule excludes a change in obligor or addition of an obligor that results in a deemed exchange because the Treasury Department and the IRS are concerned about such modifications circumventing the funding rule generally. The special rule excludes a material deferral of scheduled payments that results in a deemed exchange because the Treasury Department and the IRS are concerned about such extensions circumventing the per se period though continued extensions of maturity.

The final and temporary regulations also clarify that if the principal amount of a covered debt instrument is increased, the portion of the covered debt instrument attributable to such increase is treated as issued on the date of such increase.

The final and temporary regulations do not extend the special rule for modifications of debt instruments to an actual refinancing outside of the context of a modification described in § 1.1001–3(a). For example, the rule would not apply to a refinancing of a debt instrument held by one expanded group member through the issuance of a new debt instrument to another expanded group member. The Treasury Department and the IRS have determined that it is appropriate to provide this special rule in the context of a deemed exchange for tax purposes that may not be treated as an exchange for legal, accounting or other relevant purposes. By contrast, in a transaction that is in form a refinancing that involves an exchange for tax purposes without regard to the application of § 1.1001–3(b), the Treasury Department and the IRS decline to provide a special rule. Furthermore, the Treasury Department and the IRS are concerned that the limitations to this special rule that would be necessary to prevent abuse would be difficult to administer in the context of an actual refinancing.

4. Insurance and Reinsurance Arrangements

Comments asserted that the regulations should not apply to insurance or reinsurance transactions entered into in the ordinary course of an insurer's or reinsurer's trade or business. Several comments further noted that the regulations should not apply to reinsurance arrangements where funds otherwise due to the reinsurance company are withheld by the insurance company ceding risk to a reinsurance company.

The final and temporary regulations only apply to interests that would, but for the application of § 1.385–3, be treated as debt instruments as defined in section 1275(a) and § 1.1275–1(d). As a result, insurance and reinsurance contracts generally would not be subject to § 1.385–3 because such contracts are not ordinarily treated as debt instruments as defined in section 1275(a) and § 1.1275–1(d). To the extent that an arrangement entered into in connection with an insurance or reinsurance contract would be treated as a debt instrument, as defined in section 1275(a) and § 1.1275–1(d), that arrangement is a debt instrument for federal income tax purposes. As a result, the Treasury Department and the IRS have determined that such a debt instrument should not be treated differently than any other interest subject to § 1.385–3. However, as discussed in Section G.2 of this Part V, the final and temporary regulations exclude debt instruments issued by regulated insurance companies.

5. Securitization Transactions

One comment requested an exception for instruments issued pursuant to certain securitization transactions. The comment stated that in a common securitization transaction, an operating entity transfers income producing assets, such as receivables or loans, to a special purpose vehicle (SPV). The SPV then re-transfers the assets to a bankruptcy-remote entity that is typically disregarded for federal tax purposes in exchange for tranches of instruments that the SPV sells, usually to unrelated parties and often utilizing an underwriter or broker. The SPV frequently hires a servicing agent to collect on the income producing assets and channel the payments to the appropriate class of securities. The funding rule is implicated when an expanded group member acquires securities of the SPV (or instruments of the disregarded entity treated as instruments of the SPV for federal tax purposes). This may occur in the normal course of the expanded group member's investment in portfolio securities. It may also occur when the expanded group member acquires the securities because the SPV cannot place them all with unrelated parties at the time of issuance. The comment stated that the rule is particularly problematic when the SPV is a member of a consolidated group that is itself the subsidiary of a foreign parent, and an expanded group member that is not a member of the consolidated group acquires the securities. In this case, a distribution by the common parent could be considered funded by the SPV's issuance of debt instruments acquired by related parties. The comment requested an exemption for such transactions because they are motivated by non-tax considerations and do not present the policy concerns underlying the proposed regulations.

The proposed regulations do not adopt an exception for all securitization

transactions. The Treasury Department and the IRS have determined that related party debt issued as part of a securitization transaction presents the same general policy concerns as related-party debt issued in other contexts. This is because the proceeds from the sale of debt issued as part of a securitization transaction generally may be used to fund a distribution or acquisition. However, the final and temporary regulations adopt a number of exceptions for non-tax motivated transactions that provide relief to the transaction described in the comment. First, the final and temporary regulations adopt an exception for qualified dealer debt instruments acquired in the ordinary course of the dealer's business that are subsequently disposed of outside the expanded group. See Section F.1 of this Part V. Second, the final and temporary regulations do not apply to instruments issued by a foreign SPV. *See* Part III.A.1 of this Summary of Comments and Explanation of Revisions. Finally, the regulations continue to treat a consolidated group as a single corporation, such that the SPV will only be considered funded to the extent the securities are acquired by an expanded group member that is not part of the issuer's consolidated group. *See* Part III.A.2 of this Summary of Comments and Explanation of Revisions. To the extent such a funding occurs, the elimination of the cliff effect in the threshold exception also provides relief. *See* Section E.4 of this Part V. Accordingly, the final and temporary regulations do not provide special rules for the treatment of instruments issued as part of a securitization transaction, but do provide numerous new exceptions that will exclude many of these transactions.

6. Principal Motive of Tax Avoidance

One comment recommended that proposed § 1.385–3 be limited to debt issuances that have a principal motivation of tax avoidance. The comment does not elaborate on what type of transaction would constitute tax ''avoidance.''

As discussed in Section A.1 of this Part V, the Treasury Department and the IRS have decided that consideration of whether a debt instrument issued to a member of the issuer's expanded group finances new investment is an appropriate determinative factor for whether a corporation-shareholder or debtor-creditor relationship exists. Such factor may exist regardless of whether a taxpayer is motivated principally by tax avoidance. Although the final and temporary regulations retain a principal purpose test as part of the funding rule, this test looks to whether the taxpayer intended for the debt issuance to fund a distribution or acquisition, rather than whether such transaction avoided tax. *See* Section D.2.e of this Part V.

G. Exceptions From § 1.385–3 for Debt Instruments Issued by Certain Issuers

The final and temporary regulations limit the application of the general rule and funding rule by excluding debt instruments issued by excepted regulated financial companies and regulated insurance companies from the definition of covered debt instruments.

1. Regulated Financial Groups

Several comments requested that the proposed regulations be revised to exclude debt instruments issued by certain types of regulated financial institutions. Comments reasoned that financial institutions, whose core business is financial intermediation (such as the transmission of funds between lenders and borrowers), rely on intercompany loans to efficiently transfer funds among their affiliates, and therefore would be disproportionately affected by the proposed regulations. These comments also asserted that the supervision and regulation to which regulated financial institutions are subject significantly restricts their ability to engage in the types of transactions the proposed regulations are intended to address. Furthermore, the comments noted that certain regulatory and supervisory requirements mandate the issuance of intercompany debt and that it would be particularly burdensome for such debt to be subject to the proposed regulations. Comments in particular sought exceptions from the regulations for transactions that U.S. subsidiaries of foreign banks undertake to comply with the requirement adopted by the Board of Governors of the Federal Reserve System (Federal Reserve) that certain foreign banks reorganize their U.S. subsidiaries under a U.S. intermediate holding company. Comments also referred to the rules proposed by the Federal Reserve that would require U.S. subsidiaries of certain foreign banks to issue intercompany debt that could be used to facilitate a recapitalization of such subsidiaries in the event their intermediate holding company is in default or in danger of default. Comments recommended excluding companies described in, for example, section 954(h) or 904(d)(2)(C), or by reference to other provisions of U.S. law that describe financial entities subject to certain forms of federal regulation. Comments also recommended excluding certain transactions typically used to fund financial institutions subject to regulation, such as transactions of the type that are described in section 956(c)(2)(I) and (J).

In response to these comments, the final and temporary regulations provide an exception to the definition of covered debt instrument in § 1.385–3(g)(3) for covered debt instruments that are issued by an excepted regulated financial company. An excepted regulated financial company is defined in § 1.385–3(g)(3)(iv) to mean a covered member that is a regulated financial company or a member of a regulated financial group.

A regulated financial company is defined in § 1.385–3(g)(3)(iv)(A) by reference to certain types of financial institutions that are subject to specific regulatory capital or leverage requirements. The definition of regulated financial company is comprised of: Bank holding companies; certain savings and loan holding companies; insured depository institutions and any other national banks or state banks that are members of the Federal Reserve System; nonbank financial companies subject to a determination by the Financial Stability Oversight Council; certain U.S. intermediate holding companies formed by foreign banking organizations; Edge Act and agreement corporations; supervised securities holding companies; registered broker-dealers; futures commission merchants; swap dealers; security-based swap dealers; Federal Home Loan Banks; Farm Credit System institutions; and small business investment companies. The final and temporary regulations include exceptions for swap dealers and security-based swap dealers in anticipation of the adoption of final rules that would apply capital requirements to such entities.

The Treasury Department and the IRS recognize that other types of companies are subject to various levels of regulation and supervision, including regulation designed to ensure the financial soundness of the company. However, the Treasury Department and the IRS have tailored the exception to regulated institutions that are subject to capital or leverage requirements because such requirements most directly constrain the ability of such institutions to engage in the transactions that are intended to be addressed by the final and temporary regulations. Although the specific requirements vary across the regulatory regimes identified in § 1.385–3(g)(3)(iv)(A), in each case the regulatory regime imposes capital or leverage requirements that have the effect of limiting the extent to which a regulated company can increase the

amount of its debt. In contrast, institutions that are not subject to entity-specific capital or leverage requirements, such as certain types of savings and loan holding companies, are not eligible for the exception. Furthermore, the exception is tailored to focus on financial institutions that are financial intermediaries whose business activities require the efficient transfer of money among affiliates.

In addition, certain financial institutions that are included in the definition of regulated financial company (specifically, those listed in § 1.385–3(g)(3)(iv)(A)(*1*) through (*10*)) are subject to consolidated supervision with respect to the entire group, including consolidated capital or leverage requirements and supervision of all material subsidiaries. This degree of regulation and supervision generally places meaningful limits on the ability of subsidiaries to issue debt. The final and temporary regulations therefore also exclude from the definition of covered debt instrument debt instruments issued by any subsidiary of a regulated financial company that is listed in § 1.385–3(g)(3)(iv)(A)(*1*) through (*10*), which includes bank holding companies and certain other types of banking organizations. With respect to these regulated financial companies, § 1.385–3(g)(3)(iv)(B) defines a regulated financial group to include the subsidiaries of the regulated financial company that would constitute members of an expanded group that had as its expanded group parent the regulated financial company. Therefore, if a regulated financial company is the expanded group parent of an expanded group, the entire expanded group constitutes a regulated financial group. On the other hand, if a regulated financial company is a non-parent member of an expanded group, then only the direct and indirect subsidiaries of such regulated financial company that are expanded group members constitute the regulated financial group.

However, the Treasury Department and the IRS also have determined that certain subsidiaries of a bank holding company or savings and loan company that engage in a non-financial business should not be treated as part of a regulated financial group. Specifically, under § 1.385–3(g)(3)(iv)(B)(*2*), subsidiaries of a bank holding company or savings and loan holding company that are held pursuant to the complementary activities authority, merchant banking authority, or grandfathered commodities activities authority provided by sections 4(k)(1)(B), 4(k)(4)(H), and 4(o) of the Bank Holding Company Act, respectively, are not treated as part of the bank holding company's or savings and loan holding company's regulated financial group. Such subsidiaries are engaged in non-financial businesses and have the same incentives as non-financial companies that are not subsidiaries of bank holding companies or savings and loan holding companies to use related-party debt to generate significant federal tax benefits without having meaningful non-tax effects, and generally do not face significant regulatory restrictions on doing so. Therefore, it is appropriate to treat such non-financial subsidiaries comparably to non-financial companies that are not subsidiaries of bank holding companies or savings and loan holding companies.

The final and temporary regulations do not provide a separate exception for debt issued *to* an excepted regulated financial company because entities included within the definition of an excepted regulated financial company generally are not subject to regulatory limits on their ability to lend. In any case, debt instruments issued by one member of a regulated financial group to another member of the group are excluded from the definition of covered debt instrument under the final and temporary regulations by virtue of being issued by an excepted regulated financial company.

2. Regulated Insurance Companies

For reasons similar to those discussed in the immediately preceding section, the Treasury Department and the IRS have determined that debt instruments issued by insurance companies that are subject to risk-based capital requirements under state law should be excluded from the definition of covered debt instrument. The Treasury Department and the IRS have determined that, similar to regulated financial companies, regulated insurance companies are subject to risk-based capital requirements and other regulation that mitigates the risk that they would engage in the types of transactions addressed by the final and temporary regulations.

Therefore, the final and temporary regulations provide that a covered debt instrument does not include a debt instrument issued by a regulated insurance company. Section 1.385–3(g)(3)(v) defines a regulated insurance company as a covered member that is: (i) Subject to tax under subchapter L of chapter 1 of the Code; (ii) domiciled or organized under the laws of a state or the District of Columbia; (iii) licensed, authorized, or regulated by one or more states or the District of Columbia to sell insurance, reinsurance, or annuity contracts to persons other than related persons (within the meaning of section 954(d)(3)); and (iv) engaged in regular issuances of (or subject to ongoing liability with respect to) insurance, reinsurance, or annuity contracts with persons that are not related persons (within the meaning of section 954(d)(3)). In order to prevent a company from inappropriately qualifying as a regulated insurance company, the final and temporary regulations also provide that in no case will a corporation satisfy the licensing, authorization, or regulation requirements if a principal purpose for obtaining such license, authorization, or regulation was to qualify as a ''regulated insurance company'' under the final and temporary regulations.

The last prong of the definition of ''regulated insurance company'' has the effect of not including within the exclusion certain captive insurance and reinsurance captive companies. Covered debt instruments issued by such companies are not excluded under the final and temporary regulations because captive insurers are not subject to risk-based capital requirements and are otherwise not subject to regulation and oversight to the same degree as other insurance and reinsurance companies.

The Treasury Department and the IRS have not extended the regulated insurance company exception to other members of an insurance company's group that are not themselves regulated insurance companies. State insurance regulators only exercise direct authority over regulated insurance companies; such direct authority does not extend to other non-insurance entities within the group. Subsidiaries of insurance companies that are not themselves insurance companies are only subject to regulation indirectly through supervision of the affiliated insurance companies. Among other things, in contrast to a regulated financial group, such non-insurance subsidiaries and affiliates are generally not subject to consolidated capital requirements.

3. Instruments Issued In Connection With Certain Real Estate Investments and Other Capital Investment

Comments expressed concern that a debt instrument that is treated as stock would not be treated as an interest ''solely as a creditor'' for purposes of determining whether the holder has an interest in a United States real property holding corporation (USRPHC) for purposes of sections 897 and 1445. Generally, a foreign corporation that disposes of stock of a domestic corporation is not subject to U.S. income tax on the gain realized upon

the sale. However, section 897(a) treats gains from the disposition of a United States real property interest (USRPI), which includes an interest in a USRPHC, as income that is effectively connected with a U.S. trade or business that is subject to tax under section 882(a)(1). A USRPHC is defined in section 897(c)(2) as any corporation more than 50 percent of the fair market value of the business and real estate assets of which are USRPIs. Under section 897(c)(1)(A), an interest solely as a creditor in a domestic corporation does not constitute a USRPI. Under § 1.897–1(d)(3)(i)(A), stock of a corporation is not an interest solely as a creditor.

Comments requested that an instrument treated as stock under the proposed regulations nonetheless be considered to be an interest solely as a creditor for purposes of section 897(c)(1)(A). Alternatively, comments requested relief for a good faith failure to report and withhold under section 1445 with respect to a recharacterized instrument no longer considered to be an interest solely as a creditor. Comments also suggested that the proposed regulations would impact various ownership-based tests under section 897 (including whether a corporation constitutes a USRPHC and the application of certain exceptions to section 897) and lead to unexpected tax consequences. In particular, comments asserted that the proposed regulations could affect the application of the ''look-through'' rule in section 897(c)(5), which could ultimately affect the treatment of unrelated persons with no control or knowledge of the recharacterized instruments.

As discussed in Section B.1 of this Part V, the Treasury Department and the IRS have determined that an interest determined to be stock under the final and temporary regulations generally should be treated as stock for all federal tax purposes. Accordingly, the final and temporary regulations do not provide a special exception for purposes of section 897. The regulations are concerned with the use of related-party indebtedness issued to an expanded group member that does not finance new investment in the operations of the issuer. These concerns are no less implicated in the case of debt issued by a domestic corporation investing in U.S. real estate that may be treated as a USRPHC as compared to any other domestic corporation.

With respect to the application of the various ownership-based tests under section 897, including the look-through rule in section 897(c)(5), to the extent any uncertainties exist, they do not arise uniquely as a result of the final and temporary regulations. Instead, such uncertainties would arise whenever purported debt instruments are characterized as stock under applicable common law. Section B.1 of this Part V illustrates other areas in which recharacterization, whether under the common law or under the final and temporary regulations, can impact the application of other Code provisions.

The final and temporary regulations also do not adopt a special rule for purposes of withholding under section 1445 because § 1.1445–1(e) provides rules of general application for the failure to withhold under section 1445, and the application of the final and temporary regulations does not present unique issues in this regard. The concerns raised in comments related to transfers of USRPIs among members of an expanded group, which are, by definition, highly-related parties that should be able to determine whether a particular instrument has been recharacterized under the final and temporary regulations. Furthermore, any liability of the transferee will be potentially mitigated by § 1.1445–1(e)(3), which provides that the transferee is relieved of liability to the extent the transferor satisfies its tax liability with respect to the transfer. If the instrument is sold outside the group, the disposition will not subject an unrelated person to liability under section 1445 (assuming the interest is an interest solely as a creditor in the hands of the unrelated person) because the deemed exchange described in § 1.385–3(d)(2) occurs immediately before the instrument leaves the group.

A comment also requested an exception for qualified foreign pension funds described in section 897(l)(2), which generally allows such funds to invest in U.S. real estate without being subject to section 897. The comment reasoned that the effect of the regulations on interest deductibility could decrease the after-tax returns such funds receive on investments in U.S. infrastructure investments, resulting in decreased investment. Other comments cited similar concerns, with one comment recommending an exception for a newly defined infrastructure asset holding company and another comment recommending an exemption for debt tied to U.S. capital expenditure investment more broadly. The Treasury Department and the IRS decline to adopt these recommendations because the regulations are concerned in general about the creation of indebtedness that does not finance new investment, without regard to the identity of the ultimate beneficial owners of the expanded group, and without regard to the nature of a taxpayer's business.

H. Operating Rules

1. Timing Rules

The proposed regulations provided that when a debt instrument is treated as stock under the funding rule, the debt instrument is treated as stock from the time the debt instrument is issued, but only to the extent it is issued in the same or a subsequent taxable year as the distribution or acquisition that the debt instrument is treated as funding. Comments recommended that this rule be modified such that a debt instrument cannot be treated as stock before the occurrence of the transaction that the debt instrument is treated as funding. Comments noted that the collateral consequences described in Section B.1 of this Part V (including the implications under section 368(c)) would be particularly burdensome in this context. Similarly, comments requested clarification that the timing rule did not cause a debt instrument that was repaid before the occurrence of a distribution or acquisition to be treated as funding that distribution or acquisition.

The final and temporary regulations eliminate the timing rule under which a covered debt instrument that is treated as funding a distribution or acquisition that occurs later in the same year is treated as stock when the covered debt instrument is issued. As a result, when a covered debt instrument is treated as funding a distribution or acquisition that occurs later in the same year, or in a subsequent year, the covered debt instrument is recharacterized on the date of the later distribution or acquisition. Thus, when a covered debt instrument is repaid before a distribution or acquisition that the debt instrument might otherwise be treated as funding, the covered debt instrument is not recharacterized.

2. Covered Debt Instrument Treated as Stock That Leaves the Expanded Group

In general, under proposed § 1.385–3(d)(2), if a debt instrument treated as stock leaves the expanded group, either because the instrument is transferred outside the expanded group or because the holder leaves the expanded group, the issuer is deemed to issue a new debt instrument to the holder in exchange for the debt instrument that was treated as stock, in a transaction that is disregarded for purposes of applying the general rule and funding rule. Comments recommended that, when the instrument is transferred outside the group, rules similar to the deemed

exchange rules of proposed § 1.385–1(c) apply to the instrument treated as stock that is converted to debt upon sale outside the expanded group. Another comment suggested that the expanded group member disposing of the instrument be treated as selling stock under section 1001 and the acquirer treated as purchasing debt at an issue price determined as if the debt were respected as debt since issuance (that is, adjusting the actual purchase price to account for any accrued interest). Finally, a comment also requested a clarification that any stated interest that had accrued between the last payment date and the date of the deemed exchange should be considered a portion of the redemption price. As discussed in Part III.C of this Summary of Comments and Explanation of Revisions, the final and temporary regulations do not adopt these recommendations because there are detailed rules in sections 1273 and 1274 that describe how to determine issue price when a debt instrument is issued for stock. Moreover, the Treasury Department and the IRS are of the view that in the situation where a debt instrument treated as stock leaves the expanded group, treating that instrument as newly issued more appropriately reflects the characterization of the transaction in the final and temporary regulations.

A comment also suggested removing the re-testing rule in the proposed regulations that required an issuer to re-test all outstanding debt instruments after a debt instrument treated as stock leaves the expanded group. The final and temporary regulations do not adopt this recommendation. The re-testing rule addresses a concern similar to that discussed in Section B.4 of this Part V, regarding when a debt instrument that is treated as stock is repaid in a transaction that is treated as a distribution for purposes of § 1.385–3. In the context of a repayment of the recharacterized debt instrument, the Treasury Department and the IRS are concerned that, unless the repayment is treated as a distribution for purposes of the funding rule, the repayment could result in an inappropriate removal of a distribution or acquisition described in the general rule or funding rule from the funding rule. In the context of a transfer of the instrument outside of the expanded group, there is no repayment of the recharacterized debt instrument that would be treated as a distribution for purposes of the funding rule (although the recharacterized debt instrument is deemed redeemed when transferred outside the expanded group, proposed § 1.385–3(d)(2) disregarded that redemption for purposes of the funding rule). Nonetheless, there is a similar concern about an inappropriate removal of the underlying distribution or acquisition from the funding rule. Thus, the proposed regulations provided that, after a transfer of the instrument outside of the expanded group, the underlying distribution or acquisition that caused the disposed debt instrument to be treated as stock is re-tested against other debt instruments not already recharacterized as stock. *See* proposed § 1.385–3(g)(3) *Example 7.* The final and temporary regulations clarify that this rule also applies to recharacterize later issued covered debt instruments that are within the per se period. Thus, this final rule provides that when a covered debt instrument treated as stock is transferred outside of the expanded group, the underlying distribution or acquisition that caused the disposed debt instrument to be treated as stock can cause any other covered debt instrument issued during the per se period to be treated as stock. The final and temporary regulations also apply this operating rule when a covered debt instrument treated as stock becomes a consolidated group debt instrument under § 1.385–4T(c)(2).

Another comment suggested that the re-testing rule should be limited to debt instruments issued in the 36 months before the re-testing date because the re-testing rule could apply to a debt instrument issued many years before the disposition of the debt instrument treated as stock. The final and temporary regulations adopt this recommendation because it is consistent with the per se application of the funding rule as described in Section D.2 of this part V.

The Treasury Department and the IRS considered an alternative approach that would more closely harmonize the rules for repayments and dispositions of debt instruments treated as stock by accepting the comment to eliminate the re-testing rule in § 1.385–3(d)(2) when the instrument is transferred outside of the group and making a corresponding change to the funding rule to prevent inappropriate removal of a distribution or acquisition described in the general rule or funding rule. This alternative approach would require deeming a separate distribution that is subject to the funding rule. The Treasury Department and the IRS decline to make those changes because the net effect would extend the per se period.

3. Aggregate Treatment of Partnerships

a. Overview

The legislative history of subchapter K of chapter 1 of the Code (subchapter K) provides that, for purposes of interpreting Code provisions outside of that subchapter, a partnership may be treated as either an entity separate from its partners or an aggregate of its partners, depending on which characterization is more appropriate to carry out the purpose of the particular section under consideration. H.R. Conf. Rep. No. 2543, 83rd Cong. 2d. Sess. 59 (1954). To prevent the avoidance of the application of the regulations through the use of partnerships, the proposed regulations adopted an aggregate approach to controlled partnerships.

The proposed regulations provided that, for example, when a corporate member of an expanded group becomes a partner (an expanded group partner) in a partnership that is a controlled partnership with respect to the expanded group, the expanded group partner is treated as acquiring its proportionate share of the controlled partnership's assets and issuing its proportionate share of any debt instruments issued by the controlled partnership. For these purposes, the proposed regulations determined a partner's proportionate share in accordance with the partner's share of partnership profits.

This aggregate treatment also applied to the recharacterization under proposed § 1.385–3 of a debt instrument issued by a controlled partnership. Therefore, proposed § 1.385–3 provided that the holder of a recharacterized debt instrument issued by a controlled partnership would be treated as holding stock in the expanded group partners rather than as holding an interest in the controlled partnership. The proposed regulations also required the partnership and its partners to make appropriate conforming adjustments to reflect this treatment. Comments raised concerns that neither section 385 nor the legislative history to section 385 suggests that Congress authorized regulations to determine the status of debt issued by a non-corporate entity and requested that any future regulations only apply to debt issued by corporations. Additionally, as described in Section H.4 of this Part V, comments expressed concern regarding the collateral consequences of treating a partnership instrument as stock of the expanded group partners under proposed § 1.385–3.

After considering the comments, the Treasury Department and the IRS have determined that it is necessary and

appropriate to adopt an aggregate approach to a controlled partnership in order to prevent the avoidance of the purposes of the final and temporary regulations through the use of a partnership. Thus, consistent with the longstanding practice of the Treasury Department and the IRS to apply aggregate treatment to partnerships and their partners when appropriate, and in accordance with the legislative history of subchapter K, the final and temporary regulations generally treat a controlled partnership as an aggregate of its partners in the manner described in the temporary regulations. However, in response to comments, the final and temporary regulations do not recharacterize debt issued by a partnership as equity under section 385. Instead, pursuant to the authority granted under section 7701(l) to recharacterize certain multi-party financing transactions, the temporary regulations deem the holder of a debt instrument issued by a partnership that otherwise would be subject to recharacterization (based on an application of the factors in § 1.385–3 to the expanded group partners under the aggregate approach) as having transferred the debt instrument to the expanded group partner or partners in exchange for stock in the expanded group partner or partners.

Sections H.3.b through d of this Part V, discuss the application of the aggregate approach to a controlled partnership for purposes of applying the rules in § 1.385–3, both for purposes of determining when a debt instrument issued by an expanded group partner is treated as equity, as well as when a debt instrument issued by the controlled partnership that otherwise would be treated as equity under the aggregate approach should be subject to the deemed transfer. Specifically, Section H.3.b of this Part V discusses the aggregate approach to controlled partnerships generally; Section H.3.c of this Part V describes the extent to which an expanded group partner is treated as acquiring a controlled partnership's property for purposes of applying the rules in § 1.385–3; and Section H.3.d of this Part V describes the rules for identifying the portion of a debt instrument issued by a controlled partnership that an expanded group partner is treated as issuing for purposes of applying the rules in § 1.385–3. Section H.4 of this Part V explains that a debt instrument issued by a controlled partnership that otherwise would be treated, in whole or in part, as stock under § 1.385–3 is instead deemed to be transferred, in whole or in part, by the holder to the expanded group partner or partners.

b. Determining Proportionate Share Generally

Comments raised concerns regarding the proposed regulations' requirement to determine a partner's proportionate share based on the ''partner's share of partnership profits,'' which applied equally to the determination of a partner's share of controlled partnership assets and the determination of a partner's share of a debt instrument issued by a controlled partnership. Comments requested clarity regarding the method for determining a partner's share of partnership profits, and asserted that the determination could be made in a number of different ways. In the context of a debt instrument issued by a controlled partnership, comments noted that determining a partner's proportionate share in accordance with its share of partnership profits may be inappropriate in certain cases, such as if a controlled partnership distributes borrowed funds on a non-pro rata basis to its partners, or if a minority partner guarantees a debt. Comments further asserted that, regardless of how a partner's ''proportionate share'' is determined, that share may fluctuate and rules should specify when the partner's proportionate share is determined.

The temporary regulations continue to provide that, for purposes of applying the factors in § 1.385–3 (as well as the rules of § 1.385–3T), an expanded group partner is treated as acquiring its share of property owned by a controlled partnership and as issuing its share of a debt instrument issued by a controlled partnership. Specifically, § 1.385–3T(f)(2) provides rules for acquisitions of property by a controlled partnership, and § 1.385–3T(f)(3) provides rules addressing the treatment of a debt instrument issued by a controlled partnership. Both sets of rules rely on a determination of a partner's ''share'' of the controlled partnership's property or indebtedness. However, and as described in more detail in Section H.3.c and d of this Part V, ''share'' is defined differently for each purpose and, in response to comments, is no longer defined by reference to a partner's share of profits.

When an expanded group partner is treated as acquiring a share of property owned by a controlled partnership or as issuing a share of a debt instrument issued by a controlled partnership, except as described in Section H.4 of this Part V, all parties apply the rules of § 1.385–3 as though the expanded group partner acquired the property or issued the debt instrument.

c. Partner's Proportionate Share of Controlled Partnership Property

A member of an expanded group that is an expanded group partner on the date a controlled partnership acquires property (including expanded group stock, a debt instrument, or any other property) from another expanded group member is treated as acquiring its share of that property under § 1.385–3T(f)(2)(i)(A). The covered member is treated as acquiring its share of the property from the transferor member in the manner (for example, in an exchange for property or an issuance), and on the date on which, the property is actually acquired by the controlled partnership from the transferor member. Thus, for example, if the controlled partnership acquires expanded group stock in exchange for property other than other expanded group stock, an expanded group partner is treated as making an acquisition described in § 1.385–3(b)(3)(i)(B) (funding rule) to the extent of its share of the expanded group stock. Likewise, if a controlled partnership acquires a debt instrument issued by a covered member in a distribution by that covered member or a covered member distributes property to a controlled partnership, the covered member is treated as making a distribution described in § 1.385–3(b)(2)(i) (general rule) or 1.385–3(b)(3)(i)(A) (funding rule) to the extent of any expanded group partner's share of the distributed property.

Section 1.385–3T(f)(2)(i)(C) provides that, if an expanded group partner transfers expanded group stock to the controlled partnership, the member is not treated as reacquiring (by reason of its interest in the controlled partnership) any of the expanded group stock it transferred. Thus, an expanded group partner will not be treated as acquiring expanded group stock that it already owned by reason of transferring that expanded group stock to a controlled partnership.

Expanded group stock is the only kind of property a member of an expanded group is treated as acquiring if it becomes an expanded group partner after the controlled partnership acquired the property. Under § 1.385–3T(f)(2)(ii)(A), a member of an expanded group that becomes an expanded group partner when the controlled partnership already owns expanded group stock generally is treated, on the date the member becomes an expanded group partner, as acquiring its share of the expanded group stock owned by the controlled partnership from an

expanded group member in exchange for property other than expanded group stock. Thus, subject to an exception described in this paragraph, the member is treated as making an acquisition described in § 1.385–3(b)(3)(i)(B) (funding rule) to the extent of its share of the expanded group stock owned by the controlled partnership, regardless of how the controlled partnership acquired that expanded group stock. This approach avoids the complexity of attempting to trace the acquisition of expanded group stock to certain transferors for certain consideration depending on whether the partnership interest was acquired by contribution or transfer. Section 1.385–3T(f)(2)(ii)(C) provides an exception to this general rule whereby a member of an expanded group that acquires an interest in a controlled partnership, either from another partner in exchange solely for expanded group stock or upon a contribution to the controlled partnership comprised solely of expanded group stock, is not treated as acquiring expanded group stock owned by the controlled partnership, so that § 1.385–3(b)(3)(i)(B) will not apply.

In response to comments regarding the use of a ''partner's share of partnership profits'' to identify a partner's share of property, the temporary regulations provide that a partner's share of property acquired by a controlled partnership, including expanded group stock acquired by a controlled partnership before the member of the expanded group became an expanded group partner, is determined in accordance with the partner's liquidation value percentage. Pursuant to § 1.385–3T(g)(17), a partner's liquidation value percentage in a controlled partnership (which can include a partnership that is owned indirectly through one or more partnerships) is the ratio (expressed as a percentage) of the liquidation value of the expanded group partner's interest in the partnership divided by the aggregate liquidation value of all the partners' interests in the partnership. The liquidation value of an expanded group partner's interest in a partnership is the amount of cash the partner would receive with respect to the interest if the partnership sold all of its property for an amount of cash equal to the fair market value of the property (taking into account section 7701(g)), satisfied all of its liabilities (other than those described in § 1.752–7), paid an unrelated third party to assume all of its § 1.752–7 liabilities in a fully taxable transaction, and then the partnership (and any partnership through which the partner indirectly owns an interest in the controlled partnership) liquidated.

The Treasury Department and the IRS also agree with comments that the regulations should set forth a specific time for determining a partner's share of property owned by a controlled partnership. Therefore, if an expanded group member is an expanded group partner on the date the controlled partnership acquires property, then, under § 1.385–3T(f)(2)(i)(B), the liquidation value percentage is determined on the date the controlled partnership acquires the property. Otherwise, under § 1.385–3T(f)(2)(ii)(B), liquidation value percentage is determined on the date the expanded group member becomes an expanded group partner in the controlled partnership.

The Treasury Department and the IRS determined that using liquidation value percentage in this context, as opposed to the test based on capital and profits that is used for purposes of identifying a controlled partnership, is appropriate because the two tests are being used for different purposes. On the one hand, the determination of whether a partnership is a controlled partnership is a threshold-based control determination. Thus, while there may be uncertainty as to ownership percentages at the margins, that uncertainty is outweighed by the appropriateness of using a partner's share of profits as one proxy for control. On the other hand, in identifying a partner's share of a controlled partnership's property, the precision afforded by using liquidation value percentage is appropriate because the test is intended to arrive at a specific amount of the property the partner is treated as acquiring.

d. Partner's Proportionate Share of Controlled Partnership Indebtedness

Comments recommended alternative approaches to determining a partner's proportionate share of a debt instrument issued by a controlled partnership, including determining the partner's proportionate share by applying principles under section 752, by reference to the partners' capital accounts, or by reference to a partner's liquidation value percentage as defined in proposed § 1.752–3(a)(3) (relating to the determination of a partner's share of nonrecourse liabilities). Alternatively, comments suggested providing such methods as safe harbors. One comment suggested that the regulations adopt a rule similar to the tracing rule in § 1.707–5(b)(2)(i) (relating to debt-financed distributions) for determining a partner's share of a partnership liability.

The Treasury Department and the IRS have determined that an approach based on a partner's anticipated allocations of the partnership's interest expense is better tailored to the purposes of the temporary regulations. Like the proposed regulations, § 1.385–3T(f)(3)(i) provides that, for purposes of applying §§ 1.385–3 and 1.385–3T, an expanded group partner is treated as the issuer with respect to its share of a debt instrument issued by a controlled partnership. Thus, for example, the determination of whether a debt instrument is a covered debt instrument is made at the partner level. Section 1.385–3T(f)(3)(ii)(A) provides that an expanded group partner's share of a covered debt instrument is determined in accordance with the partner's issuance percentage. A partner's issuance percentage is defined in § 1.385–3T(g)(16) as the ratio (expressed as a percentage) of the partner's reasonably anticipated distributive share of all the partnership's interest expense over a reasonable period, divided by all of the partnership's reasonably anticipated interest expense over that same period, taking into account all the relevant facts and circumstances. This approach is premised, in part, on the fungible nature of interest expense. The Treasury Department and the IRS have determined that this rule should, in most cases over time, appropriately match the interest income that an expanded group partner will be deemed to receive under the rules described in Section H.4 of this Part V with respect to the portion of a debt instrument issued by a partnership that otherwise would be treated as stock under an aggregate application of § 1.385–3, with a partner's allocations of partnership interest expense.

The Treasury Department and the IRS also agree with comments that the temporary regulations should set forth the specific time for determining a partner's share of a debt instrument issued by a controlled partnership. Accordingly, § 1.385–3T(f)(3)(ii)(A) provides that an expanded group partner's share of a debt instrument is determined on each date on which the partner makes a distribution or acquisition described in § 1.385–3(b)(2) or 1.385–3(b)(3)(i). Given that a partner's issuance percentage is a forward-looking facts and circumstances determination and that it may need to be determined on different dates, a partner's issuance percentage may be different from one date to another depending on whether the facts and

circumstances have changed between determinations.

The exception to the funding rule for qualified short-term debt instruments is applied at the partnership level by treating the partnership as the issuer of the relevant debt instruments. This is an exception to the general rule that, for purposes of applying §§ 1.385–3 and 1.385–3T, an expanded group partner is treated as issuing its share of a debt instrument issued by a controlled partnership to a member of the expanded group. Thus, for example, in applying the specified current assets test, one looks to the amount of specified current assets reasonably expected to be reflected on the partnership's balance sheet as a result of transactions in the ordinary course of the partnership's business.

4. Treatment of Recharacterized Partnership Instrument

a. Comments on Recharacterization Approach of Proposed Regulations

Comments requested clarification regarding the treatment of a partnership instrument recharacterized as stock of the expanded group partners under proposed § 1.385–3. A number of comments pointed out a variety of seemingly unintended consequences of the approach taken in the proposed regulations. Those consequences arose under, among other provisions, § 1.337(d)–3T; sections 707, 752, and the regulations thereunder; the fractions rule under section 514(c)(9)(E); rules regarding tax credits; and rules regarding the capitalization of interest expense into cost of goods sold.

Some comments noted that the approach in the proposed regulations could lead to collateral consequences for non-expanded group partners in a controlled partnership. Comments requested clarity regarding the ''appropriate conforming adjustments'' required to reflect the recharacterization of debt issued by a partnership and further noted that the relationship between the partnership and the expanded group partners deemed to issue stock to the funding member could affect allocations of partnership items of income, gain, loss, deduction, and credit among partners, which could have economic consequences. Comments also asked whether the terms of additional partnership interests issued under the proposed regulations' recharacterization rule would be identical to the terms of the recharacterized indebtedness. One comment requested that the proposed regulations be revised to permit partnerships to adjust the basis of partnership property without regard to the rules of § 1.754–1(b) (relating to the time for making a section 754 election to adjust basis of partnership property) when gain is recognized as a result of the section 385 regulations. A comment requested clarification of the tax consequences when a partnership pays interest and principal on purported debt that has been recharacterized as stock. Finally, comments asserted that the equity interest in the partnership that a partner necessarily would receive as a result of the ''appropriate adjustments'' upon a recharacterization of a partnership's debt instrument could be viewed as an interest that gives rise to guaranteed payments, which would result in the partnership allocating deductions to its partners.

Several similar comments suggested an alternative approach to the recharacterization of a partnership's debt instrument. Those comments all essentially suggested that the proposed regulations be revised to provide that, upon an event that otherwise would result in the partnership's debt instrument being treated as equity, in lieu of recharacterizing the debt instrument, the expanded group member that holds the debt instrument be deemed to contribute its receivable to the expanded group partner or partners that made, or were treated as making under the aggregate approach, the distribution or acquisition that gave rise to the potential recharacterization of the debt instrument (deemed conduit approach). The comments asserted that this deemed conduit approach would result in interest income from the receivable offsetting the interest deductions from the partnership's debt obligation that would be allocated to the expanded group partner or partners that made (or were treated as making) the distribution or acquisition that otherwise would give rise to the recharacterization of the debt instrument. Additionally, the comments asserted that, because this deemed conduit approach would not require the ''appropriate conforming adjustments'' required by the proposed regulations, the deemed conduit approach would mitigate nearly all of the collateral consequences previously described regarding the proposed regulations.

In response to these comments, the temporary regulations adopt the deemed conduit approach. The Treasury Department and the IRS agree with comments that this approach should alleviate nearly all of the collateral consequences the comments identified. The Treasury Department and the IRS also agree with comments that this approach should effectively match interest income with interest expense where appropriate, thus addressing the policy concerns set forth in the proposed regulations and in this preamble. Moreover, section 7701(l) provides ample authority for the deemed conduit approach. The adoption of the deemed conduit approach renders many of the other comments received with respect to the application of the proposed regulations to partnerships moot.

b. General Framework for Deemed Conduit Approach

The first step in applying the deemed conduit approach is to determine the portion of a debt instrument that is treated as issued by an expanded group partner and that otherwise would be treated as stock under the aggregate approach to applying § 1.385–3(b) (specified portion). Section 1.385–3T(f)(4)(i) then provides that, instead of treating the specified portion as stock, the holder-in-form of the debt instrument is deemed to transfer a portion of the debt instrument (deemed transferred receivable) with a principal amount equal to the adjusted issue price of the specified portion to the expanded group partner (deemed holder) in exchange for stock in the expanded group partner (deemed partner stock). This transaction is called a ''deemed transfer.'' Any portion of a debt instrument issued by a controlled partnership that is not deemed transferred is a ''retained receivable'' in the hands of the holder. Because the holder-in-form of the debt instrument is deemed to transfer the deemed transferred receivable, if a specified portion is created at a time when another specified portion exists, only all or a portion of the retained receivable is deemed to be transferred to the deemed holder. This rule prevents a later distribution or acquisition described in § 1.385–3(b)(2) or 1.385–3(b)(3)(i) from causing a deemed transferred receivable that was previously deemed to be transferred to an expanded group partner from being deemed to be transferred again when there is a new specified portion with respect to a covered debt instrument. The deemed transfer is treated as occurring for all federal tax purposes, although there are special rules under § 1.385–3(d)(7) for purposes of section 1504(a) (determining whether a corporation is a member of an affiliated group) and under § 1.385–3T(f)(4)(vi) for purposes of section 752 (allocating partnership liabilities). The special rules regarding section 752 are described in more detail in Section H.4.c of this Part V.

An expanded group partner that is treated as issuing part of a covered debt

instrument issued by a controlled partnership can have a specified portion because it actually makes a distribution or acquisition described in § 1.385–3(b)(2) or 1.385–3(b)(3)(i), or is treated under the aggregate approach as acquiring expanded group stock the controlled partnership owns or acquires.

Defining an expanded group partner's specified portion by reference to the portion of the expanded group partner's share of a covered debt instrument that would be treated as stock under § 1.385–3(b) ensures that the principal amount of the deemed transferred receivable will never exceed the lesser of (i) the expanded group partner's share of a covered debt instrument, and (ii) the amount of the distribution or acquisition described in § 1.385–3(b)(2) or 1.385–3(b)(3)(i) the expanded group partner made or was treated as making.

The Treasury Department and the IRS agree with comments that the terms of stock deemed to exist as a result of section 385 applying to a debt instrument issued by a partnership along with the consequences of payments with respect to such an instrument should be clear. Section 1.385–3T(f)(4)(iv)(A) provides that the deemed partner stock generally has the same terms as the deemed transferred receivable. Section 1.385–3T(f)(4)(iv)(B) provides that when a payment is made with respect to a debt instrument issued by a controlled partnership for which there is one or more deemed transferred receivables, then, if there is no retained receivable held by the holder of the debt instrument and a single deemed holder is deemed to hold all of the deemed transferred receivables, the entire payment is allocated to the deemed transferred receivables held by the single deemed holder. Otherwise, if there is a retained receivable held by the holder of the debt instrument or there are multiple deemed holders of deemed transferred receivables, or both, the payment is apportioned among the retained receivable, if any, and each deemed transferred receivable in proportion to the principal amount of all the receivables. The portion of a payment allocated or apportioned to a retained receivable or a deemed transferred receivable reduces the principal amount of, or accrued interest with respect to, such item as applicable under general federal tax principles depending on the payment. When a payment allocated or apportioned to a deemed transferred receivable reduces the principal amount of the receivable, the expanded group partner that is the deemed holder with respect to the deemed transferred receivable is deemed to redeem the same amount of the deemed partner stock, and the specified portion with respect to the debt instrument is reduced by the same amount. When a payment allocated or apportioned to a deemed transferred receivable reduces accrued interest with respect to the receivable, the expanded group partner that is the deemed holder with respect to the deemed transferred receivable is deemed to make a matching distribution in the same amount with respect to the deemed partner stock. The controlled partnership is treated as the paying agent with respect to the deemed partner stock.

It would be necessary to determine an expanded group partner's share of a debt instrument after a deemed transfer if there is a retained receivable and the expanded group partner makes or is treated as making a distribution or acquisition described in § 1.385–3(b)(2) or 1.385–3(b)(3)(i). In that case, under § 1.385–3T(f)(3)(ii)(B)(*1*), the expanded group partner's share of a debt instrument (determined as of the time of the subsequent distribution or acquisition) is reduced, but not below zero, by the sum of all of the specified portions, if any, with respect to the debt instrument that correspond to one or more deemed transferred receivables that are deemed to be held by the partner. That is, the creation of a deemed transferred receivable does not change the total amount of a debt instrument for which expanded group partners must be assigned shares, but it does reduce a particular partner's share of the debt instrument that can result in a subsequent deemed transferred receivable to that partner. If an expanded group partner's issuance percentage on the later testing date is lower than it was on the original testing date, it is possible that the expanded group partner's share of the covered debt instrument cannot be reduced by the entire amount of the expanded group partner's specified portion without reducing that expanded group partner's share below zero. In that case, under § 1.385–3T(f)(3)(ii)(B)(*2*), the other partners' shares of the covered debt instrument are reduced proportionately. Reducing a partner's share of a debt instrument for this purpose does not affect the amount of any specified portion with respect to that partner with respect to prior deemed transfers or any deemed transferred receivable previously deemed transferred. Under these rules, it is impossible for the partners' aggregate shares of a covered debt instrument to exceed the adjusted issue price of the covered debt instrument reduced by any specified portions of that debt instrument, and therefore, the maximum principal amount of all deemed transferred receivables with respect to a covered debt instrument will never exceed the adjusted issue price of the covered debt instrument.

c. Special Rules

In response to comments regarding the treatment of debt instruments actually held by an expanded group partner, § 1.385–3T(f)(4)(ii) provides that, if a specified portion is with respect to an expanded group partner that is the holder-in-form of a debt instrument, then the deemed transfer described in Section H.4.b of this Part V does not occur with respect to that partner and that debt instrument is not treated as stock. Similarly, § 1.385–3T(f)(6) provides more broadly that as long as no partner deducts or receives an allocation of expense with respect to the debt instrument, a debt instrument issued by an expanded group partner to a controlled partnership and a debt instrument issued by a controlled partnership to an expanded group partner are not subject to the rules in § 1.385–3T(f).

Section 1.385–3T(f)(5) provides rules for events that could affect the ownership of a deemed transferred receivable. These events are called ''specified events.'' Under § 1.385–3T(f)(5)(iii), a specified event includes the following: (A) The controlled partnership that is the issuer of the debt instrument either ceases to be a controlled partnership or ceases to have an expanded group partner that is a covered member; (B) the holder-in-form is a member of the expanded group immediately before the transaction, and the holder-in-form and the deemed holder cease to be members of the same expanded group for the reasons described in § 1.385–3(d)(2); (C) the holder-in-form is a controlled partnership immediately before the transaction, and the holder-in-form ceases to be a controlled partnership; (D) the expanded group partner that is both the issuer of deemed partner stock and the deemed holder transfers (directly or indirectly through one or more partnerships) all or a portion of its interest in the controlled partnership to a person that neither is a covered member nor a controlled partnership with an expanded group partner that is a covered member; (E) the expanded group partner that is both the issuer of deemed partner stock and the deemed holder transfers (directly or indirectly through one or more partnerships) all or a portion of its interest in the controlled partnership to a covered member or a

controlled partnership with an expanded group partner that is a covered member; (F) the holder-in-form transfers the debt instrument (which is disregarded for federal tax purposes) to a person that is neither a member of the expanded group nor a controlled partnership.

Under § 1.385–3T(f)(5)(i), in the case of any specified event, immediately before the specified event, the expanded group partner that was deemed to issue the deemed partner stock is deemed to distribute the deemed transferred receivable to the holder of the deemed partner stock in redemption of the deemed partner stock. If the specified event is that the expanded group partner transfers all or a portion of its partnership interest to a covered member or a controlled partnership with an expanded group partner that is a covered member, then under § 1.385–3T(f)(5)(ii), the holder of the deemed partner stock is deemed to retransfer the deemed transferred receivable to the transferee expanded group partner. In all cases, the redemption of the deemed partner stock is disregarded for purposes of testing whether there has been a funded distribution or acquisition. However, under § 1.385–3(d)(2), all other debt instruments of the expanded group partner that are not currently treated as stock are re-tested to determine whether those other debt instruments are treated as funding the distribution or acquisition that previously resulted in the deemed transfer.

Under § 1.385–3T(f)(4)(v), a transfer of the debt instrument, which after a deemed transfer is disregarded for federal tax purposes in whole or in part, to a member of the expanded group or to a controlled partnership is not a specified event. Such transfers are excluded from the definition of specified event because all specified events result in deemed partner stock being redeemed for the deemed transferred receivable, which is unnecessary when the debt instrument (as opposed to an interest in the controlled partnership) is transferred to a member of the expanded group or a controlled partnership. It is consistent with the rules contained in § 1.385–3T(f) that an expanded group partner continue to own a deemed transferred receivable after the transfer of the debt instrument to a member of the expanded group or a controlled partnership. Therefore, upon such a transfer, the deemed partner stock is not redeemed for the deemed transferred receivable and instead the holder is deemed to transfer the retained receivable and the deemed partner stock to the transferee.

Finally, § 1.385–3T(f)(4)(iii) provides specificity on who is deemed to receive a receivable if one or more expanded group partners are a member of a consolidated group. That section generally provides that the holder of a debt instrument is deemed to transfer the deemed transferred receivable or receivables to the expanded group partner or partners that are members of a consolidated group that make, or are treated as making (under § 1.385–3T(f)(2)) the regarded distributions or acquisitions (within the meaning of § 1.385–4T(e)(5)) described in § 1.385–3(b)(2) or (b)(3)(i) in exchange for deemed partner stock in such partner or partners. To the extent those distributions or acquisitions are made by a member of the consolidated group that is not an expanded group partner, the holder-in-form is treated as transferring a portion of the deemed transfer receivable to each member of the consolidated group that is an expanded group partner ratably as described in § 1.385–3T(f)(4)(iii).

d. Remaining Collateral Consequences

Comments raised certain additional consequences that the deemed conduit approach does not mitigate.

Comments noted that the proposed regulations could have reduced the debt a partnership was treated as issuing, and therefore reduced a partner's share of partnership liabilities under section 752. This reduction would be considered a distribution of money to the partner, which could be in excess of the partner's adjusted tax basis in its partnership interest and thereby result in gain recognition under section 731(a). The deemed conduit approach does not reduce the debt a partnership is treated as issuing, but does cause one or more partners to be deemed to be the holder of the debt. Causing a partner to be the holder of partnership debt, absent a special rule, could result in the liability being reallocated among the partners under § 1.752–2(c)(1). Under § 1.752–2(a), a partner's share of a recourse partnership liability equals the portion of that liability, if any, for which the partner or a related person bears the economic risk of loss. Section 1.752–2(c)(1) generally provides that a partner bears the economic risk of loss for a partnership liability to the extent that the partner makes a nonrecourse loan to the partnership. If the partner who is deemed to own a deemed transferred receivable was not previously allocated all of the partnership liability represented by the deemed transferred receivable, the creation of a deemed transferred receivable can result in a reallocation of the partnership liability. This reallocation of the partnership liability raises a concern similar to that raised regarding the proposed regulations, but it is not the result of debt being treated as equity. This consequence only results from the application of these temporary regulations. For that reason, § 1.385–3T(f)(4)(vi) provides that a partnership liability that is a debt instrument with respect to which there is one or more deemed transferred receivables is allocated for purposes of section 752 without regard to any deemed transfer. Section 1.752–2(c)(3) contains a cross-reference to this rule.

Comments also noted that the proposed regulations could have resulted in partners recognizing gain under § 1.337(d)–3T. Generally, the proposed regulations could cause a corporate partner to recognize gain when a transaction has the effect of the corporate partner acquiring or increasing an interest in its own stock in exchange for appreciated property. For this purpose, stock of a corporate partner includes stock of a corporation that controls the corporate partner within the meaning of section 304(c), except that section 318(a)(1) and (3) shall not apply. The final and temporary regulations do not provide an exception to the application of § 1.337(d)–3T where a debt instrument held by a partnership is recharacterized as stock because the Treasury Department and the IRS do not agree that an instrument recharacterized under the final and temporary regulations should be treated differently for purposes of section 337(d) than an instrument recharacterized under common law. Likewise, neither the final nor the temporary regulations provide an exception where debt issued by a subsidiary of a partnership results in that subsidiary controlling a corporate partner because Treasury and the IRS have determined that such an event that would result in gain recognition under § 1.337(d)–3T is not likely to occur often.

Finally, comments asked about the interaction of the regulations with future partnership audit procedures under section 1101 of the Bipartisan Budget Act of 2015, Public Law 114–74. Because the regulations under this new partnership audit regime are under development, it is not possible to address this comment at this time.

5. Disregarded Entities

Comments requested that the treatment of debt instruments and EGIs issued by disregarded entities under proposed §§ 1.385–2 and 1.385–3 be conformed. As noted in Part IV.A.4 of

this Summary of Comments and Explanation of Revisions, the final and temporary regulations modify the rules in § 1.385–2 to generally conform those rules to the treatment of a debt instrument issued by a disregarded entity under the temporary § 1.385–3 regulations.

Proposed § 1.385–3(d)(6) provided that if a debt instrument of a disregarded entity was treated as stock under proposed § 1.385–3, the debt instrument would be treated as stock in the entity's owner rather than as an equity interest in the entity. Comments requested clarity regarding the mechanical recharacterization of an interest in a disregarded entity, particularly if the disregarded entity is owned by a partnership. Consistent with the proposed regulations, the temporary regulations generally provide that a covered debt instrument issued by a disregarded entity will not be treated as an equity interest in the entity. The final and temporary regulations also provide that, to the extent that a covered debt instrument issued by a disregarded entity would be treated as stock under the final and temporary regulations, then, rather than treat the covered debt instrument as stock, the covered member that is the regarded owner of the disregarded entity is deemed to issue its stock. For purposes of the final and temporary regulations, if the covered debt instrument otherwise would have been treated as stock under the general rule, then the covered member is deemed to issue its stock to the expanded group member to which the covered debt instrument was, in form, issued (or transferred) in the relevant general rule transaction. If the covered debt instrument otherwise would have been treated as stock under the funding rule, then the covered member is deemed to issue its stock to the holder of the covered debt instrument in exchange for the covered debt instrument. In each case, the covered member that is the regarded owner of the disregarded entity is treated as the owner of a debt instrument issued by the disregarded entity.

This rule must be applied in a manner that is consistent with the principles of § 1.385–3T(f)(4). Thus, for example, stock deemed issued by the covered member that is the regarded owner of the disregarded entity is deemed to have the same terms as the covered debt instrument issued by the disregarded entity, other than the identity of the issuer, and payments on the stock are determined by reference to payments made on the debt instrument issued by the disregarded entity. Under the rules in § 1.385–3T(d)(4), if the regarded owner of a disregarded entity is a controlled partnership, then § 1.385–3T(f) applies as though the controlled partnership were the issuer in form of the debt instrument. Thus, a debt instrument issued by a disregarded entity owned by a controlled partnership will generally not be, for purposes of the final and temporary regulations, treated as issued by the disregarded entity or the controlled partnership, and any recharacterization of a covered debt instrument as stock required by the final and temporary regulations will happen at the partner level.

6. Withholding Under Section 1441

One comment requested that a paying agent that does not have actual knowledge that a purported debt instrument is treated as stock be exempt from liability under section 1441 for a failure to withhold on a distribution with respect to the recharacterized stock. The final and temporary regulations do not address this concern because the determination of whether a payment is subject to withholding requires a withholding agent to make a number of factual determinations. These determinations are not limited to whether an instrument is debt or equity. The uncertainties that may arise in making those determinations are generally addressed in §§ 1.1441–2, 1.1441–3, and 1.1441–7. Accordingly, the final and temporary regulations do not adopt additional exemptions from liability under chapter 3 for covered debt instruments.

I. Anti-Abuse and Affirmative Use

1. Anti-Abuse Rule

a. In General

Comments recommended that the anti-abuse rule in proposed § 1.385–3(b)(4) be narrowed to apply to transactions only if a principal purpose of the transaction is the avoidance of the purposes of the regulations (rather than the avoidance of the ''application'' of the regulations). The final and temporary regulations adopt the recommendation and provide that the anti-abuse rule in § 1.385–3(b)(4) applies if a member of an expanded group enters into a transaction with a principal purpose of avoiding the purposes of § 1.385–3 or § 1.385–3T.

Comments recommended that the anti-abuse rule be narrowed to apply only if ''the'' principal purpose (rather than ''a'' principal purpose) is the avoidance of the purposes of the regulations. This recommendation is not adopted because the Treasury Department and the IRS have determined that the anti-abuse rule should apply when a principal purpose of a transaction is to avoid the purposes of § 1.385–3 or § 1.385–3T, even if a taxpayer can establish that it also had other principal purposes for the transaction. In particular, it is often difficult for the IRS to establish that any one purpose was more or less motivating than another. The requirement that the purpose be a ''principal'' purpose serves as a sufficient limitation such that the rule should only apply in appropriate cases. In addition, the use of ''a'' principal purpose as part of an anti-abuse rule is standard administrative practice and is consistent with other recent regulations. *See* §§ 1.304–4(b); 1.956–1T(b)(4).

Comments also suggested that, if the anti-abuse rule applies, it should result in the instrument being subject to the regulations, rather than in the instrument automatically being recharacterized as stock. The Treasury Department and the IRS decline to accept this recommendation because of the administrative complexity that would be involved in applying the general rule and funding rule to transactions that are, in form, not subject to these rules due to structuring undertaken by the taxpayer to intentionally avoid their application.

Comments also requested that the anti-abuse rule be clarified in several respects to provide increased certainty, and that examples be provided of the types of transactions that are considered abusive. In addition, comments requested various specific exclusions from the anti-abuse rule. The Treasury Department and the IRS decline to provide new limitations on the anti-abuse rule. While it is intended that the anti-abuse rule will be applicable in cases of avoidance transactions, as opposed to routine transactions that happen to achieve a particular result, the anti-abuse rule must retain the flexibility to address transactions that circumvent the purposes of the final and temporary regulations in ways that were unexpected when the regulations were issued.

The proposed regulations contained a non-exhaustive list of the types of transactions that could implicate the anti-abuse rule, and the preamble to the proposed regulations described other transactions that could be relevant. The final and temporary regulations include the same transactions listed in the proposed regulations that could implicate the anti-abuse rule and add additional transactions with which the Treasury Department and the IRS are concerned. The final and temporary

regulations also reorganize the anti-abuse rule to clarify that the principal purpose element is relevant both to issuances of a debt instrument as well as other transactions (including distributions or acquisitions); examples of both are provided. The examples listed in § 1.385–3(b)(4)(i) and (ii) are illustrative and do not constitute a mutually exclusive list of the types of transactions that could implicate the anti-abuse rule.

b. Requested Clarifications to and Exclusions From the Anti-Abuse Rule

i. Debt Between Unrelated Parties

Comments specifically requested clarification that the anti-abuse rule would not apply to bona fide debt between unrelated parties (provided that neither party is acting as a conduit or agent for a related party) while the loan is held by the unrelated party. In addition, comments requested clarification that guaranteed loans are not subject to the anti-abuse rule. In particular, one comment suggested that the proposed regulations could apply to a decision by a subsidiary to borrow directly from an unrelated bank with a parent guarantee rather than cause the parent to borrow from the unrelated bank and on-lend to the subsidiary. The final and temporary regulations do not adopt these recommendations. The Treasury Department and the IRS have determined that, in light of the revision to apply § 1.385–3(b)(4) only when a principal purpose of a transaction is to avoid the ''purposes'' of the regulations (rather than avoiding the ''application'' of the regulations), it would not be appropriate to provide a complete exception for loans with unrelated parties or related-party guarantees. There already is sufficient clarity under the regulations that, absent other facts and circumstances, borrowing funds from an unrelated lender including with a related-party guarantee would not avoid the purposes of § 1.385–3 or § 1.385–3T, which are intended to apply in the particular factual circumstance of loans between highly-related corporations.

In addition, the Treasury Department and the IRS remain concerned about transactions with non-expanded group members that are structured to avoid the purposes of § 1.385–3 or § 1.385–3T, such as a transaction where the lender is a not a member of the expanded group, but only on a temporary basis. As in the proposed regulations, § 1.385–3(b)(4) includes two examples of this situation. In one example, a covered debt instrument is issued to, and later acquired from, a person that is not a member of the issuer's expanded group with a principal purpose of avoiding the purposes of § 1.385–3. In the second example, with a principal purpose of avoiding the purposes of § 1.385–3, a covered debt instrument is issued to a person that is not a member of the issuer's expanded group, and such person later becomes a member of the issuer's expanded group.

ii. Transactions That Meet Existing Exceptions

Comments requested that the anti-abuse rule not apply to a transaction that satisfies a specific exception to either the general rule or funding rule. For example, the comments questioned the application of the anti-abuse rule when a taxpayer issues multiple debt instruments in multiple years, each debt instrument would, but for the E&P exception, be treated as stock, and some of the debt instruments would not have benefitted from the E&P exception if they had been issued during the first year. The comments asserted that none of the debt instruments in that example should be treated as stock under the anti-abuse rule (for example, by being treated as being issued all at once in the first year of the period). The Treasury Department and the IRS agree that in that example, the anti-abuse rule generally would not be implicated, because no purpose of the regulations has been avoided. As discussed in Section I.1.a of this Part V, the final and temporary regulations provide that the anti-abuse rule applies to transactions with a principal purpose of avoiding the ''purposes'' of §§ 1.385–3 or 1.385–3T, rather than applying to transactions with a principal purpose of avoiding the ''application'' of §§ 1.385–3 or 1.385–3T.

However, the Treasury Department and the IRS decline to provide that the anti-abuse rule cannot apply to transactions that meet a specific exception to either the general rule or funding rule. The Treasury Department and the IRS remain concerned about structured transactions that satisfy the technical requirements for exceptions or exclusions but avoid the purposes of the final and temporary regulations. Those structured transactions may technically qualify for a specific exception, but would nonetheless be subject to the anti-abuse rule. Accordingly, the Treasury Department and the IRS decline to adopt the specific recommendation.

Because the final and temporary regulations significantly expand the exceptions and reductions in § 1.385–3(c) that are discussed in Section E of this Part V, and because of other changes addressed in § 1.385–4T that are discussed in Part VI of this Summary of Comments and Explanation of Revisions, the final and temporary regulations also clarify that the anti-abuse rule explicitly addresses distributions or acquisitions that occur with a principal purpose of avoiding the purposes of § 1.385–3 or § 1.385–3T, as well as other transactions that are undertaken with a principal purpose of avoiding the purposes of § 1.385–3 or § 1.385–3T.

iii. Interests That Are Not Debt Instruments

Comments requested additional guidance concerning the application of the anti-abuse rule to interests that are not debt instruments, with specific requests for clarity concerning preferred partnership interests. As discussed in Section F.2 of this Part V, the Treasury Department and the IRS decline to adopt a recommendation to limit the funding rule to instruments that are, in form, debt instruments and also decline to adopt a recommendation to exclude from the funding rule a deemed loan arising from a nonperiodic payment with respect to a notional principal contract. The Treasury Department and the IRS similarly decline to narrow the application of the anti-abuse rule in these contexts.

The Treasury Department and the IRS continue to study whether it is appropriate to subject preferred equity in a controlled partnership to the rules that would apply to a debt instrument issued by a controlled partnership. As described in the preamble to the proposed regulations, the IRS intends to closely scrutinize, and may challenge under the anti-abuse rule, transactions in which a controlled partnership issues preferred equity to an expanded group member and the rules of § 1.385–3T(f) would have applied had the preferred equity been denominated as a debt instrument issued by the partnership.

2. Affirmative Use

The proposed regulations provided that the rules of proposed §§ 1.385–3 and § 1.385–4 do not apply to the extent a person enters into a transaction that otherwise would be subject to proposed § 1.385–3 with a principal purpose of reducing the federal tax liability of any member of the expanded group that includes the issuer and the holder of the debt instrument by disregarding the treatment of the debt instrument that would occur without regard to § 1.385–3.

Comments suggested eliminating the prohibition on affirmative use as contradictory to the objective factor-

based analysis of the proposed regulations and creating unnecessary uncertainty for taxpayers that could lead to controversy with tax authorities. Comments expressed concern that determining whether a transaction was entered into with a principal purpose of reducing U.S. tax presented additional administrative difficulties, particularly if the expected tax benefits are realized at a future date, accrue to a related taxpayer, or are subject to a material contingency. Furthermore, a taxpayer could often issue preferred stock (or another form of equity) in instances where such treatment is preferable rather than relying on recharacterization. One comment asked how the rule concerning affirmative use should interact with common law and for clarification as to what is meant by a reduction in U.S. federal income tax liability.

In response to comments, including comments about the no affirmative use rule creating unnecessary uncertainty, the Treasury Department and the IRS reserve on the application of the no affirmative use rule in § 1.385–3 pending continued study after the applicability date.

VI. Comments and Changes to Proposed § 1.385–4—Treatment of Consolidated Groups

A. Treatment of Consolidated Groups as One Corporation

To prevent application of the proposed regulations under section 385 to interests between members of a consolidated group, proposed § 1.385–1(e) provided that a consolidated group (as defined in § 1.1502–1(h)) is treated as one corporation (the one-corporation rule). Several comments were received requesting expansions, clarifications, or modifications of this rule, as described in this Part VI.

1. Expansion of the One-Corporation Rule

Several comments suggested that all domestic corporations under some degree of common control should be treated as one corporation under the regulations. For example, comments suggested that a group of domestic entities meeting the ownership requirements of section 1504(a)(2) connected through common ownership by a domestic corporation (treating a controlled partnership as an aggregate of its partners or as a corporation for this purpose) should be treated as one corporation. Other comments suggested that all members of a ‘‘super affiliated group,’’ as defined in proposed § 1.163(j)–5(a)(3), should be treated as one corporation. Others suggested that multiple consolidated groups that are commonly controlled should be treated as one corporation, without specifying the necessary degree of common control.

Comments also suggested that certain entities that would not be treated as members of a consolidated group should be treated as consolidated group members for purposes of the one-corporation rule. For example, comments suggested that the one-corporation rule should apply to affiliated groups determined without regard to section 1504(b)(2) and (c) (preventing certain life insurance companies from joining an affiliated group) or section 1504(b)(6) (preventing RICs and REITs from joining an affiliated group).

As discussed in Part V.A.2 of this Summary of Comments and Explanation of Revisions, the proposed regulations did not apply to indebtedness issued by a corporation to members of its consolidated group while the indebtedness was held in such group because the policy concerns addressed in the proposed regulations generally are not present when the issuer’s deduction for interest expense and the holder’s corresponding inclusion of interest income offset on the group’s consolidated federal income tax return. For the reasons described in Part V.A.2 of this this Summary of Comments and Explanation of Revisions, the Treasury Department and the IRS continue to view the filing of a single federal income tax return as the appropriate basis for excluding transactions among consolidated group members, and decline to extend the treatment afforded to consolidated groups to expanded group members that file separate federal income tax returns. In addition, modifications made in the final and temporary regulations significantly reduce, and in certain cases eliminate, the application of the regulations to life insurance companies and non-controlled RICs and REITs.

2. Clarification of the One-Corporation Rule

a. Scope

Comments generally supported the principle-based one-corporation rule of the proposed regulations while recommending certain specific clarifications and exceptions, each of which is described in this preamble. One comment requested guidance regarding the interaction of the one-corporation rule with other provisions of the Code, recommending that the regulations provide an order of operations as follows: First, apply the provisions of the Code and the regulations thereunder, treating the members of a consolidated group as separate entities for purposes of applying the rules; second, apply the section 385 regulations to the transaction as it is characterized under other provisions of the Code and the regulations thereunder, giving effect to the one-corporation rule. For example, assume that FP owns USP1 and USP2, each of which is the common parent of a different consolidated group. USP1, which owns USS1 and several other subsidiaries, sells USS1 to USP2 for a note. The comment recommended that USP1 be treated as transferring USS1 stock, but noted that the transaction could instead be treated as the sale of a branch comprised of USS1’s assets and liabilities under the one-corporation rule.

The temporary regulations adopt this recommendation. Under the order of operations rule of § 1.385–4T(b)(5), a transaction involving one or more members of a consolidated group is first characterized under federal tax law without regard to the one-corporation rule, and then §§ 1.385–3 and 1.385–4T apply to the transaction as characterized to determine whether the debt instrument is treated as stock, treating the consolidated group as one corporation, unless otherwise provided. Applying this rule to the example above, USP2’s acquisition of USS1 is respected as an acquisition of the stock of USS1 in exchange for a note of USP2. Therefore, absent an exception, the note issued by USP2 is treated as stock under § 1.385–3(b).

Another comment stated that the scope of the one-corporation rule is unclear, and recommended that certain items be clearly included or excluded from the one-corporation rule and that a principle-based rule be used to address the items not expressly included or excluded. For example, the comment noted that, for purposes of determining the treatment of an interest that ceases to be a consolidated group debt instrument, proposed § 1.385–4(b)(1)(ii)(B) respected the existence of the consolidated group debt instrument solely for purposes of determining the per se period under proposed § 1.385–3(b)(3)(iv)(B). As discussed in more detail in Section B.2 of this Part VI, the temporary regulations address the concern raised in this comment by providing that when a departing member ceases to be a member of a consolidated group, but remains a member of the expanded group, the departing member’s history of transactions with other consolidated

group members remains disregarded. For this purpose, a departing member is a member of an expanded group that ceases to be a member of its original consolidated group but continues to be a member of the same expanded group.

b. Wholly-Owned Partnerships

Comments requested clarification of the treatment of loans between a consolidated group member and a partnership that is wholly owned by members of the consolidated group. Specifically, comments requested clarification that any such loan would be treated as a loan from one consolidated group member to another consolidated group member, which generally would be treated as a debt instrument issued and held by members of the same consolidated group (a consolidated group debt instrument), so that the loan would not be subject to proposed §§ 1.385–3 and 1.385–4. By contrast, other comments recommended that the regulations not apply to such a debt instrument because the one-corporation rule suggests that a partnership wholly owned by members of a consolidated group should be disregarded as a separate entity for purposes of proposed §§ 1.385–3 and 1.385–4.

The temporary regulations clarify that a partnership all of the partners of which are members of the same consolidated group is treated as a partnership for purposes of §§ 1.385–3, 1.385–3T, and 1.385–4T. However, § 1.385–3T treats a partner in a controlled partnership as issuing its share of a debt instrument issued by the controlled partnership and holding its share of a debt instrument held by the controlled partnership. Accordingly, under the one-corporation rule, a covered debt instrument between a consolidated group member and a controlled partnership that is wholly owned by members of the consolidated group is treated as a consolidated group debt instrument.

c. Identity of Issuer

Comments recommended that the regulations provide that a debt instrument issued by a member of a consolidated group, if characterized as stock under the regulations, is stock in the particular member that issued the debt instrument. Comments noted that this result was demonstrated by examples in the proposed regulations, but requested that an operative rule in the regulations confirm the outcome demonstrated by the examples. Other comments questioned whether this was the appropriate outcome, and indicated that in certain cases, the common parent of a consolidated group should be treated as the issuer when a debt instrument issued by another member of its consolidated group is treated as stock under the regulations. However, one comment noted that treating a debt instrument issued by one member as having been issued by another member (such as the common parent) may be inappropriate in certain cases, including when the issuer of the instrument has a minority shareholder that is not a member of the consolidated group.

In response to these comments, the temporary regulations provide that a debt instrument issued by a member of a consolidated group, if treated as stock under the regulations, is treated as stock in the particular member that is treated as the issuer of the debt instrument under general tax principles.

d. Interaction With the Funding Rule

One comment requested confirmation that an effect of the one-corporation rule is that, under the funding rule, a debt instrument issued by one member of a consolidated group to a member of its expanded group that is not a member of the same consolidated group could be treated as funding a transaction described in proposed § 1.385–3(b)(3) undertaken by a different member of the same consolidated group, such that the debt instrument would be treated as stock. The temporary regulations confirm this result in § 1.385–4T(b)(1).

Another comment recommended an exception from the one-corporation rule which would reverse this outcome when the issuer of the debt instrument can demonstrate that the proceeds obtained in connection with the issuance of the debt instrument can be shown to have not directly funded the other consolidated group member's transaction. The temporary regulations do not adopt this recommendation, which is essentially a tracing approach, for the reasons described in Section V.D.2 of this Summary of Comments and Explanation of Revisions.

Multiple comments were received regarding the application of the funding rule when a corporation joins a consolidated group. One comment stated that when an expanded group member engages in a transaction described in proposed § 1.385–3(b)(3)(ii) and subsequently joins a consolidated group (while remaining a member of the same expanded group), it is appropriate to treat the consolidated group as having engaged in the transaction. For example, assume that FP, USS1, and USS2 are members of the same expanded group, and that USS1 is the common parent of a consolidated group that, in Year 1, does not include USS2. If USS2 makes a distribution to FP in Year 1, and joins USS1's consolidated group in Year 2, the USS1 consolidated group would be treated as having made USS2's Year 1 distribution. The temporary regulations adopt this recommendation by providing that, when a member of an expanded group becomes a member of a consolidated group and continues to be a member of the same expanded group (a joining member), the joining member and the consolidated group that it joins are a predecessor and successor (respectively) for purposes of § 1.385–3(b)(3).

e. Interaction With the Reduction for Expanded Group Earnings

Comments recommended that the regulations clarify how to apply the current year earnings and profits exception for a consolidated group treated as one corporation. Generally, comments questioned whether the one corporation's current year earnings and profits is based on § 1.1502–33, or whether it should instead be recalculated as though each member of the consolidated group other than the common parent were a branch. For example, under the latter approach, current year earnings and profits would not include worthless stock loss deductions with respect to stock of a consolidated group member, and certain stock acquisitions would be treated as asset acquisitions, which could produce a step-up or step-down in the basis of depreciable or amortizable assets.

As discussed in Section V.E.3.a of this Summary of Comments and Explanation of Revisions, the earnings and profits exception has been modified in the final and temporary regulations. With respect to the expanded group earnings account, the temporary regulations provide that a consolidated group has one account and only the earnings and profits, determined in accordance with § 1.1502–33 (without regard to the application of § 1.1502–33(b)(2), (e), and (f)), of the common parent (within the meaning of section 1504) of the consolidated group are considered in calculating the expanded group earnings for the expanded group period of a consolidated group. The Treasury Department and the IRS have determined that a methodology based on modified § 1.1502–33 principles is the simplest to administer and most accurately reflects the treatment of all members of a consolidated group as one corporation for purposes of the final and temporary regulations.

The temporary regulations provide rules for determining when, and to what extent, a consolidated group (treated as one corporation) or a departing member

succeeds to all or some of the expanded group earnings account of a joining member or a consolidated group, respectively. In this regard, a consolidated group succeeds to the expanded group earnings account of a joining member. In addition, if a departing member (including departing members that immediately after leaving a consolidated group themselves comprise another consolidated group treated as one corporation) leaves a consolidated group in a distribution under section 355, the expanded group earnings account of the consolidated group is allocated between the consolidated group and the departing member in proportion to the earnings and profits of the consolidated group and the earnings and profits of the departing member immediately after the transaction. However, no amount of the expanded group earnings account of a consolidated group is allocated to a departing member that leaves the consolidated group in a transaction other than a distribution to which section 355 applies. The temporary regulations provide similar rules with respect to the reduction for qualified contributions, discussed in Section A.2.f of this Part VI.

Comments also questioned whether the issuer's earnings and profits or the consolidated group's earnings and profits should be used when an issuer makes a distribution to a minority shareholder that is not a member of the consolidated group but is a member of the expanded group. Providing each member of a consolidated group access to the consolidated group's earnings account with respect to a distribution or acquisition made by such member to or from another member of the expanded group is consistent with the premise of treating all members of a consolidated group as one corporation. Accordingly, the temporary regulations provide that a distribution or acquisition that a member of a consolidated group makes to or from another member of the same expanded group that is not a member of the same consolidated group is reduced to the extent of the expanded group earnings account of the consolidated group.

f. Interaction With Reduction for Qualified Contributions

As discussed in Part V.E.3.b of this Summary of Comments and Explanation of Revisions, the final and temporary regulations provide that an expanded group member's distributions and acquisitions are reduced by qualified contributions for purposes of applying the general rule and funding rule. The temporary regulations provide that, for purposes of applying the qualified contribution reduction to distributions or acquisitions by a consolidated group, qualified contributions to any member that remains consolidated immediately after the contribution are treated as made to the consolidated group, a qualified contribution that causes a deconsolidation of a member is treated as made to the departing member and not to the consolidated group, and no contribution of property by a member of a consolidated group to any other member of the consolidated group is treated as a qualified contribution.

g. Interaction With Other Specific Provisions in § 1.385–3

The temporary regulations provide that the determination of whether a debt instrument issued by a member of a consolidated group is a covered debt instrument is made on a separate member basis without regard to the one-corporation rule. The Treasury Department and the IRS have determined that separate-member treatment is appropriate for making this determination because the exceptions to covered debt instrument status are tailored to specific entity-level attributes of the issuer. For example, because status as an excepted regulated financial company is determined on an issuer-by-issuer basis, the Treasury Department and the IRS have determined that it would not be appropriate to extend that special status to other members of a consolidated group that do not meet the specific requirements for the exception.

Similarly, the determination of whether a member of a consolidated group has issued a qualified short-term debt instrument for purposes of § 1.385–3(b)(3)(vii) is made on a separate member basis. The policy justifications for the specific tests set forth in that exception, in particular the specified current asset test, are more suited to a separate member analysis. Despite the general use of a separate member approach to applying the qualified short-term debt instrument tests, § 1.385–3(b)(4)(ii)(D) specifically references situations in which a member of an expanded group enters into a transaction with a principal purpose of avoiding the purposes of § 1.385–3 or § 1.385–3T, including as part of a plan or a series of transactions through the use of the consolidated group rules set forth in § 1.385–4T. That rule could apply, for example, to transactions in which two different members of the same consolidated group engage in ''alternating'' loans from a lender that is not a member of the consolidated group with a principal purpose of avoiding the purposes of the limitations in the 270-day test in § 1.385–3(b)(3)(vii)(A)(2) by also engaging in other intra-consolidated group transactions that otherwise would be disregarded under the one-corporation rule.

3. State and Local Tax Comments

Comments noted that the regulations add complexity to state and local tax systems and may result in additional state tax costs and compliance burdens for taxpayers. In particular, a comment noted that, if a state applies the one-corporation rule based on the composition of the state filing group rather than the federal consolidated group, transactions could be subject to the regulations for state income tax purposes even when the transactions are not subject to the regulations for federal income tax purposes. The comment suggested that this concern could be mitigated in states that adhere to the literal language of the section 385 regulations by modifying proposed § 1.385–1(e) to provide that ''all members of a consolidated group (as defined in § 1.1502–1(h)) that file (or that are required to file) consolidated U.S. federal income tax returns are treated as one corporation.'' The temporary regulations adopt this recommendation.

4. Newly-Acquired Life Insurance Subsidiaries

Several comments noted the one-corporation rule in proposed § 1.385–1(e) would not apply in cases where section 1504(c)(2) prohibits inclusion of newly-acquired life insurance subsidiaries in a consolidated group. These comments asked that the regulations treat such newly-acquired life insurance companies as part of a consolidated group even when section 1504(c)(2) would not.

The one-corporation rule is intended only to treat members of a consolidated group that file a single federal income tax return as a single taxpayer because items of income and expense with respect to debt instruments between such members are included and offset each other on the consolidated group's single federal income tax return. To the extent that section 1504(c)(2) prohibits recently-acquired life insurance companies from joining a consolidated group, the items of income and expense of the companies and the consolidated group are not included in a single federal income tax return. In this context, a consolidated group and its recently-acquired life insurance subsidiaries are not materially different from two separate consolidated groups are part of the same expanded group. Transactions between two separate

consolidated groups that are part of the same expanded group are subject to §§ 1.385–3 and 1.385–4T. As a result, the Treasury Department and the IRS decline to include a special rule related to section 1504(c)(2) in the temporary regulations. However, as discussed in Part V.G.2 of this Summary of Comments and Explanation of Revisions, the final and temporary regulations exclude debt instruments issued by regulated insurance companies.

B. Debt Instruments That Cease To Be Among Consolidated Group Members and Remain Among Expanded Group Members

The proposed regulations provided two rules governing the treatment of a consolidated group debt instrument that ceased to be a consolidated group debt instrument, but continued to be issued and held by members of the same expanded group. One set of rules (the departing instrument rules) addressed situations in which a member of a consolidated group transfers a consolidated group debt instrument to an expanded group member that is not a member of the consolidated group. The other set of rules (the departing member rules) addressed debt held or issued by a consolidated group member that leaves a consolidated group but continues to be a member of the expanded group (such corporation, a departing member). Several comments were received regarding the operation of these rules.

1. Departing Instrument Rules

Under the departing instrument rules, when a member of a consolidated group that held a consolidated group debt instrument transferred the consolidated group debt instrument to an expanded group member that was not a member of the consolidated group, the debt instrument was treated as issued by the issuer of the debt instrument (which is treated as one corporation with the transferor of the debt instrument) to the transferee expanded group member on the date of the transfer. For purposes of proposed § 1.385–3, the consequences of the transfer were determined in a manner that was consistent with treating a consolidated group as one corporation. To the extent the debt instrument was treated as stock upon being transferred, the debt instrument was deemed to be exchanged for stock immediately after the debt instrument was transferred outside of the consolidated group.

Comments recommended that when a consolidated group member distributes a debt instrument issued by another member of its consolidated group to a nonconsolidated expanded group member in a distribution, the distribution should not be taxable as an exchange, but should instead be taxable in the same manner as a distribution by a consolidated group member of its own debt instrument to a nonconsolidated member of its expanded group, which would generally be treated as a distribution subject to section 305. The temporary regulations do not adopt this comment because the comment implicitly suggests that the regulations apply the one-corporation rule for all federal tax purposes, rather than as a rule for applying §§ 1.385–3, 1.385–3T, and 1.385–4T in the consolidated return context.

2. Departing Member Rules

a. Harmonization With the Departing Instrument Rule

Comments recommended harmonizing the departing member rules with the departing instrument rules. For example, one comment recommended that, when a departing member of a consolidated group is the holder or the issuer of a debt instrument issued or held by another member of the consolidated group, and the departing member remains in the same expanded group after leaving the consolidated group, then the debt instrument generally should be treated for purposes of § 1.385–3 as being reissued immediately following the member's departure from the consolidated group (consistent with the departing instrument rule). This would have the effect of harmonizing the departing member rules with the departing instrument rules because the departing instrument rules provide that when a member of a consolidated group that held a consolidated group debt instrument transfers the instrument to an expanded group member that is not a member of the consolidated group, the instrument is treated as newly issued by the issuer to the transferee. The comment suggested that, if the debt instrument was issued by or to the departing member of the consolidated group as part of a plan that included the member's departure from the consolidated group, then the debt should be recast as stock when the member departs from the consolidated group if it would have previously been recast as stock absent the one-corporation rule. However, the comment also suggested that absent a plan that included the member's departure from the consolidated group and the issuance of the debt instrument, the debt instrument should be treated as reissued immediately after the member's departure from the consolidated group. As discussed in more detail in Section B.2.b of this Part VI, the temporary regulations generally adopt this approach by eliminating the classification of a departing member's debt instruments that were previously consolidated group debt instruments as either exempt consolidated group debt instruments or non-exempt consolidated group debt instruments after departure. Instead, the temporary regulations treat those debt instruments as reissued, and thus generally do not require separate tracking of intra-consolidated group transactions, unless the anti-abuse rule in § 1.385–3(b)(4) applies.

Another comment noted that, if the departing member rule and the departing instrument rule are not harmonized, there could be situations in which both rules appear to apply. For example, a consolidated group member that holds a consolidated group debt instrument and undergoes an outbound reorganization described in section 368(a)(1)(F) may be viewed as both transferring the consolidated group debt instrument and ceasing to be a member of the consolidated group. The temporary regulations add an overlap rule to provide that, if both the departing member rules and the departing instrument rules could apply to the same transaction, the departing instrument rules, rather than the departing member rules, apply.

b. Operation of Departing Member Rules

The proposed regulations generally provided that any consolidated group debt instrument that is issued or held by the departing member and that was not treated as stock solely by reason of the one-corporation rule (an exempt consolidated group debt instrument, under the nomenclature of the proposed regulations) was deemed to be exchanged for stock immediately after the departing member leaves the consolidated group. The proposed regulations also generally provided that any consolidated group debt instrument issued or held by a departing member that is not an exempt consolidated group debt instrument (a non-exempt consolidated group debt instrument, under the nomenclature of the proposed regulations) continued to be treated as indebtedness after the departure, unless and until the non-exempt consolidated group debt instrument was treated as stock under the funding rule as a result of a later distribution or acquisition. However, the proposed regulations also provided that, solely for purposes of applying the per se rule, the debt instrument was treated as having been

issued when it was first treated as a consolidated group debt instrument, and not when the departing member departed from the consolidated group.

Several comments addressed the operation of the departing member rules. Comments requested clarification as to how the current year earnings and profits exception described in proposed § 1.385–3(c)(1) applied for purposes of determining whether a consolidated group debt instrument is an exempt consolidated group debt instrument or a non-exempt consolidated group debt instrument. Specifically, the comments noted that, in order to analyze whether a consolidated group debt instrument would or would not have been recharacterized under proposed § 1.385–3(b)(3) but for the one-corporation rule, the issuer would need to analyze the availability of the various exceptions in proposed § 1.385–3(c), including the current year earnings and profits exception in the proposed regulations. For purposes of applying the earnings and profits exception, comments questioned whether the determination should be made by reference to the specific issuer's earnings and profits (without regard to the one-corporation rule) or whether some other measure, such as the issuer's earnings and profits plus the earnings and profits of lower-tier group members should be used. Further, one comment questioned whether adjustments to an issuer's earnings and profits should be made based on adjustments to the earnings and profits of lower-tier consolidated group members if all exempt consolidated group debt instruments were treated as stock rather than debt.

Comments also suggested that the special timing rule for non-exempt consolidated group debt instruments be eliminated. Specifically, comments noted that, because the proposed rule for non-exempt consolidated group debt instruments did not turn off the deemed satisfaction and reissuance rules of § 1.1502–13(g), the deemed reissuance rule in § 1.1502–13(g) could conflict with the special timing rule, and, as a result, start a new time period for the per se rule. *See* proposed § 1.385–4(d)(3), *Example 4.* Comments recommended that the example be revised to take the deemed satisfaction and reissuance rules into account, and by implication, eliminate the special timing rule for non-exempt consolidated group debt instruments. Other comments questioned whether the interaction of the special timing rule for non-exempt consolidated group debt instruments and the ordering rule in proposed § 1.385–3(b)(3)(iv)(B)(*3*) (multiple interests) could lead to inappropriate results.

Other comments more directly recommended that the regulations disregard any history of transactions that occurred solely between consolidated group members before a departure. This approach would also render moot the concept of a non-exempt consolidated group debt instrument and an exempt consolidated group debt instrument. One comment noted that requiring tracking of consolidated group history is contrary to the notion of excluding debt instruments issued by members of a consolidated group from the scope of proposed § 1.385–3, because the consolidated group would still have to monitor and analyze the history of intra-consolidated group transactions in the event there was a departing member.

Along similar lines, other comments recommended that the regulations provide that unfunded distribution and acquisition transactions that occurred solely within a consolidated group be disregarded for all purposes of proposed §§ 1.385–3 and 1.385–4, so that the history of such intra-consolidated group distribution and acquisition transactions would not follow a member that leaves the consolidated group. For example, assume that in Year 1, DS1 makes a $100x distribution to USS1, the common parent of a consolidated group of which DS1 is a member. In Year 2, DS1 ceases to be a member of the USS1 consolidated group, but remains a member of the same expanded group as USS1. Immediately afterwards, DS1 borrows $100x from a member of the expanded group that is not a member of the USS1 consolidated group. The comments recommended that, for purposes of applying the funding rule in this context, DS1's distribution to USS1 in Year 1 should be disregarded.

Comments also requested clarification of the application of the funding rule to a departing member in situations in which one member of a consolidated group makes a distribution or acquisition to or from another member of the same expanded group that is not a member of the same consolidated group (a regarded distribution or acquisition), and subsequently, another member of the consolidated group departs the consolidated group but remains a member of the expanded group. One comment indicated that the departing member should not be treated as having made the regarded distribution or acquisition for purposes of the funding rule, and by implication, the consolidated group should continue to be treated as having made the regarded distribution or acquisition for purposes of the funding rule. Other comments indicated that, in order to prevent duplication, the departing member should be allocated a portion of each regarded distribution or acquisition for purposes of the funding rule.

Another comment sought clarification when a member of a consolidated group is funded through a borrowing from an expanded group member that is not a member of the same consolidated group, and therefore the entire consolidated group is treated as a funded member for purposes of proposed § 1.385–3(b)(3), and a different member of the consolidated group subsequently leaves the consolidated group. The comment specifically asked whether that departing member is still treated as a funded member after departure.

The temporary regulations generally adopt the recommendations described above. Specifically, the temporary regulations provide that if a consolidated group debt instrument ceases to be treated as such because the issuer and holder are no longer members of the same consolidated group but remain members of the same expanded group, then the issuer is treated as issuing a new debt instrument to the holder in exchange for property immediately after the debt instrument ceases to be a consolidated group debt instrument. Absent application of the anti-abuse rule in § 1.385–3(b)(4), the departing member's history of prior transactions with other consolidated group members, which were disregarded under the one-corporation rule for purposes of applying § 1.385–3(b)(3), remain disregarded when the departing member ceases to be a member of the consolidated group. By giving greater effect to the one-corporation rule, the temporary regulations reduce the need to monitor transactions solely among consolidated group members and make the additional exceptions set forth in § 1.385–3(c) more administrable, particularly the exceptions for expanded group earnings and qualified contributions.

The temporary regulations also clarify the designation of funded status when a member leaves a consolidated group but remains in the expanded group. When a consolidated group member is funded through a borrowing from an expanded group member that is not a member of the same consolidated group, and that consolidated group member later departs the consolidated group, the departing member continues to be treated as funded by the borrowing, and the consolidated group from which the departing member departs ceases to be treated as funded by the borrowing. If

instead a non-departing member had been funded by the borrowing, the temporary regulations provide that the consolidated group from which the departing member departs continues to be treated as funded by the borrowing, and the departing member ceases to be treated as funded by the borrowing when it leaves the consolidated group.

Similarly, the temporary regulations also clarify the treatment of consolidated groups in situations when a departing member has made a regarded distribution or acquisition that has not yet caused a recharacterization of a debt instrument under the general rule or funding rule. The temporary regulations provide that, in such a situation, if the departing member departs the consolidated group in a transaction other than a section 355 distribution, the departing member continues to be treated as having made the regarded distribution or acquisition, and the consolidated group from which the departing member departs ceases to be treated as having made the regarded distribution or acquisition.

For purposes of applying the funding rule when a departing member ceases to be a member of a consolidated group by reason of a section 355 distribution, the temporary regulations clarify that a departing member is a successor to the consolidated group and the consolidated group is a predecessor to the departing member. Specifically, based on the order of operations rule of § 1.385–4T(b)(5), the temporary regulations provide that the determination as to whether an expanded group member that is not a member of a consolidated group is a predecessor or successor of another expanded group member that is a member of a consolidated group is made without regard to the one-corporation rule. Similarly, the determination as to whether a an expanded group member that also is a member of a consolidated group is a predecessor or successor to another expanded group member that is not a member the consolidated group is made without regard to the one-corporation rule. The temporary regulations further provide that, for purposes of the funding rule, if a consolidated group member is a predecessor or successor of a member of the expanded group that is not a member of the same consolidated group, the consolidated group is treated as a predecessor or successor of the expanded group member (or the consolidated group of which that expanded group member is a member). Thus, a departing member that is a successor to a member of the consolidated group of which it ceases to be a member is treated as a successor to the consolidated group, and the consolidated group is treated as a predecessor to the departing member. Accordingly, any regarded distribution or acquisition by the consolidated group before the departing member ceases to a be a member of the consolidated group may be treated as made by either the departing member or the consolidated group, depending on the application of the multiple interest rule of § 1.385–3(b)(3)(B).

In connection with these and other changes in § 1.385–4T, the final and temporary regulations add to the anti-abuse rule in § 1.385–3(b)(4) a specific reference to § 1.385–4T, as well as specific examples where an expanded group member engages in a transaction with a principal purpose of avoiding the purposes of § 1.385–3, 1.385–3T, or 1.385–4T through the use of a departing member. The anti-abuse rule may apply, for example, if a covered debt instrument is issued by a member of a consolidated group (USP) to an expanded group member, and pursuant to a plan with a principal purpose of avoiding the purposes of § 1.385–3, 1.385–3T, or 1.385–4T, the following transactions occur: (i) The proceeds of the borrowing are contributed by USP to its subsidiary (US1), also a member of the same consolidated group, (ii) US1 deconsolidates by USP transferring all of its US1 stock to another expanded group member that is not a member of the same consolidated group, and (iii) US1 makes a distribution to its shareholder.

Finally, the temporary regulations clarify that if an interest in a consolidated group member has previously been characterized as stock under § 1.385–3, that interest continues to be treated as stock in the member after the member departs the consolidated group but remains in the expanded group.

c. Subgroups Leaving the Consolidated Group

Comments questioned whether the departing member rule should apply when an issuer and holder simultaneously depart the same consolidated group (the old consolidated group) and then simultaneously join another consolidated group (the new consolidated group), and both the old and new consolidated groups are in the same expanded group. Comments recommended that, under these circumstances, the concerns addressed in the proposed regulations generally are not present because the issuer's deduction for interest expense and the holder's corresponding interest income continue to offset on the new consolidated group's consolidated federal income tax return. Accordingly, comments recommended the provision of a ''subgroup exception'' under which proposed § 1.385–4(b)(1)(ii)(B) would not apply where the issuer and holder together depart one consolidated group and together join another consolidated group within the same expanded group. In response to these comments, the temporary regulations adopt a subgroup rule when both the issuer and the holder of a consolidated group debt instrument cease to be members of a consolidated group, but the issuer and the holder both become members of another consolidated group that is in the same expanded group immediately after the transaction. When this exception applies, the debt instrument between subgroup members remains a consolidated group debt instrument rather than a debt instrument that is treated as issued under § 1.385–4T(c)(1)(ii) or deemed reissued under § 1.385–4T(c)(1)(i).

3. Debt Instrument Entering a Consolidated Group

One comment noted that the deemed exchange that occurred pursuant to proposed § 1.385–4(c) could be treated as a divided equivalent redemption described in section 302(d). The comment recommended that, to prevent some of the ancillary consequences of such treatment (for example, withholding tax liability), the deemed exchange should occur only after the debt instrument becomes a consolidated group debt instrument. The Treasury Department and the IRS generally adopt this recommendation. The final and temporary regulations provide that, if a covered debt instrument that is treated as stock under § 1.385–3 becomes a consolidated group debt instrument, then immediately after the covered debt instrument becomes a consolidated group debt instrument, the issuer is deemed to issue a new covered debt instrument to the holder in exchange for the covered debt instrument that was treated as stock. In addition, the final and temporary regulations provide that when the covered debt instrument that previously was treated as stock becomes a consolidated group debt instrument, the underlying distribution or acquisition that caused the covered debt instrument to be treated as stock is re-tested against other covered debt instruments issued by the consolidated group following principles set forth in § 1.385–3(d)(2)(ii)(A). For further discussion of the re-testing principles in § 1.385–3(d)(2)(ii)(A), see Part V.H.2 of

this Summary of Comments and Explanation of Revisions.

4. Other Comments Regarding Proposed § 1.385–4

a. Respecting Deemed Exchanges

Comments noted that § 1.1502–13(g)(3) creates a deemed satisfaction and reissuance of an obligation that ceases to be an intercompany obligation, and does so immediately before such cessation, while § 1.1502–13(g)(5) generally creates a deemed satisfaction and reissuance of an obligation that becomes an intercompany obligation, and does so immediately after the obligation enters the consolidated group. The consolidated return regulations explicitly provide, in each case, that the deemed satisfaction and reissuance are treated as transactions separate and apart from the transaction giving rise to the deemed satisfaction and reissuance. The comments noted that, absent similar rules to address the deemed exchanges occurring under proposed § 1.385–4 (including deemed exchanges occurring when a debt instrument becomes or ceases to be a consolidated group debt instrument, as well as deemed exchanges occurring under the transition rule described in proposed § 1.385–4(e)(3)), it is possible that those exchanges could be viewed under general tax principles as transitory and thus be disregarded in certain cases. Comments recommended that the regulations expressly provide that any deemed issuances, satisfactions, or exchanges arising under § 1.1502–13(g) and proposed § 1.385–4(b) or 1.385–4(e)(3) as part of the same transaction or series of transactions be respected as steps that are separate and apart from one another, similar to the rules currently articulated under §§ 1.1502–13(g)(3)(ii)(B) and 1.1502–13(g)(5)(ii)(B). The temporary regulations adopt this recommendation in § 1.385–4T(c)(3).

b. Terminology

The preamble to the proposed regulations described a debt instrument issued by one member of a consolidated group to another member of the same consolidated group as a ''consolidated group debt instrument.'' The same term was used in the text of the proposed regulations, but the term was not defined. One comment recommended that the regulations define the term consolidated group debt instrument. The temporary regulations adopt this recommendation.

Another comment recommended that proposed § 1.385–4 should employ terminology and concepts that are consistent with those utilized throughout the consolidated return regulations. The comment noted that, consistent with the one-corporation rule, the examples in proposed § 1.385–4 refer to a consolidated group as the issuer of a debt instrument, whereas the consolidated return regulations would refer to a particular member of the consolidated group as an issuer. Consistent with the one corporation rule in §§ 1.385–3 and 1.385–4T, the final and temporary regulations continue to refer to a consolidated group as the issuer of a debt instrument.

VII. Other Comments

A. Coordination With § 1.368–2(m)(3)

One comment recommended that the regulations clarify their interaction with § 1.368–2(m)(3)(iii), which provides that a transaction may qualify as a reorganization described in section 368(a)(1)(F) (an F reorganization) even though a holder of stock in the transferor corporation receives a distribution of money or other property from either the transferor corporation or the resulting corporation (including in exchange for shares of stock in the transferor corporation). The regulations provide that the receipt of such a distribution is treated as an unrelated, separate transaction from the reorganization, whether or not connected in a formal sense. Thus, for example, assume that FP owns USS1, USS1 forms USS2, USS1 merges into USS2, and FP receives USS2 stock and a USS2 debt instrument in exchange for its USS1 stock. Further assume that the merger would be treated as an F reorganization and that, under § 1.368–2(m)(3)(iii), USS2's distribution of a debt instrument would be treated as a separate and independent transaction to which section 301 applies.

The comment stated that the proposed regulations' interaction with § 1.368–2(m)(3)(iii) presented a circularity issue. Specifically, the comment stated that a distribution treated as a separate and independent transaction, such as USS2's distribution of its debt instrument, would result in the USS2 debt instrument being treated as stock, such that § 1.368–2(m)(3)(iii) would no longer apply. The comment further stated that if § 1.368–2(m)(3)(iii) did not apply, no separate and independent distribution would be treated as occurring, such that the general rule of proposed § 1.385–3(b)(2)(i) would not apply. To address this, the comment recommended that a coordinating rule be added to clarify the application of the section 385 regulations to the issuance of a debt instrument under this and similar circumstances.

The Treasury Department and the IRS decline to adopt the recommendation, because it is not correct that this fact pattern presents a circularity problem. Pursuant to § 1.368–2(m)(3)(ii) and (iii), if a distribution of money or other property occurs at the same time as the transactions otherwise qualifying as an F reorganization, the distribution does not prevent the transactions from so qualifying. Pursuant to § 1.368–2(m)(3)(iii), the distribution is treated as a separate and unrelated transaction from the F reorganization and is subject to section 301. Thus, the receipt by FP of the USS2 debt instrument in the merger would constitute a section 301 distribution of the instrument, which would be treated as stock of USS2 under the general rule.

B. Proposed Section 358 Regulations

One comment noted that under proposed § 1.358–2, a 100-percent shareholder in a corporation may be treated as holding multiple blocks of stock with different adjusted tax bases. The comment noted that the proposed regulations, which would treat purported indebtedness as stock, would increase the number of instances in which a shareholder has multiple blocks of stock with different adjusted tax bases. The Treasury Department and the IRS decline to address comments regarding proposed regulations under section 358, which are beyond the scope of the final and temporary regulations. The final and temporary regulations do, however, retain the proposed regulations' approach to treating an EGI or a debt instrument as stock under certain circumstances. On the date the indebtedness is recharacterized as stock, the indebtedness is deemed to be exchanged, in whole or in part, for stock with a value that is equal to the holder's adjusted basis in the portion of the indebtedness that is treated as equity under the regulations, and the issuer of the indebtedness is deemed to retire the same portion of the indebtedness for an amount equal to its adjusted issue price as of that date. Although this rule may result in indebtedness that is treated as stock having a different basis than other shares of stock held by a shareholder, many comments expressed support for this rule given that it generally will prevent both the holder and issuer from realizing gain or loss from the deemed exchange other than foreign exchange gain or loss recognized by the issuer or holder under section 988.

C. Certain Additional Guidance

1. Hook Equity

Ordinarily, the IRS will not issue a ruling or determination letter regarding the treatment or effects of ''hook equity,'' including as a result of its issuance, ownership, or redemption. For this purpose, ''hook equity'' means an ownership interest in a business entity (such as stock in a corporation) that is held by another business entity in which at least 50 percent of the interests (by vote or value) in such latter entity are held directly or indirectly by the former entity. However, if an entity directly or indirectly owns all of the equity interests in another entity, the equity interests in the latter entity are not hook equity. *See* Rev. Proc. 2016–3, section 4.02(11), 2016–1 I.R.B. 126. One comment, noting that the proposed regulations could result in certain debt instruments being treated as stock that would qualify as hook equity, recommended that the IRS repeal its policy on the issuance of rulings or determination letters regarding the treatment or effects of hook equity. The Treasury Department and the IRS decline to address this recommendation, which is beyond the scope of the final and temporary regulations. The recommendation will be considered, as appropriate, in connection with future guidance.

2. Examination Guidance

One comment recommended that the IRS should issue guidance to examiners concerning the interpretation and practical application of the regulations. The Treasury Department and the IRS decline to address this comment, which is beyond the scope of the final and temporary regulations.

VIII. Applicability Dates

A. Applicability Dates of the Proposed Regulations

Proposed §§ 1.385–1 and 1.385–2 were proposed to apply to any applicable instrument issued or deemed issued on or after the date that the proposed regulations were published as final regulations and to any applicable instrument issued or deemed issued as a result of an entity classification election made under § 301.7701–3 that is filed on or after that date. For purposes of applying proposed §§ 1.385–3 and 1.385–4, the provisions of proposed § 1.385–1 were proposed to be applicable in accordance with the proposed applicability dates of proposed §§ 1.385–3 and 1.385–4.

Proposed §§ 1.385–3 and 1.385–4 were proposed to be applicable on the date of publication in the **Federal Register** of the Treasury decision adopting these rules as final regulations. Proposed §§ 1.385–3 and 1.385–4 were proposed to apply to any debt instrument issued on or after April 4, 2016, and to any debt instrument issued before April 4, 2016, as a result of an entity classification election made under § 301.7701–3 that is filed on or after that date. However, the proposed regulations also provided that, if a debt instrument otherwise would be treated as stock before publication of the final regulations, the debt instrument would be treated as indebtedness until the date that is 90 days after publication of the final regulations, and would only be recharacterized on that date to the extent that the debt instrument was held by expanded group members on that date (the proposed transition period). This transition rule in the proposed regulations did not apply to debt instruments issued on or after publication of the final regulations.

The proposed regulations also provided that, for purposes of determining whether a debt instrument is described in proposed § 1.385–3(b)(3)(iv) (the per se funding rule), a distribution or acquisition that occurred before April 4, 2016, other than a distribution or acquisition that is treated as occurring before April 4, 2016, as a result of an entity classification election made under § 301.7701–3 that is filed on or after April 4, 2016, is not taken into account.

B. Applicability Dates of the Final and Temporary Regulations

1. In General

The final and temporary regulations apply to taxable years ending on or after January 19, 2017. As described in Part IV.B.2.b of this Summary of Comments and Explanation of Revisions, the final regulations under § 1.385–2 delay the implementation period described in proposed § 1.385–2 such that § 1.385–2 does not apply to interests issued or deemed issued before January 1, 2018. Sections 1.385–3 and 1.385–3T grandfather debt instruments issued before April 5, 2016 (rather than before April 4, 2016, as was provided in the proposed regulations). The final and temporary regulations do not include the special rule in proposed § 1.385–3(h)(1) relating to entity classification elections filed on or after April 4, 2016. The final and temporary regulations in § 1.385–3(b)(3)(viii) also grandfather distributions and acquisitions occurring before April 5, 2016, for purposes of applying the funding rule.

2. Transition Rules

The final regulations under § 1.385–3 lengthen the proposed transition period by providing that any covered debt instrument that would be treated as stock by reason of the application of the final and temporary regulations on or before January 19, 2017 (the final transition period) is not treated as stock during that 90-day period, but rather the covered debt instrument is deemed to be exchanged for stock immediately after January 19, 2017, but only to the extent that the covered debt instrument is held by a member of the issuer's expanded group immediately after January 19, 2017 (final transition period rule). Thus, the final transition period rule addresses both covered debt instruments that would have been recharacterized before the final and temporary regulations become applicable (that is, because the recharacterization would have occurred during a taxable year ending before January 19, 2017, as well as other covered debt instruments that would be treated as stock on or before January 19, 2017. The Treasury Department and the IRS extended the final transition period, as compared to the proposed regulations, in response to comments that requested additional time for taxpayers to adjust their conduct to take into account the final and temporary regulations.

Generally, under the final transition period rule, any issuance of a covered debt instrument during the final transition period that would be treated as stock under § 1.385–3(b)(2) upon issuance but for the final transition period rule is treated as an issuance of indebtedness, and not an issuance of stock. The final transition period rule also clarifies that §§ 1.385–1, 1.385–3T, and 1.385–4T are taken into account in applying § 1.385–3 during the final transition period.

The Treasury Department and the IRS are concerned that, under the final transition period rule, a taxpayer could avoid the purposes of the final and temporary regulations by, during the transition period, distributing a covered debt instrument that otherwise would be treated as stock under the general rule, and then issuing a second debt instrument to retire the first instrument (either in a direct refinancing or indirectly by using the proceeds from the second debt instrument) before the end of the transition period. If this were permitted to occur, a taxpayer could issue substantial related-party debt that does not finance new investment after having received notice of these final and temporary regulations, contrary to the purposes of the applicability dates and

limited grandfather rules provided in the proposed regulations and in these final and temporary regulations. Accordingly, the final and temporary regulations also add a transition funding rule. This transition funding rule provides that on or after the date on which a covered debt instrument would be treated as stock but for the applicability date of § 1.385–3 or the final transition period rule, any payment made with respect to such covered debt instrument (other than stated interest), including pursuant to a refinancing, is treated as a distribution for purposes of the funding rule. This transition funding rule is intended to provide for the orderly operation of the funding rule, taking into account the combination of the applicability date of § 1.385–3, the final transition period rule, and § 1.385–3(b)(6).

Section 1.385–3(b)(6) is a non-duplication rule that provides that, once a covered debt instrument is recharacterized as stock, the distribution or acquisition that caused that recharacterization cannot cause a recharacterization of another covered debt instrument even after the first instrument is repaid. The non-duplication rule in § 1.385–3(b)(6) is premised on the fact that the funding rule already treats the repayment of an instrument that is treated as stock as its own distribution for purposes of the funding rule. The rule in § 1.385–3(b)(6) prevents the funding rule from applying on a duplicative basis—to the repayment of the recharacterized instrument, and to the actual distribution or acquisition that caused the recharacterization. *See* Part V.B.4 of this Summary of Comments and Explanation of Revisions. The transition funding rule supersedes that non-duplication rule during the final transition period while the covered debt instrument that otherwise would be treated as stock continues to be treated as indebtedness. The transition funding rule treats payments with respect to the instrument as distributions for purposes of the funding rule, which is necessary because repayments during the final transition period are not otherwise treated as distributions.

Consistent with this transition funding rule, the final and temporary regulations also provide that a covered debt instrument that is issued in a general rule transaction during the transition period is not treated as a transaction described in § 1.385–3(b)(3)(i) if, and to the extent that, the covered debt instrument is held by a member of the issuer's expanded group immediately after the transition period. In such a case, the covered debt instrument would be deemed to be exchanged for stock immediately after the transition period, and no other covered debt instrument would be treated as funding the issuance during the transition period. This change addresses a comment concerning the interaction of the general rule and funding rule during the transition period.

Covered debt instruments that otherwise would not be recharacterized for federal income tax purposes during the final transition period (due, for example, to the fact that the covered debt instrument was not treated as funding a distribution or acquisition that also occurred during the final transition period) remain subject to the funding rule after the final transition period. Finally, the final regulations clarify in § 1.385–3(b)(4) that the anti-abuse rule in § 1.385–3(b)(4) may apply if a covered debt instrument is issued as part of a plan or series of transactions with a principal purpose to expand the applicability of the transition rules described in § 1.385–3(j)(2) or § 1.385–3T(k)(2).

The following example illustrates these transition rules: Assume FP, a foreign corporation, wholly owns USS, a domestic corporation. Both FP and USS use a calendar year as their taxable year. No exceptions described in § 1.385–3(c) apply. Assume that on June 1, 2016, USS distributes a $100x covered debt instrument (Note 1) to FP. On January 1, 2017, USS distributes a $200x covered debt instrument (Note 2) to FP. On January 2, 2017, USS makes a $100x repayment to retire Note 1.

For USS and FP, the first taxable year to which the final and temporary regulations apply is the taxable year ending December 31, 2017. Section 1.385–3 does not apply to the issuance of Note 1 because Note 1 is not issued in a taxable year ending on or after January 19, 2017. Section 1.385–3 does apply to the issuance of Note 2, because Note 2 is issued in a taxable year ending on or after January 19, 2017.

However, the final transition period rule applies to Note 2 because Note 2 otherwise would be treated as stock on or before January 19, 2017. Accordingly, Note 2 is not treated as stock until immediately after January 19, 2017; and to the extent that Note 2 is held by a member of USS's expanded group immediately after January 19, 2017, Note 2 is deemed to be exchanged for stock immediately after January 19, 2017.

The final transition period rule also applies to Note 1 because § 1.385–3(b) and (d)(1) would have treated Note 1 as stock in a taxable year ending before January 19, 2017 but for the fact that USS's taxable year ending December 31, 2016, is not a taxable year described in § 1.385–3(j)(1). However, because Note 1 was repaid on January 2, 2017, Note 1 is not held by a member of USS's expanded group immediately after January 19, 2017 and, as a result, Note 1 will not be recharacterized as stock. Because Note 1 would be recharacterized as stock during the final transition period, but Note 1 was not recharacterized as stock because it was not outstanding immediately after the final transition period, the transition funding rule applies to treat the payment with respect to Note 1 on January 2, 2017, as a distribution for purposes of applying § 1.385–3(b)(3) to USS's taxable year ending on December 31, 2017, and onward.

The temporary regulations provide similar transition rules for transactions covered by §§ 1.385–3T(f)(3) through (5).

C. Retroactivity

The Treasury Department and the IRS received various comments regarding the applicability date of the rules in proposed §§ 1.385–3 and 1.385–4. Comments asserted that applying proposed §§ 1.385–3 and 1.385–4 to instruments issued on or after the date of the notice of proposed rulemaking but before the adoption of final or temporary regulations would be impermissibly retroactive under the relevant statutory authorities.

While the Treasury Department and the IRS disagree with these comments, the applicability dates of the final and temporary regulations have been revised. The comments regarding retroactivity continue to be inapposite. The final and temporary regulations under §§ 1.385–3, 1.385–3T, and 1.385–4T apply only to taxable years ending on or after 90 days after the publication of the final and temporary regulations (that is, January 19, 2017. Accordingly, the final and temporary regulations do not require taxpayers to redetermine their federal income tax liability for any taxable year ending before January 19, 2017.

Furthermore, as described in Section B of this Part VIII, debt instruments issued on or before April 4, 2016, are never subject to §§ 1.385–3 or 1.385–3T, even if they remain outstanding during taxable years to which the final and temporary regulations apply. Further, any covered debt instrument issued after April 4, 2016, and on or before January 19, 2017, will not be recharacterized until immediately after January 19, 2017. Any recharacterization under the final and

temporary regulations will change an instrument's federal tax characterization only prospectively.

The applicability dates governing these regulations are not retroactive. Regulations are retroactive if they ''impair rights a party possessed when [that party] acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'' *Landgraf* v. *USI Film Prods.,* 511 U.S. 244, 280 (1994) (explaining retroactivity). The regulations do not impair rights or increase a party's tax liability with respect to a purported debt instrument until at least 90 days after the date of publication of the final and temporary regulations. Regardless of when an instrument is issued, beginning on the publication date of the final and temporary regulations, affected parties are on notice that such instrument could be subject to the rules described in the final and temporary regulations, and those instruments will only be prospectively recast as equity (that is, beginning 90 days after publication of the final and temporary regulations).

Additionally, even if the final and temporary regulations were retroactive, the Treasury Department and the IRS have statutory authority to issue retroactive rules. Regulations which relate to statutory provisions enacted before July 30, 1996—such as section 385—are subject to the pre-1996 version of section 7805(b). That provision provides express retroactive rulemaking authority by stating that the Secretary may prescribe the extent, if any, to which any ruling or regulation shall be applied without retroactive effect. Section 7805(b) (1995). Therefore, although the final and temporary regulations are not retroactive, section 7805(b) in any event provides the necessary statutory authority to issue regulations with retroactive effect.

Comments also stated that the Treasury Department and the IRS failed to comply with the Administrative Procedure Act (APA) notice-and-comment and delayed-applicability-date provisions by purportedly making proposed §§ 1.385–3 and 1.385–4 effective as of April 4, 2016. One comment stated that the APA's requirement of a delayed-applicability date in 5 U.S.C. 553(d) overrides the authority provided by section 7805(b). This comment pointed to the provision in the APA that a subsequent statute may not be held to supersede or modify the APA's rulemaking requirements except to the extent that it does so expressly. 5 U.S.C. 559.

These comments are inapposite because the final and temporary regulations comply with the requirement of a 30-day delayed-applicability date in 5 U.S.C. 553(d). The final and temporary regulations apply only to taxable years that end on or after 90 days after publication of the final and temporary regulations, and only begin to recharacterize instruments as equity immediately after 90 days after publication of the final and temporary regulations. Furthermore, section 7805(b), which permits regulations to have retroactive effect, controls in these circumstances because the more specific statute has precedence over the general notice statute in section 553(d) of the APA. *See, e.g., Redhouse* v. *Commissioner,* 728 F.2d 1249, 1253 (9th Cir. 1984); *Wing* v. *Commissioner,* 81 T.C. 17, 28–30 & n.17 (1983). Finally, the statutory authority contained in section 7805(b) predates the APA, so it is not a subsequent statute that is governed by section 559 of the APA.

Comments also identified a restriction on Congress's authorization in section 385(a) to promulgate regulations determining whether an instrument is ''in part stock and in part indebtedness.'' *See* Omnibus Budget Reconciliation Act, Public Law 101–239, § 7208(a)(2) (requiring that such authority ''shall only apply with respect to instruments issued after the date on which'' the Secretary ''provides public guidance as to the characterization of such instruments whether by regulation, ruling, or otherwise''). As explained in Part III.D of this Summary of Comments and Explanation of Revisions, the Treasury Department and the IRS have decided at this time not to adopt a general bifurcation rule pending further study. Furthermore, to the extent that § 1.385–3 results in a partial recharacterization of a purported debt instrument after January 19, 2017, the final and temporary regulations only apply to instruments issued after April 4, 2016, which is the date on which the proposed regulations were filed for public inspection with the **Federal Register**. Accordingly, the final and temporary regulations do not apply to debt instruments issued on or before the date (April 4, 2016) that the Treasury Department and the IRS provided public guidance regarding recharacterization. Therefore, the final and temporary regulations comply with the restriction regarding section 385(a) in the Omnibus Budget Reconciliation Act.

Some comments questioned the fairness of applying the proposed regulations to instruments issued before the publication date of final or temporary regulations, in light of the broad scope of the proposed rules and the complex subject matter at issue. The Treasury Department and the IRS have concluded that the final and temporary regulations adequately address these concerns. As is explained throughout this preamble, the scope of the final and temporary regulations is significantly narrower than the proposed regulations. For instance, the final and temporary regulations reserve on their application to foreign issuers and include many new exceptions, including a broad exception for short-term debt instruments, among others. Moreover, the final and temporary regulations provide that covered debt instruments (which excludes instruments issued on or before April 4, 2016) issued on or before 90 days after publication of the final and temporary regulations will continue to be treated for federal tax purposes as debt instruments until immediately after 90 days after the date of publication of the final and temporary regulations. To the extent such instruments are retired on or before 90 days after the date of publication of the final and temporary regulations, they will not be affected by the regulations.

Finally, a comment observed that if the future regulations made significant changes to the proposed regulations, such that debt instruments that were not subject to the proposed rules would become subject to recharacterization under the final rules, this would create an impermissible retroactive effect that is not addressed by the proposed transition rule.

In general, the final and temporary regulations do not adopt rules that would recharacterize debt instruments that would not have been recharacterized under the proposed regulations. However, to the extent a taxpayer prefers applying the proposed regulations to debt instruments issued after April 4, 2016, but before the filing date of the final and temporary regulations, the final and temporary regulations allow the taxpayer to apply §§ 1.385–1, 1.385–3, and 1.385–4 of the proposed regulations subject to certain consistency requirements. In particular, § 1.385–3(j)(2)(v) provides that an issuer and all members of the issuer's expanded group that are covered members may choose to consistently apply those sections of the proposed regulations to all debt instruments issued after April 4, 2016, and before October 13, 2016, solely for purposes of determining whether a debt instrument will be treated as stock. Taxpayers choosing to apply the proposed regulations must apply them consistently (including applying the partnership provision in proposed § 1.385–3(d)(5) in lieu of the temporary regulations) and cannot selectively

choose which particular provisions to apply.

Furthermore, because no instrument issued before the publication date of the final and temporary regulations will be treated as equity until 90 days after the publication date, taxpayers have ample notice as to the effect the final regulations will have on such instruments.

D. Delayed Applicability Date and Transition Rules

Numerous comments requested that the final and temporary regulations' applicability date be delayed, with some comments requesting a delay of several years after the proposed regulations are finalized. Comments also requested that the final and temporary regulations apply solely to debt instruments issued on or after such delayed applicability date. Other comments suggested different applicability dates based on certain characteristics of the issuer (for example, earlier applicability dates for inverted corporations) or the situation in which an instrument is issued (for example, cash pooling arrangements, refinancings, and certain deemed issuances of debt instruments). Other comments discussed each section of the proposed regulations and suggested applicability dates appropriate for each section. For example, many comments were concerned that taxpayers would need time to design and implement systems necessary to comply with proposed § 1.385–2 and requested the applicability date of the documentation rules be delayed from a few months to two years, with the vast majority asking for a one year delay after finalization. Comments also requested that the documentation rules not apply to interests outstanding on, or to interests negotiated before, the applicability date of the final and temporary regulations. A comment questioned whether, for purposes of applying the proposed regulations before the date on which the final and temporary regulations are issued, the issuance of a debt instrument that would be treated as stock under the proposed regulations should be treated as an issuance of a debt instrument or an issuance of stock. Similarly, a comment recommended clarification of the treatment of a repayment of such a debt instrument before the date on which the interest would be treated as stock under the proposed regulations.

After considering the comments, the final and temporary regulations adopt the changes to applicability dates, grandfather rules, and expanded transition rules described in Section B of this Part VIII. However, the Treasury Department and the IRS do not adopt the recommendations to exempt covered debt instruments issued on or after April 5, 2016, and before October 21, 2016 for purposes of the regulations, or to exempt from those rules covered debt instruments issued for some period thereafter. The Treasury Department and the IRS have determined that the significant modifications made to scope of the proposed regulations, coupled with the expansion and addition of numerous exceptions, adequately address the compliance burdens raised by the comments with respect to the regulations. For example, many of the comments that requested a delayed applicability date cited compliance difficulties faced by CFC issuers and issues associated with cash pooling arrangements. The final and temporary regulations reserve on the application to debt instruments issued by CFCs, and include broad exceptions to mitigate the compliance burden for taxpayers that participate in cash pooling arrangements.

Moreover, in developing the applicability dates and grandfathering rules for the proposed regulations, the Treasury Department and the IRS balanced compliance burdens with the need to prevent taxpayers from using any delay in implementation to maximize their related-party debt. If the proposed transition rules had simply exempted covered debt instruments issued after April 4, 2016, taxpayers would have had significant incentivizes to issue related-party debt that did not finance new investment in advance of the regulations' finalization. Accordingly, the Treasury Department and the IRS have determined that the applicability dates and transition rules provided in §§ 1.385–3, 1.385–3T, and 1.385–4T are necessary and appropriate.

Future Guidance and Request for Comments

As described in this Summary of Comments and Explanation of Revisions, several aspects of the final and temporary regulations are reserved pending further study. The Treasury Department and the IRS request comments on all of the reserved issues, including in particular: (i) The application of the final and temporary regulations to foreign issuers; (ii) the application of §§ 1.385–3 and 1.385–3T to U.S. branches of foreign issuers, in the absence of more comprehensive guidance regarding the application of §§ 1.385–3 and 1.385–3T with respect to foreign issuers; (iii) the expanded group treatment of brother-sister groups with common non-corporate owners, including how to apply the exceptions in § 1.385–3(c) to such groups; (iv) the application of § 1.385–2 to debt not in form, and (v) rules prohibiting the affirmative use of §§ 1.385–2 and 1.385–3. The Treasury Department and the IRS also request comments on the general bifurcation rule of proposed § 1.385–1(d). Any subsequently issued guidance addressing these issues will not apply to interests issued before the date of such guidance.

The Treasury Department and the IRS also request comments on all aspects of the temporary regulations. In addition, regarding the exception for qualified short-term debt instruments, the Treasury Department and the IRS request comments on the specified current assets test and whether the maximum outstanding balance described in § 1.385–3T(b)(3)(vii)(A)(*1*)(*iii*) should be limited by reference to variances in expected working capital needs over some period of time, rather than by reference to the total amount of specified current assets reasonably expected to be reflected on the issuer's balance sheet during the specified period of time.

The Treasury Department and the IRS also are concerned that under certain circumstances, such as a high-interest rate environment, an interest rate that falls within the safe haven interest rate range under § 1.482–2(a)(2)(iii)(B), and thus is deemed to be an arm's length interest rate, may allow deduction of interest expense substantially in excess of the amount that would be determined to be an arm's length interest rate in the absence of § 1.482–2(a)(2)(iii)(B). Specifically, the Treasury Department and the IRS are considering whether there is a more appropriate way to allow for a risk premium in the safe haven rate than by using a fixed percentage of the applicable federal rate. The Treasury Department and the IRS are considering a separate project to address this issue and request comments on how the safe haven rate of § 1.482–2(a)(2)(iii)(B) might be modified to address these concerns.

Finally, the Treasury Department and the IRS request comments on possible future guidance to address debt instruments issued by a member of an expanded group to an unrelated third party when the obligation is guaranteed by another member of the expanded group.

Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings, notices, and other guidance cited in this document are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available

from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS Web site at *http://www.irs.gov.*

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, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action'' under section 3(f) of Executive Order 12866 and designated as economically significant. Accordingly, the rule has been reviewed by the Office of Management and Budget. A regulatory assessment for this final rule is provided below.

A. The Need for the Regulatory Action

1. In General

Corporations can raise money using a wide variety of financial instruments. But for income tax purposes, what matters is whether the firms borrow (issue debt) or sell ownership interests in the corporation (issue equity). Under U.S. tax rules, interest (the return paid on debt) is deductible in determining taxable income while dividends (the return paid on equity) are not. This implies that corporations can reduce their U.S. federal income tax liability by financing their activities with debt instruments rather than with equity. And this provides a strong incentive to characterize financial instruments issued as ''debt'' even when they have some of the properties of equity instruments. In most circumstances, however, the ability to employ debt instead of equity, and thereby reduce income taxes paid, is limited by economic forces and legal constraints. In the marketplace, the cost of debt (that is, the interest rate charged) and the willingness of lenders to supply credit are generally dependent on a borrower's creditworthiness and the terms of repayment to which the parties agree. It is also generally accepted that independent parties to a lending transaction will act in their own best interests in terms of honoring the terms of a debt and in enforcing creditor's rights. Therefore, in these circumstances where unrelated parties engage in the financial transactions, an individual corporation's choice to employ either debt or equity, and its assessment of the amount of debt it can take on, are decisions that are determined, and limited, by market forces. In this context, the ability of individual corporations to reduce U.S. federal income tax liability by financing their operations with debt issued to unrelated parties rather than equity is to a degree naturally limited.

When the checks and balances of the market are removed, as they are when related corporations transact, there are often few practical economic or legal forces that constrain the choice between employing debt or equity. Related corporations can essentially act as a unit that, in effect, borrows and lends to itself without being subject to the forces that otherwise place limits on the cost and amount of indebtedness. In the context of highly-related parties, for example a parent corporation and its wholly-owned subsidiary, factors such as creditworthiness, ability to repay, and sufficiency of collateral may not be relevant if a decision to finance has otherwise been made. In these circumstances, the financing choice thus can be determined solely on the basis of income tax considerations, which often favor debt.

The absence of market forces operating among related corporations can, in addition to influencing internal financing decisions, create incentives for corporations that do not require financing to incur debt solely for tax-related reasons. Related corporations can engage in tax arbitrage, among other ways, by causing profitable corporations (facing a relatively high marginal tax rate) to incur debt (and pay interest) to corporations with losses (facing a relatively low or zero marginal tax rate), or by causing corporations in high tax rate jurisdictions to incur debt and pay interest to corporations in low tax rate jurisdictions. In addition, because intra-group debt will often have no legal or economic consequences outside of the related-party group of corporations, related corporations can use intra-group debt to increase the total amount of their obligations labeled as debt well beyond the amount of the external, third-party indebtedness of the group. While such tax arbitrage opportunities have been a longstanding problem, their associated economic and revenue costs appear to have increased in recent years.

From a U.S. tax perspective, subject to general tax principles and certain limited statutory constraints, corporations are generally free to structure their financial arrangements, even intra-group instruments, as debt or equity. However, the unique nature of related-party debt presents a number of issues that the section 385 regulations are intended to address. At a basic level, the section 385 regulations require highly-related parties (meaning generally those that meet an 80 percent common ownership test) to demonstrate that purported debt issued among them is properly characterized as debt for U.S. federal tax purposes, and thus that they are entitled to the interest deductions associated with such debt. An 80 percent common ownership threshold is often used under the tax Code and tax regulations to identify highly-related corporations, for example, to determine eligibility to file a consolidated federal income tax return or claim a deduction offsetting dividends received from subsidiaries. As noted, there are generally no external forces that constrain related-party debt and, as a consequence, the parties to a financing may attempt to characterize a transaction as tax-favored debt when it is more properly viewed in substance as equity. The section 385 regulations provide factors that are required to be used in evaluating the nature of an instrument among highly-related parties as debt or equity.

The section 385 regulations require related parties to document their intention to create debt and that their continuing behavior is consistent with such characterization. With respect to unrelated parties, the establishment of a creditor-debtor relationship generally involves such documentation. In the context of related parties, that is not always the case, even though it is a factor indicative of debt under existing common law tax principles. The absence of such documentation can be particularly problematic, for example, when the IRS attempts to assess the appropriateness of tax deductions for interest attributable to related-party debt. The section 385 regulations provide minimum standards, in line with what would be expected of unrelated parties, that related parties must observe in order for their debtor-creditor relationships to be respected as such for income tax purposes.

In addition, the section 385 regulations recharacterize purported debt as equity when certain prescribed factors demonstrate that the interest reflects a corporation-shareholder relationship rather than a debtor-creditor relationship. An unrelated party would not agree to owe a ''creditor'' a principal amount without receiving loan proceeds or some other property of value in return. However, as discussed, related parties are not so constrained, and an unfunded promise

among such parties to pay some amount in the future may have little economic effect or legal implication. Nonetheless, that promise to pay, if respected, could have significant consequences for income tax purposes. If the interest paid on an unfunded note (a debt instrument) to a parent corporation from a U.S. subsidiary was taxed at a lower rate than the marginal tax rate faced by the subsidiary or was untaxed at the parent corporation level, then the parent-subsidiary group would have achieved a reduction of its overall tax burden without meaningfully changing its overall legal or economic profile. In characterizing an instrument as debt or equity, the section 385 regulations consider as factors the relatedness of corporations and whether or not the instrument funded new investment in the issuer. If an instrument among highly-related parties does not finance new investment, the section 385 regulations treat the instrument as representing a corporation-shareholder relationship.

The section 385 regulations are intended to apply to related-party transactions undertaken by large corporate taxpayers that are responsible for a majority of corporate business activity and that have organizational structures that include subsidiaries or affiliated groups. These businesses represent about 0.1 percent of all corporations (tax filings for consolidated groups are counted as one return) but are responsible for about 65 percent of all corporate interest deductions and 54 percent of corporate net income. It is for this group of corporations that the opportunity to engage in intercompany transactions, the scale of the business activity, and the potential gains from tax arbitrage create the most potential for mischaracterization of equity as debt.

2. Application

Information and tax data on intercompany transactions within a single multinational firm is generally not reported to the IRS, making it harder to compile than similar information for unrelated parties. Nonetheless, examples of how the mischaracterization of equity as debt can facilitate tax arbitrage are readily available. One clear example can be found in the case of foreign-parented corporations that create debt to use interest deductions to shift income out of the U.S. tax base (so-called ''interest stripping''). These corporations are referred to in this discussion as foreign controlled domestic corporations (or FCDCs) because they are owned/controlled by non-U.S. companies and they operate in the United States. When these companies pay interest to affiliated companies outside the United States, the payments reduce taxes on income generated in the United States. This is an advantage to the group as a whole if it lowers the total amount of tax paid worldwide, which will happen to the extent that the U.S. tax rate exceeds the foreign tax rate that applies to the interest income. In a purely domestic context (a U.S. owned domestic corporation lending to another affiliated U.S. owned domestic corporation), such arbitrage possibilities also exist, for example, if the borrower has net positive income but the lender has a net operating loss.

One common strategy for creating intercompany debt between related entities is distributing debt instruments. In a prototypical transaction of this type, a U.S. business distributes to its foreign parent a note. The U.S. subsidiary receives nothing in exchange for the note (in particular, it receives no cash from the parent). The parent can then keep the note, or transfer it to an affiliate in a low tax jurisdiction. The U.S. subsidiary then deducts interest on the note, which reduces U.S. income tax liability.

Such a transaction has little, if any, real economic or financial consequence aside from the tax benefit. There are no loan proceeds for the U.S. subsidiary to invest, so there is no new U.S. income generated that could offset the tax deduction for interest paid to the foreign parent. In addition, the companies can set a high interest rate on the loan (as long as they can defend the rate under tax rules as an arm's length rate; the more leveraged the firm, the higher the rate that can be justified), in order to maximize the amount of income that is stripped out of the U.S. tax system. Because the income and deduction offset each other on the multinational company's financial statements, there are no practical impediments to charging a high rate (apart from tax audit risk related to the appropriateness of the interest deduction). Importantly, the note does not lead to an increase in investment in the United States.

Other transactions can produce a similar tax result. For instance, the parent company could lend a sum to the subsidiary, but have the subsidiary return the amount borrowed to the parent through another transaction, such as a dividend of the sum lent or a purchase of the parent's own stock. When the borrowing and the related transaction to return funds to the lender are considered in their totality, this transaction has the same practical tax and economic effect as distributing a note.

The ability of related parties to create intercompany debt generates undesirable tax incentives in certain contexts. For example, the ability of a foreign parent corporation to reduce U.S. tax liability by causing a U.S. business to distribute notes to the foreign parent gives an advantage to foreign-owned U.S. businesses over U.S.-owned multinational businesses. U.S. multinational corporations (MNCs) generally cannot use related-party debt to strip earnings out of the United States, because interest paid from the U.S. parent and U.S. subsidiaries to their foreign subsidiaries is taxed when received under the subpart F rules, the U.S. controlled foreign corporation (CFC) regime that taxes currently passive and other mobile income earned outside the United States. (Interest paid from one U.S. subsidiary to another in a consolidated group would do nothing to reduce federal income taxes, because the recipient's tax inclusion would offset the payer's tax deduction in the same federal income tax return.)

Moreover, the advantage FCDCs gain over U.S. MNCs from mischaracterizing equity as debt is economically significant, because existing limits on tax deductions from interest stripping, which generally impact FCDCs, are ineffective in limiting tax arbitrage opportunities. Under current law, the two potential limits on the amount of FCDC debt are a statutory limit on related-party interest deductions (under section 163(j) of the Code) and a general limit based on case law distinguishing debt from equity. The statutory limit (section 163(j)) restricts deductions for interest paid to related parties or guaranteed by related parties to the extent that net interest deductions (interest paid less interest received) exceed 50 percent of adjusted taxable income (which is an expanded measure of income: Income measured without regard to deductions such as net interest, depreciation, amortization, depletion, net operating losses). This deduction limit applies whenever the firm's debt-equity ratio exceeds 1.5:1. Data from IRS Form 8926 ''Disqualified Corporate Interest Expense Disallowed Under Section 163(j) and Related Information'' shows that 50 percent of adjusted taxable income is roughly 100 percent of taxable income before net interest, which means that firms can on average strip all of their income out of the United States using interest deductions before the limit is reached. Case law, moreover, supports a wide variety of debt-equity ratios as acceptable for purposes of supporting debt characterization. Even when debt-

equity ratios are considered in the case law, they are considered on a facts-and-circumstances basis and as one of many factors used to distinguish debt from equity by the courts. Finally, as discussed previously, because intercompany debt does not affect the multinational firm's external capital structure, the amount of intercompany debt and the interest rate applied are not subject to the constraints that the market would impose on third-party loans. Because these limitations are not binding, the tax advantages from mischaracterizing equity as debt are large and unchecked.

While interest stripping has been a longstanding problem for the U.S. tax system, the associated economic and revenue costs appear to have increased over the past several years. For example, data gathered by Bloomberg (*http://www.bloomberg.com/graphics/infographics/tax-runaways-tracking-inversions.html*) shows the pace of corporate inversions, which are reorganizations whereby U.S. MNCs become FCDCs, has increased over the past several years. One of the principal tax advantages obtained in an inversion is the ability to use interest deductions to reduce U.S. taxes by stripping income out of the United States. While inversions are a particularly visible example of how related-party debt can be used for tax avoidance purposes, other FCDCs have similar incentives and opportunities to use related-party debt to engage in interest stripping.

The evidence suggests that FCDCs engage in substantial interest stripping. The best evidence for interest stripping by FCDCs is presented in Jim Seida and William Wempe, ''Effective Tax Rate Changes and Earnings Stripping Following Corporate Inversion,'' *National Tax Journal,* December 2004. In this paper, the authors found that the worldwide effective tax rates of inverted companies fell drastically after the inversion and that the reduction in tax was due to interest stripping. For a subsample of firms where additional information was available, the authors concluded that the mechanism for interest stripping was intercompany debt. In particular, Seida and Wempe estimate that the inverted companies selected in their subsample for detailed analysis increased U.S. interest deductions by about $1 billion per year on average in 2002 and 2003, or about $350 million in tax savings at 35 percent. Seida and Wempe did not report tax savings from their broader group of companies (of which there were 12), only reductions in tax rates.

More recently, Zachary Mider, '' 'Unpatriotic Tax Loophole' Targeted by Obama to Cost U.S. $2 billion in 2015,'' *Bloomberg BNA Daily Tax Report,* December 2, 2014, reports a Bloomberg update of Seida and Wempe's broader analysis, which expands the number of inverted companies from 12 to 15 and finds tax savings of between $2.8 billion and $5.7 billion in 2015, depending on whether cash taxes paid or accounting tax expense is used.

These analyses looked at only a small subset of the companies that have inverted. There have been at least 60 inversions by public corporations since 1982. In addition there have been many takeovers of U.S. companies by previously-inverted companies, which are equivalent in result. From companies associated with inversions, it is therefore likely that the U.S. Treasury loses tens of billions of dollars per year in corporate tax revenue due to interest stripping.

Additional revenue losses come from FCDCs that have operated in the United States for many years or were not otherwise involved in transactions classified as inversions. Studies of interest stripping by FCDCs more generally have not been as conclusive as the studies of inversions. In part, this is because the level of detail in financial reports that is available for FCDCs generally is lower than for inverted companies. Nonetheless, it is likely that, given the advantage FCDCs have over U.S. MNCs in their ability to strip earnings using interest deductions, considerable additional interest stripping is attributable to FCDCs not associated with inversions. As one indication of this possibility, the most recent (2012) available data from corporate tax Form 1120 shows that FCDCs have a nearly 50 percent higher ratio of net interest deductions relative to earnings before net interest and taxes (EBIT) than do U.S. MNCs.

While most of the concern about interest stripping is focused on interest payments made to parties outside the United States, similar transactions sometimes occur between U.S. companies. The scope for a tax advantage from such intercompany lending is limited because, in many cases, one company's deduction of an interest payment would be offset by the other company's inclusion of interest income. However, when the companies do not file a consolidated tax return, but nonetheless are members of an affiliated group, there can be tax benefits to intercompany lending. For example, if an affiliated group includes two U.S. corporations that do not file a consolidated return, and one corporation has $100 of taxable income and the other has $100 of net operating losses carried over from prior years, the corporation with taxable income pays federal income tax and the one with losses does not, nor does it get a tax refund. Collectively, the $100 of income is taxed. However, the overall federal income tax liability of the affiliated group can be reduced using an intercompany loan that results in a deductible interest payment of $100 by the entity with taxable income to the affiliate with a $100 net operating loss. As a result, both corporate entities will have zero taxable income for the year.

B. Affected Population

This analysis begins by describing some basic facts about the size of the U.S. corporate business sector. These tax facts help to frame the discussion and suggest the magnitude of the section 385 regulations' estimated effects. This analysis uses an expansive definition of the estimated affected population in order to minimize the risk that the analysis will not capture the effects on collateral groups.

1. Application to C Corporations

The regulations are intended to apply primarily to large U.S. corporations taxable under subchapter C of chapter 1 of subtitle A of the Code (''C corporations'') that engage in substantial debt transactions, or purported debt transactions, between highly-related businesses. C corporations are businesses that are subject to the separate U.S. corporate income tax. In 2012, approximately 1.6 million C corporation tax returns were filed in the United States (tax filings for consolidated groups are counted as one return). The regulations specifically exempt other corporations which, while having the corporate form of organization, generally do not pay the separate corporate income tax. They are a form of ''pass-through'' organization, so called because the income generally is passed-through the business (without tax) to the businesses' owners, who pay tax on the income. These other corporations are much more numerous than are C corporations: They number roughly 4.2 million corporations and consist mainly of ''small business corporations'' taxable under subchapter S of chapter 1 of subtitle A of the Code (''S corporations''), regulated investment companies (RICs, commonly known as mutual funds), and real estate investment trusts (REITs). Because the income of pass-through businesses is aggregated on their owners' returns, there is little tax incentive to mischaracterize equity as debt for purposes of shifting income between

pass-through entities and their owners—deductions for interest paid would generally be offset by inclusions for interest received. Moreover, these pass-through entities typically are not members of large multinational or domestic affiliated groups, and so typically are not heavily engaged in the types of intra-group lending transactions with highly-related C corporations addressed by the regulations.

In 2012, C corporations reported $63 trillion (74 percent of the total reported by all corporations) of total assets, $738 billion (91 percent of the total) of interest deductions, $9.7 trillion (75 percent of the total) of total income, and $1 trillion (59 percent of the total) of net income, according to Treasury tabulations of tax return data. Given that only 27 percent of all corporate filings are for C corporations, these figures suggest that C corporations are larger than average for all corporations and account for a disproportionate fraction of business activity, relative to their number compared to all corporations. In 2012, C corporations paid $265 billion in income taxes after credits. Most C corporation activity is concentrated in a small fraction of very large firms. For instance, only about 1 percent of C corporation returns have assets in excess of $100 million and only about 0.6 percent have total income (a proxy for revenue) in excess of $50 million. However, returns of firms of this size account for about 95 percent of total interest deductions and 85 percent of total income.

The section 385 regulations do not apply to all C corporations. The concerns addressed by the regulations are not present in certain categories of related-party corporate transactions, for example among related corporations (whether ultimately U.S-parented or foreign-parented) that file a consolidated U.S. income tax return. In addition, the Treasury Department and the IRS have determined that, with respect to certain smaller corporations, the benefits of applying the rules are outweighed by the compliance cost of applying the rules to such entities. Hence, the regulations narrow the number of firms affected substantially. As described in this description of the affected population, of 1.6 million C corporations, the Treasury Department estimates that only about 6,300 large C corporations will potentially be affected by the documentation requirements of the regulations. This is because only about 6,300 C corporations are part of expanded groups (which are defined by the regulations as section 1504(a) ''affiliated groups,'' but also include foreign corporations, tax-exempt corporations, and indirectly held corporations) that have sufficient assets (more than $100 million), revenue (more than $50 million), or are publicly traded. An even smaller number of corporations, about 1,200, appear to report transactions consistent with those that are potentially subject to the general recharacterization rules of the regulation (§ 1.385–3), although limited data exists on the number of corporations that are covered by the regulations and engaged in transactions that are economically similar to the general rule transactions. Treasury estimates that even though these 1,200 corporations comprise less than 0.1 percent of C corporations, they report approximately 11 percent of corporate interest deductions and 6 percent of corporate net income on tax returns.

2. Documentation of Intercompany Loans and Compliance

While there is variation across businesses, longer-term intercompany debt would typically be documented, in some form of agreement containing terms and rights, by corporations following good business practices. However, some information required by the regulations, such as a debt capacity analysis, may not typically be prepared in some cases. The regulations do not require a specific type of credit analysis or documentation be prepared in order to establish a debtor's creditworthiness and ability to repay, but merely impose a standard closer to commercial practice. To the extent that information supporting such analysis is already prepared in accordance with a company's normal business practice, complying with the regulations would have a relatively low compliance cost. However, where a business has not typically prepared and maintained written debt instruments, term sheets, cash flow, or debt capacity analyses for intercompany debt, compliance costs related to the regulations will be higher. While the level of documentation required is clearly evident in third-party lending, there is little available information on the extent to which related parties document their intercompany loans. Anecdotal evidence and comments received indicate that businesses vary in the extent to which related-party indebtedness is documented. Nevertheless, the Treasury Department does not have detailed and quantitative assessment of current documentation practices.

C. Description of the Regulations

1. In General

The section 385 regulations have multiple parts. In general, the regulations describe factors to be used in assessing the nature of interests issued between highly-related corporations, how such factors may be demonstrated, and when the presence of certain factors will be dispositive. As proposed, the first part (proposed § 1.385–1) allowed the IRS to bifurcate a single financial instrument between related parties into components of debt and equity, where appropriate. The final and temporary regulations, however, do not include the bifurcation rule as the Treasury Department and the IRS are continuing to study the potential issues raised by such a rule. Thus, the revenue and compliance-cost effects associated with the bifurcation rule of the proposed regulations are now excluded from this analysis.

The second part of the regulations, § 1.385–2, prescribes the nature of the documentation necessary to substantiate the tax treatment of related-party instruments as indebtedness, including documentation of factors analogous to those found in third-party loans. This generally means that taxpayers must be able to provide such things as: Evidence of an unconditional and binding obligation to make interest and principal payments on certain fixed dates; that the holder of the loan has the rights of a creditor, including superior rights to shareholders in the case of dissolution; a reasonable expectation of the borrower's ability to repay the loan; and evidence of conduct consistent with a debtor-creditor relationship. These documentation rules would apply to relevant intercompany debt issued by U.S. borrowers beginning in 2018 and would require that the taxpayer's documentation for a given tax year be prepared by the time the borrower's federal income tax return is filed.

The third part of the regulations, §§ 1.385–3 and 1.385–3T, provides rules that can recharacterize purported debt of U.S. issuers as equity if the interest is among highly-related parties and does not finance new investment. These rules are intended to address transactions that create significant U.S. federal tax benefits while lacking meaningful legal or economic significance. Subject to a variety of exceptions for more ordinary course transactions, the rules recharacterize a note that is distributed from a U.S. issuer to a parent corporation, or other highly-related entity, as equity. The rules also apply to the use of notes to fund acquisitions of related-party stock and internal asset

reorganizations, as well as multi-step transactions that have an economically similar result. Any intra-group debt recharacterized as equity by the regulations eliminates the ability of the purported borrower to deduct interest from its taxable income.

The fourth part of the regulations, § 1.385–4T, includes special rules for applying § 1.385–3 to consolidated groups, consistent with the general purpose of § 1.385–3. References in the following discussion to ''§ 1.385–3'' include §§ 1.385–3T and 1.385–4T. Section 1.385–3 applies only to debt issued after April 4, 2016, the date the proposed regulations were published, and so grandfather intragroup debt issued before that date.

2. Limitations of Final and Temporary Regulations and Significant Modifications

Taking into consideration the comments received on the proposed regulations, the Treasury Department and the IRS are modifying the regulations to address certain unintended impacts of the proposal. The final and temporary regulations also better target the entities and activities that lead to inappropriate interest deductions by limiting the type of businesses affected. In doing so, the final and temporary regulations significantly reduce compliance and administrative burden, while still placing effective limits on the transactions most responsible for inappropriately reducing U.S. tax revenue.

Because tax-motived incentives to mischaracterize equity as debt depend on a taxpayer's situation, in certain circumstances the likelihood of mischaracterization or the consequences thereof are small. In these circumstances, exceptions to the general rules may reduce the compliance or administrative burden of the rules, increase the compliance benefit relative to associated costs, or avoid unintended costs. To this end, the final and temporary regulations limit the type and size of businesses affected and the types of transactions and activities to which they apply. In particular, § 1.385–2 only applies to related groups of corporations where the stock of at least one member is publicly traded or the group's financial results report assets exceeding $100 million or annual revenue exceeding $50 million. Because there is no general definition of a small business in tax law, these asset and revenue limits are designed to exceed the maximum receipts threshold used by the Small Business Administration in defining small businesses (U.S. Small Business Administration, *Table of Small Business Size Standards, 2016*). In addition, these thresholds exclude about 99 percent of C corporation taxpayers while retaining 85 percent of economic activity as measured by total income. Approximately 1.5 million out of 1.6 million C corporation tax filers are single entities and therefore have no affiliates with which to engage in tax arbitrage. The intent is to limit the regulations to large businesses with highly-related affiliates, which are responsible for most corporate activity.

Furthermore, in response to public comments and analysis of the data related to the proposed regulations, the rules of §§ 1.385–2 and 1.385–3 have been significantly modified. In developing these modifications, the Treasury Department and the IRS considered a number of alternative approaches suggested by comments, as discussed previously in this preamble. The intended cumulative effect of these modifications is to focus the application of the regulations on large, complex corporate groups where the most opportunity for non-commercial, tax-motivated transactions of the type targeted by the regulations exists, while reducing, or eliminating, the burdens on other taxpayers. For example, large FCDCs (assets over $100 million and total income over $50 million) make up 3 percent of FCDCs but report 90 percent of FCDC interest deductions and 93 percent of FCDC total income. Similarly, the modifications are intended to exempt most ordinary course transactions from the application of the regulations. The most significant modifications include the following:

- S corporations, RICs, and REITs that are not controlled by corporate members of an expanded group are excluded from all aspects of the final and temporary regulations. *See* Part III.B.2.b of the Summary of Comments and Explanation of Revisions. The Treasury Department and the IRS have determined that an S corporation, RIC, or REIT that would otherwise be the parent of an expanded group is generally analogous to a non-controlled partnership. Under both the proposed and the final and temporary regulations, a non-controlled partnership that would, if it were a corporation, be the parent of an expanded group is excluded from the expanded group. S corporations, RICs, and REITs have similar flow-through characteristics in that business income from these types of aggregate entities generally flows to and is aggregated on the business owners' returns. Moreover, S corporations and non-controlled RICs and REITs are generally not part of multinational groups and are unlikely to engage in the types of transactions targeted by the regulations because these types of entities have fewer incentives to mischaracterize equity as debt under the U.S. tax system, so their exclusion generally does not affect tax compliance benefits and eliminates compliance costs.
- The regulations reserve on the application to non-U.S. issuers (that is, foreign corporations that issue debt). *See* Part III.A.1 of the Summary of Comments and Explanation of Revisions. Non-U.S. issuers have limited incentives to mischaracterize equity as debt under the U.S. tax system because non-U.S. debt does not generally affect U.S. corporate liability directly either because (i) the issuer is entirely foreign owned (and thus generally outside of the U.S. tax system if it lacks a U.S. presence) or, (ii) in the case of an issuer that is a CFC, its income is eligible for deferral. Applying the regulations to non-U.S. issuers would impact the operations of large, complex MNCs which may involve foreign-to-foreign lending or non-U.S. issuance, which would be burdensome to document and monitor for compliance, but there would be minimal revenue gains because the use of related party debt in these contexts generally does not result in U.S. tax benefits. In general, there is negligible tax revenue lost by this exclusion, while compliance costs are significantly reduced. Nevertheless, in certain cases there may be U.S. tax effects from mischaracterizing interests of non-U.S. issuers, although these effects are less direct and of a different nature. The regulations reserve on the application to foreign issuers as the Treasury Department and the IRS continue to consider how the burdens of complying in this context compare to the advantages of limiting potential abuses and how a better balance might be achieved.
- The final and temporary regulations generally exclude from the rules of § 1.385–3 regulated financial services entities that are subject to certain levels of federal regulation and supervision, including insurance companies (other than captive insurers). *See* Parts IV.B.2.a and b, and V.G.1 and 2 of the Summary of Comments and Explanation of Revisions. Regulated financial service entities are subject to capital or leverage requirements which constrain the ability of such institutions to engage in the transactions that are addressed by the regulations. For example, such entities could be precluded from or required to issue related-party debt in certain cases. Such an exception is also generally consistent with international

accepted approaches on addressing interest stripping, which acknowledge the special circumstances presented by banks and insurance companies. *See* OECD BEPS Action Item 4 (*Limiting Base Erosion Involving Interest Deductions and Other Financial Payments*), ch. 10. Furthermore, compliance costs of including these entities in the regulations would likely have been significant compared to potential tax revenue gains from their inclusion. The documentation rules under § 1.385–2 exempt from some of the documentation requirements debt instruments issued by regulated financial service entities to the extent the debt instruments contain terms required by a regulator to satisfy regulatory requirements or require a regulator's approval before principal or interest is paid.

- The regulations under § 1.385–3 provide various exceptions and exclusions that are intended to exempt certain transactions and certain common commercial lending practices from being subject to the rules in cases where compliance burdens or efficiency costs are likely to be elevated and potential improvements in tax compliance modest.
  - Section 1.385–3 excludes cash pool borrowing and other short-term debt, by excluding loans that are short term in form and substance. *See* Part V.D.8 of the Summary of Comments and Explanation of Revisions. The exception for short-term debt allows companies to efficiently transfer cash around an affiliated group in order to meet the day-to-day global cash needs of the business without resorting to third-party borrowing in order to avoid § 1.385–3. These transactions tend to have low interest rates such that for a fixed amount of debt, the interest expense is limited. On the other hand, the costs of tracking these loans, which could occur with high frequency, for purposes of determining whether § 1.385–3 applies may be significant. Therefore, tax compliance gains from their inclusion are likely to be small relative to the costs of compliance.
  - When applying the § 1.385–3 rules, an expanded earnings and profits (E&P) exception takes into account a corporation's E&P accumulated after April 4, 2016, as opposed to limiting distributions to the amount of E&P generated each year. *See* Part V.E.3.a of the Summary of Comments and Explanation of Revisions. The change ensures that companies are not incentivized to make distributions that use up their current E&P before it becomes unusable in the next taxable year. However, the accumulated E&P available to offset distributions or acquisitions resets to zero when there is a change in control of the issuer, due, for example, to the issuer being acquired by an unrelated party. The accumulated E&P available to offset distributions or acquisitions also resets to zero when there is a change of expanded group parent (including in an inversion). These limitations avoid creating incentives for companies (including inverted companies) to acquire or undertake transactions with companies rich in accumulated earnings to circumvent the regulations by relying on previously accumulated E&P. Therefore, this exception is of limited benefit to inverted corporations seeking to acquire new U.S. targets or to U.S. corporations themselves that undertake an inversion that results in a new foreign parent, which could otherwise represent a major source of tax revenue loss.
  - The final and temporary regulations allow a taxpayer to reduce the amount of its distributions and acquisitions that otherwise could cause an equal amount of the taxpayer's debt to be recharacterized as equity by the amount of the contributions to the taxpayer's capital. This has the effect of treating distributions and acquisitions as funded by new equity contributions before related-party borrowings and ensuring that companies that have not seen a reduction in net equity are not subject to the rules. *See* Part V.E.3.b of the Summary of Comments and Explanation of Revisions.
  - The final and temporary regulations expand access to the $50 million indebtedness exception by removing the ''cliff effect'' of the threshold exception under the proposed regulations, so that all taxpayers can exclude the first $50 million of indebtedness that otherwise would be recharacterized. *See* Part V.E.4 of the Summary of Comments and Explanation of Revisions. Eliminating the $50 million cliff has little tax revenue effect but eliminates a potential economic distortion to the financing choices of corporations near the threshold.
- The regulations reduce and relax the documentation rules in various ways that reduce compliance burdens without compromising tax compliance.
  - The documentation requirements in § 1.385–2 do not apply until January 1, 2018. Delaying the documentation requirements marginally lowers the start-up costs related to complying with the regulations. The effect on revenue is expected to be negligible and the compliance costs slightly lower.
  - The compliance period for documenting a loan has been extended from 30 days after issuance (or other relevant date) to instead be the date when the borrower's tax return is filed. Providing additional time for the recurring documentation requirements may lower the compliance burden while still providing documentation necessary for tax administration.
  - The documentation rules have been eased so that a failure with respect to documentation of a particular instrument does not automatically result in recharacterization as equity where a group is otherwise substantially compliant with the rules. *See* Parts IV.A.2 and 3 of the Summary of Comments and Explanation of Revisions. This relief is expected to have negligible tax revenue cost while potentially lowering compliance costs for companies and increasing costs for the IRS.
- The final and temporary regulations do not include a general rule that bifurcates (for tax purposes) a single financial instrument into debt and equity components. *See* Part III.D of the Summary of Comments and Explanation of Revisions. The general bifurcation rule in the proposed regulations was broadly applicable and not subject to the same threshold rules as most of the regulations' other provisions. The proposed rule is not being finalized due to concerns about a lack of specificity in application and corresponding unintended collateral consequences. For example, one concern was that this provision could have unintended and disqualifying effects on an entity's tax status, such as for an S Corporation or a REIT. The regulatory revenue effect was reduced by approximately 10 percent as a result of this change.

The exceptions and exclusions summarized in this Regulatory Impact Assessment limit the compliance burden imposed by the final and temporary regulations at limited revenue cost. Hence, the final and temporary regulations narrowly target the transactions of greatest concern while still being administrable.

D. Assessment of the Regulations' Effects

The documentation requirements for purported debt (§ 1.385–2) are likely to affect the largest number of corporations. As mentioned previously, in 2012 there were roughly 1.6 million U.S. C corporation tax returns filed (tax filings for consolidated groups are counted as one return). The Treasury Department and the IRS estimate that only 6,300 (0.4 percent) of these taxpayers would be affected by the documentation rules, mainly because 95 percent of taxpayers do not have affiliated corporations, and the

regulations only affect transactions between affiliates.

While only a small fraction of corporate taxpayers will be affected by § 1.385–2, these 6,300 taxpayers tend to be the largest, with 65 percent of total interest deductions, 53 percent of total income, 81 percent of total income subject to tax, and 75 percent of total income tax after credits. Of these corporations, approximately one-third are FCDCs that report about 20 percent of the affected total income and 20 percent of the affected interest deductions.

A subset of these corporate taxpayers, including both domestic and foreign-controlled domestic corporations, are likely to be affected by § 1.385–3. While it is difficult to measure the exact number of firms that are likely to be affected due to tax data limitations, Treasury estimates that of the 6,300 firms affected by § 1.385–2, about 1,200 will be affected by § 1.385–3. The number of firms affected is smaller because only transactions that exceed $50 million plus relevant E&P and capital contributions are affected, and because other exemptions in the final and temporary regulations limit the number of firms affected. The largest revenue effects are anticipated to arise from foreign-controlled domestic corporations.

The regulations are intended to address scenarios that present the most potential for the creation of significant U.S. federal tax benefits without having meaningful non-tax significance because the obligations are between commonly-owned corporations and because the obligations do not finance new investment in the issuer. These situations most affect revenues due to tax arbitrage. That is, the regulations are tailored to reach only transactions between related parties (where the risk of such tax arbitrage is greatest), tax situations and transactions where incentives for mischaracterization of equity as debt are strongest, and only then when there is no new investment in the borrowing entity. In developing the regulations, care was taken to balance the goals of addressing the areas where mischaracterization of equity was likely to result in tax avoidance and to introduce economic distortions against the higher compliance costs placed on business.

The likely effects of the rules in terms of their economic benefits and costs are discussed in the subsequent sections. The Treasury Department and the IRS used the best available studies, models, and data to estimate the effects of this rule. However, with regard to certain issues, relatively little relevant data and few rigorous studies are available.

1. Monetized Estimates of the Benefits and Costs

The primary benefit of the regulations is an improvement in tax compliance, which is expected to increase tax revenue. In addition, there are likely to be modest efficiency benefits because differences in the tax treatment of competing corporations are reduced. The primary cost of the regulations is the change in compliance costs of businesses, particularly from the § 1.385–2 documentation rules.

a. Revenue Effects Associated With Improved Compliance

Because the regulations cover only new debt issuances occurring after April 4, 2016, and because the primary effect of the regulations is to limit the extent to which the transactions subject to the regulations can be used to achieve interest stripping, the revenue estimate is calculated primarily as a percentage reduction in the estimated growth in interest stripping relative to the baseline of current law absent these regulations. While the regulations are also likely to reduce tax avoidance by affiliated domestic corporations that do not file a consolidated return, those revenue effects are likely to be smaller and data limitations preclude an exact estimate of their magnitude. The estimated growth in interest stripping is the sum of estimates of the growth of interest stripping by existing FCDCs plus interest stripping by new FCDCs. Growth in interest stripping by existing FCDCs was calculated from the estimate of interest stripping by inverted corporations based on the Seida and Wempe and Bloomberg studies, inflated to 2016 dollars, and doubled to incorporate the amount of interest stripping by all other FCDCs, which are more numerous but where interest stripping is likely to be less intensive. The level of interest stripping is assumed to grow at a 5 percent rate annually.

Interest stripping by new FCDCs was derived from the average interest stripping by firms in the Seida and Wempe (2004) subsample, discussed above, inflated to 2016 dollars. Based on inversion rates for the past 20 years, growth by three inversions of this average size per year was assumed. This assumed growth was doubled to account for interest stripping by new FCDCs not created by inversion.

The assumed percentage reductions in interest stripping by existing FCDCs and by the creation of new FCDCs were in the mid-single digits, with the latter somewhat smaller than the former because interest stripping is not the sole reason for FCDC creation. The limitations and exclusions detailed above restrict the affected amounts of debt to a small fraction of total debt outstanding. The most important of these limitations and exclusions are the exception for short-term debt, the application of the regulations solely to related-party debt, the exclusion for most distributions separated by at least 36 months from debt issuance, and the E&P exception. Further, the grandfathering of existing interest stripping arrangements suggests that very little additional tax revenue will be paid in the short term, but that the growth rate of revenue will be high.

While the regulations also apply to affiliated domestic corporations that do not file a consolidated return, there is no good information on the extent of interest stripping by such groups. The tax benefits of such interest stripping are likely of a smaller magnitude, because in the purely domestic context, both the interest deductions and the interest income are subject to the same U.S. tax system and hence interest stripping to reduce total U.S. tax liability in this context relies on asymmetric tax positions across the affiliated groups. As a result, the revenue estimate excludes tax revenue from purely domestic groups.

Both §§ 1.385–2 and 1.385–3 contribute to the revenue gain.

The § 1.385–2 rules requiring documentation of instruments to support debt characterization are consistent with best documentation practices under case law, but many taxpayers do not currently follow best documentation practices. Specifically, the existence of a written loan agreement and an evaluation of the creditworthiness of a borrower are factors used by courts in deciding whether an intercompany advance should be treated as debt or equity; however, under current law taxpayers are able to sustain debt treatment even in the absence of documentation. Elevating the importance of documentation will both aid in IRS audits (by requiring a taxpayer to show contemporaneous relevant documentation as to the parties' intent and their analysis of the borrower's ability to pay) and prevent taxpayers from characterizing intercompany debt with the aid of hindsight. Both effects will improve compliance and thus raise tax revenue.

The revenue gain is also due to the § 1.385–3 rules, which should limit the ability to mischaracterize equity as debt to facilitate interest stripping behaviors

to the extent not covered by the exclusions and limitations previously discussed. For example, under the regulations those taxpayers choosing to interest strip by borrowing from unrelated parties will have an incentive to minimize interest rates relative to what they pay to highly-related parties. Alternatively, taxpayers may choose to separate borrowings from distributions by more than 3 years, but there will be incentives to earn as much as possible on the funds in the interim, and such earnings offset interest deductions.

Other significant limits on revenue gain from these rules include the availability of other means of earnings stripping, such as royalties and management fees, that can substitute for interest.

Preliminary estimates of the regulatory revenue effect are $7.4 billion over 10 years (or $600 million per year on an annualized 3 percent discounted basis). There is not a single answer to the question of how much revenue is generated by each piece of the regulations. This is because interactions between the pieces make the allocated subtotals depend on the order in which the allocation is made. If one assumes that § 1.385–2 is ''stacked first,'' then § 1.385–2 accounts for approximately $1.5 billion of the total, and § 1.385–3 accounts for the rest.

Annual discounted total revenue effects ($ millions in 2016 dollars) are shown below.

Annualized monetized transfer	Fiscal years 2017 to 2026 (3% discount rate, 2016)	Fiscal years 2017 to 2026 (7% discount rate, 2016)
Estimated change in annual tax revenue—from firms to the Federal Government	$600	$461

The regulations as originally proposed would have raised $10.1 billion over 10 years (or $843 million on an annualized 3 percent discounted basis). Since then, modifications of the rules have lowered the revenue estimate by approximately 25 percent. The modifications that lowered the revenue estimate include: The short-term debt exception and the exclusion of the § 1.385–1 rules allowing the bifurcation of instruments into debt and equity components from this analysis.

b. Compliance Burden

Most of the compliance burden will stem from the rules requiring documentation of intra-group loans. Our analysis thus focuses on the compliance effects of the § 1.385–2 documentation requirements.

The Treasury Department and the IRS use the IRS business taxpayer burden model to estimate the additional compliance burden imposed on businesses by the regulations. These compliance costs are borne by businesses and are the primary costs imposed by this rule.

The IRS business taxpayer burden model used to calculate this compliance cost estimate is a micro-simulation model created by the IRS to provide monetized estimates of compliance costs for the business income tax return population. The model is based on an econometric specification developed using linked compliance cost survey data and tax return data. This model accounts for time as well as out-of-pocket costs of businesses and controls for the substitution of time and money by monetizing time and reporting total compliance costs in dollars. Costs are differentiated based on the characteristics and size of the business. For more detailed information on this methodology, see ''Taxpayer Compliance Costs for Corporations and Partnerships: A New Look''; Contos, Guyton, Langetieg, Lerman, Nelson; SOI Tax Stats—2012 IRS–TPC Research Conference. *https://www.irs.gov/pub/irs-soi/12rescontaxpaycompliance.pdf.*

Estimates of the change in compliance costs as a result of the regulations are produced using a process that compares results from a baseline scenario simulation (representing current law and practice) with an alternative scenario simulation (representing the effects of the regulations). The difference between the baseline and alternative simulation serves as the estimated compliance cost effect of the regulations.

The estimates are likely to be somewhat overstated for two practical reasons. First, they do not allow for a decline in compliance costs over time as firms become more accustomed to documenting loans. Second, the analysis assumes that the documentation requirements apply immediately to all existing loans when the § 1.385–2 apply prospectively to loans originated on or after January 1, 2018. While this is intended to provide an accurate estimate of the ongoing costs of documentation in the future, it will take several years for all of a company's intra-group loans to be covered by the regulations. Hence, the actual volume of loans requiring documentation and associated costs will initially be smaller. Thus, the compliance cost for any one of the first several years in which the regulations are in effect will be lower.

Tax data were used to identify the (approximately) 6,300 businesses likely to be affected by § 1.385–2 because they are estimated to have intercompany loans subject to the regulations. About 5,200 of these businesses have foreign affiliates, while the remaining firms have intercompany loans between U.S. affiliates.

Compliance costs are unlikely to be the same on a per firm basis, since some firms are likely to engage in more transactions requiring documentation, and, conditional on current practice, some firms are going to have greater compliance costs per transaction. The tax data are used to estimate for each firm the number of transactions likely to require documentation (based on interest payments) and to place firms in categories that reflect differences in compliance cost per dollar of transaction.

Estimates using the IRS model show a compliance cost increase of approximately $56 million or an average of $8,900 per firm in 2016 dollars. In 2012, net income for these taxpayers was about $960 billion, so the documentation requirements would reduce profits for these taxpayers by, on average, roughly 0.006 percent. Of course, the experience of each affected firm will vary.

These estimates are higher than the $13 million estimate for the proposed regulations because of modifications in the regulations and adjustments to the methodology used to estimate the costs. The proposed regulations would have affected more businesses (21,000), but the modifications in response to comments significantly reduced the number affected (to 6,300). In and of itself, this would have significantly lowered the compliance cost. However, the initial estimate projected an average cost per business of $600, while the revised estimate projects an average cost per business of about $8,900. This change in the cost per business resulted in a higher overall compliance cost, all

else being constant. The initial estimate was based on assumptions and modeling approaches, including a lower-than-appropriate wage rate for accountants and attorneys working on the compliance issues, that were subsequently revised in light of comments received. The revised estimate is based on a more complete analysis by the IRS burden model.

The burden estimate is lower than those suggested in some of the comments received on the proposed regulations. In part, this is because some comments assumed that none of the affected businesses have any documentation of affected loans, when other businesses, reported that they already maintain some or all of the information required. In addition, however, our estimate is lower because the final and temporary regulations have been modified in many ways in order to reduce the burden, in response to the comments received. For example, the final rules apply just to U.S. borrowers, while the proposed regulations also applied to borrowing between foreign affiliates. These foreign-to-foreign transactions are now outside the scope of the regulations, so that the numbers of businesses and transactions subject to the rule are reduced. This change reduces the compliance costs compared to those originally proposed.

The $56 million estimate only reflects ongoing compliance costs. It does not reflect the initial startup costs and infrastructure investment. Initial startup costs and infrastructure investment are expected to result in additional costs in the first years that the section 385 regulations are in effect. IRS-supported research by Forrester in 2013 indicates these one-time start-up expenses are approximately four times the annual costs, or approximately $224 million in 2016 dollars primarily over the initial years when the section 385 regulations go into effect. Most of these start-up costs are in 2017 even though the § 1.385–2 regulations require documentation starting in 2018. The ongoing and start-up costs are reported on an annual average basis in the table on these costs. In addition, the analysis includes a sensitivity analysis in which the compliance costs are estimated for a 90 percent interval around our best estimate. First the distributional characteristics of critical parameters used to produce the estimate are evaluated. Then Monte Carlo simulations are used to vary the parameter values. Finally, alternative high and low estimates are computed based on parameter values at either end of the 90 percent range. These ongoing compliance cost estimates range from $29 million per year on an annualized basis in 2016 dollars to $60 million. Using the same factor of four to estimate one-time start-up expenses, these range from $15 million per year on an annualized basis in 2016 dollars to $27 million. These combined ongoing and start-up costs on an annual average basis for both the high and low estimates appear in the table summarizing these costs. Our sensitivity analysis indicates that even using the high compliance cost estimates, that tax revenues generated by the regulations would be 6 to 7 times as large as these costs.

Annual discounted ongoing and start-up compliance costs ($ millions in 2016 dollars) are shown below.

Compliance costs associated with addressing	Fiscal years 2017 to 2026 (3% discount rate, 2016)	Fiscal years 2017 to 2026 (7% discount rate, 2016)
Central estimate	$70	$59
High estimate	87	73
Low estimate	52	44

2. Non-Monetized Effects

a. Increased Tax Compliance System Wide

The U.S. tax system relies for its effectiveness on voluntary tax compliance. Voluntary compliance is eroded when there is a perception that some taxpayers are able to avoid paying their fair share of the tax burden. Tax strategies of large multinational corporations, such as interest stripping, have been widely reported in the press as inappropriate ways for these companies to avoid paying their fair share of taxes. By reducing the ability of such firms to strip earnings out of the U.S. through transactions with no meaningful economic or non-tax effect, and so raising their tax payments, the regulations are likely to increase the overall perceived legitimacy of the U.S. tax system, and hence promote voluntary compliance. This effect is not quantified.

b. Efficiency and Growth Effects

By changing the treatment of certain transactions and activities, the regulations potentially affect economic efficiency and growth (output). While these changes may have multiple and, to some extent, offsetting effects, on net, they are likely to improve economic efficiency. For example, the regulations reduce the tax advantage foreign owners have over domestic owners of U.S. assets, and consequently reduce the propensity for foreign purchases and ownership of U.S. assets that are motivated by tax considerations rather than economic substance. While these effects are likely to be small, they are likely to enhance efficiency and growth. By reducing tax-motivated acquisitions or ownership structures, the regulations may encourage assets to be owned or managed by those most capable of putting the assets to their highest-valued use. In addition, the regulations reduce the tax benefit of inversions, which can have economic costs to the United States even if the actual management of a firm is not changed when the firm's ownership changes. And, it may help to put purely domestic U.S. firms on more even tax footing with their foreign-owned competitors operating in the United States. On the other hand, the regulations may slightly increase the effective tax rate and compliance costs on U.S. inbound investment. While the magnitude of this increase is small because of those provisions that exempt transactions financing new investment, to the extent that it reduces new capital investment in the U.S. its effects would be efficiency and growth reducing. On balance, the likely effect of the regulations is to improve the efficiency of the corporate tax system.

The extent to which the regulations' changes in tax prices affect real U.S. economic activity depends on their size and on taxpayers' reaction to the changes. At the outset, it is important to realize that the change in tax prices associated with the regulations are likely to be small. The estimated total tax paid by the 1,200 taxpayers affected by the § 1.385–3 rules was $13 billion in 2016 dollars. The annualized 3 percent discounted revenue effect is $600 million per year in 2016 dollars. Even assuming that all of the revenue comes from the § 1.385–3 rules (which overstates the relevant revenue) implies

that the affected taxpayers would pay less than 5 percent (roughly 1 percentage point) in additional tax, which is likely far less than their current tax advantage relative to domestic non-FCDCs corporations. (For example, Seida and Wempe find that the average reduction in effective tax rates of corporations in their inversion sample was 11.57 percentage points.) Furthermore, much evidence points to relatively small behavioral reactions to such tax changes. Many analysts have argued that even major changes in tax policy have no more than modest effects on the economy. For an idea of the range of results, *see* Congressional Research Service Report R42111, *Tax Rates and Economic Growth,* by Jane G. Gravelle and Donald J. Marples, January, 2015; Joint Committee on Taxation Staff, *Macroeconomic Analysis of the ''Tax Reform Act of 2014'',* JCX 22–14, February 26, 2014; Robert Carroll, John Diamond, Craig Johnson, and James Mackie, *A Summary of the Dynamic Analysis of the Tax Reform Options Prepared for the President's Advisory Panel on Federal Tax Reform,* Office of Tax Analysis Paper Prepared for the American Enterprise Institute *Conference on Tax Reform and Dynamic Analysis,* May 25, 2006. It is unlikely, then, that a small tax increase on a small set of companies would have a measurable effect on major economic aggregates.

Although the rules are designed to minimize any detrimental effect on U.S. investment, the regulations do to some extent make the U.S. a less attractive location for foreign investment. The effect is likely to be small, however because the rules exclude financing activities that are clearly associated with new investment in the U.S. For example, interest paid by a FCDC to a related party on new borrowing used to make a new investment in the U.S. would continue to be deductible. This is true, moreover, even if the new debt comes in the form of a ''dividend'' note paid out of E&P generated after the regulation's effective date. Such new debt finances new U.S. investment in the sense that the FCDC retains and invests in the United States cash earned on U.S. profits, rather than sending the cash to its foreign parent as a dividend.

Furthermore, most inbound investment is via acquisition of existing U.S. companies rather than greenfield (new) investment in the U.S., and so changes the ownership of existing assets, without necessarily adding to the stock of capital employed in the U.S. Such acquisitions and cross-border mergers can make the U.S. economy stronger by encouraging foreign investment to flow into the United States and by enabling U.S. companies to invest overseas. But in an efficient market, these transactions should be driven by genuine business strategies and economic benefits, not simply by a desire to avoid U.S. taxes. One effect of the regulations is to reduce tax-motivated incentives for foreign ownership instead of domestic ownership of domestic companies and thus to improve economic efficiency. As Mihir A. Desai and James R. Hines, Jr. write, ''given the central importance of ownership to the nature of multinational firms, there is good reason to be particularly concerned about the potential for economic inefficiency due to distortions to ownership patterns.'' ''Evaluating International Tax Reform,'' *National Tax Journal* 56 No. 3 (September, 2003): 487–502. By reducing the tax advantage to foreign ownership, the regulations may help to promote a more efficient ownership structure, one guided more by economic fundamentals and less by tax benefits.

Recently, apparently tax-motivated acquisitions of U.S. companies by foreign businesses have attracted much attention in the debate over inversions. Much of this debate has focused on the tax cost to the U.S. government, which can be substantial. But there could be other costs as well. For example, headquarters jobs may leave the United States. In addition, formerly U.S. headquartered companies may lose their U.S. focus and identity over time, which could reduce the incentive to keep production and research in the United States. Interest stripping is a primary tax benefit of inversions. By reducing the tax benefit of certain types of interest stripping, the regulations thus are likely to reduce, to some extent, the tax incentive for inversions. However, any reduction in inversion activity is likely to be modest because the tax change is small and leaves in place tax advantages for foreign ownership, *e.g.,* through interest stripping not prohibited by the regulation.

Finally, because FCDCs currently face lower effective tax rates than can be achieved by domestic U.S. firms, even when operating in domestic markets, they currently enjoy a competitive advantage in pricing, marketshare, and profitability. To the extent that this rule reduces this tax advantage, it levels the playing field relative to U.S. corporations, and thereby promotes efficient economic choices—choices motivated by underlying economic fundamentals, rather than by tax differences.

c. Lower Tax Administrative Costs for the IRS

The increased loan documentation required of large corporations will help the IRS to more effectively administer the tax laws by making it easier for the IRS to evaluate whether purported debt transactions are legitimate loans. This will lower the cost of auditing and evaluating the tax returns of companies engaged in these transactions. The lower administrative cost for the IRS offsets to some degree the higher compliance cost placed on corporations. It has not been possible, however, to quantify the cost savings.

II. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. Chapter 6), it is hereby certified that the final and temporary regulations will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

The Commissioner and the courts historically have analyzed whether an interest in a corporation should be treated as stock or indebtedness for federal tax purposes by applying various sets of factors to the facts of a particular case. Section 1.385–1 does not require taxpayers to take any additional actions or to engage in any new procedures or documentation. Because § 1.385–1 contains no such requirements, it does not have an effect on small entities.

To facilitate the federal tax analysis of an interest in a corporation, taxpayers are required under existing law to substantiate their classification of an interest as stock or indebtedness for federal tax purposes. Section 1.385–2 provides minimum standards on documentation needed to substantiate the treatment of certain related-party instruments as indebtedness, and provides rules on the weighting of particular factors in conducting such analysis. Section 1.385–2 will not have an impact on a substantial number of small entities for several reasons. First, the rules do not apply to S corporations or non-controlled pass-through entities. Second, the rules apply only to debt in form issued within expanded groups of corporations. Third, § 1.385–2 only applies to expanded groups if the stock of a member of the expanded group is publicly traded, or financial statements of the expanded group or its members show total assets exceeding $100 million or annual total revenue exceeding $50 million. Because the rules are limited to larger expanded groups, they will not affect a substantial number of small entities.

Section 1.385–3 provides that certain interests in a corporation that are held by a member of the corporation's expanded group and that otherwise would be treated as indebtedness for federal tax purposes are treated as stock. Section 1.385–3T provides that for certain debt instruments issued by a controlled partnership, the holder is deemed to transfer all or a portion of the debt instrument to the partner or partners in the partnership in exchange for stock in the partner or partners. Section 1.385–4T provides rules regarding the application of §§ 1.385–3 and 1.385–3T to members of a consolidated group. Sections 1.385–3 and 1.385–3T include multiple exceptions that limit their application. In particular, the threshold exception provides that the first $50 million of expanded group debt instruments that otherwise would be reclassified as stock or deemed to be transferred to a partner in a controlled partnership under § 1.385–3 or § 1.385–3T will not be reclassified or deemed transferred under § 1.385–3 or § 1.385–3T. Although it is possible that the classification rules in §§ 1.385–3, 1.385–3T, and 1.385–4T could have an effect on small entities, the threshold exception of the first $50 million of debt instruments otherwise subject to recharacterization or deemed transfer under §§ 1.385–3, 1.385–3T, and 1.385–4T makes it unlikely that a substantial number of small entities will be affected by §§ 1.385–3, 1.385–3T, and 1.385–4T.

Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business. Comments were received requesting that the monetary thresholds contained in proposed §§ 1.385–2, 1.385–3, and 1.385–4 be increased in order to mitigate the impact on small businesses. These comments are addressed in Parts IV.B.1.d and V.E.4 of the Summary of Comments and Explanation of Revisions. No comments were received concerning the economic impact on small entities from the Small Business Administration.

III. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is a ''major rule'' as defined by 5 U.S.C. 804(2) and will become applicable more than 60 days after publication (see §§ 1.385–1(g), 1.385–2(i), 1.385–3(j), 1.385–3T(k), 1.385–4T(g), and 1.752–2T(l)(4)).

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), Public Law 104–4 (March 22, 1995), requires that an agency prepare a budgetary impact statement before promulgating a rule that may result in expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. See Part I of this Special Analyses for a discussion of the budgetary impact of this final rule.

Drafting Information

The principal authors of these regulations are Austin M. Diamond-Jones of the Office of Associate Chief Counsel (Corporate) and Joshua G. Rabon of the Office of Associate Chief Counsel (International). 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.

Adoption of 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 entries in numerical order to read as follows:

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

Section 1.385–1 also issued under 26 U.S.C. 385.

Section 1.385–2 also issued under 26 U.S.C. 385, 6001, 6011, and 7701(l).

Section 1.385–3 also issued under 26 U.S.C. 385, 701, 1502, 1504(a)(5)(A), and 7701(l).

Section 1.385–3T also issued under 26 U.S.C. 385, 701, 1504(a)(5)(A), and 7701(l).

Section 1.385–4T also issued under 26 U.S.C. 385 and 1502.

* * * * *

■ **Par. 2.** Section 1.385–1 is added to read as follows:

§ 1.385–1 General provisions.

(a) *Overview of section 385 regulations.* This section and §§ 1.385–2 through 1.385–4T (collectively, the section 385 regulations) provide rules under section 385 to determine the treatment of an interest in a corporation as stock or indebtedness (or as in part stock and in part indebtedness) in particular factual situations. Paragraph (b) of this section provides the general rule for determining the treatment of an interest based on provisions of the Internal Revenue Code and on common law, including the factors prescribed under common law. Paragraphs (c), (d), and (e) of this section provide definitions and rules of general application for purposes of the section 385 regulations. Section 1.385–2 provides additional guidance regarding the application of certain factors in determining the federal tax treatment of an interest in a corporation that is held by a member of the corporation's expanded group. Section 1.385–3 sets forth additional factors that, when present, control the determination of whether an interest in a corporation that is held by a member of the corporation's expanded group is treated (in whole or in part) as stock or indebtedness. Section 1.385–3T(f) provides rules on the treatment of debt instruments issued by certain partnerships. Section 1.385–4T provides rules regarding the application of the factors set forth in § 1.385–3 and the rules in § 1.385–3T to transactions described in those sections as they relate to consolidated groups.

(b) *General rule.* Except as otherwise provided in the Internal Revenue Code and the regulations thereunder, including the section 385 regulations, whether an interest in a corporation is treated for purposes of the Internal Revenue Code as stock or indebtedness (or as in part stock and in part indebtedness) is determined based on common law, including the factors prescribed under such common law.

(c) *Definitions.* The definitions in this paragraph (c) apply for purposes of the section 385 regulations. For additional definitions that apply for purposes of their respective sections, see §§ 1.385–2(d), 1.385–3(g), and 1.385–4T(e).

(1) *Controlled partnership.* The term controlled partnership means, with respect to an expanded group, a partnership with respect to which at least 80 percent of the interests in partnership capital or profits are owned, directly or indirectly, by one or more members of the expanded group. For purposes of identifying a controlled partnership, indirect ownership of a partnership interest is determined by applying the principles of paragraph

(c)(4)(iii) of this section. Such determination is separate from the determination of the status of a corporation as a member of an expanded group. An unincorporated organization described in § 1.761–2 that elects to be excluded from all of subchapter K of chapter 1 of the Internal Revenue Code is not a controlled partnership.

(2) *Covered member.* The term covered member means a member of an expanded group that is—

(i) A domestic corporation; and

(ii) [Reserved]

(3) *Disregarded entity.* The term disregarded entity means a business entity (as defined in § 301.7701–2(a) of this chapter) that is disregarded as an entity separate from its owner for federal income tax purposes under §§ 301.7701–1 through 301.7701–3 of this chapter.

(4) *Expanded group*—(i) *In general.* The term expanded group means one or more chains of corporations (other than corporations described in section 1504(b)(8)) connected through stock ownership with a common parent corporation not described in section 1504(b)(6) or (b)(8) (an expanded group parent), but only if—

(A) The expanded group parent owns directly or indirectly stock meeting the requirements of section 1504(a)(2) (modified by substituting ''or'' for ''and'' in section 1504(a)(2)(A)) in at least one of the other corporations; and

(B) Stock meeting the requirements of section 1504(a)(2) (modified by substituting ''or'' for ''and'' in section 1504(a)(2)(A)) in each of the other corporations (except the expanded group parent) is owned directly or indirectly by one or more of the other corporations.

(ii) *Definition of stock.* For purposes of paragraph (c)(4)(i) of this section, the term stock has the same meaning as ''stock'' in section 1504 (without regard to § 1.1504–4) and all shares of stock within a single class are considered to have the same value. Thus, control premiums and minority and blockage discounts within a single class are not taken into account.

(iii) *Indirect stock ownership.* For purposes of paragraph (c)(4)(i) of this section, indirect stock ownership is determined by applying the constructive ownership rules of section 318(a) with the following modifications:

(A) Section 318(a)(1) and (a)(3) do not apply except as set forth in paragraph (c)(4)(v) of this section;

(B) Section 318(a)(2)(C) applies by substituting ''5 percent'' for ''50 percent;'' and

(C) Section 318(a)(4) only applies to options (as defined in § 1.1504–4(d)) that are reasonably certain to be exercised as described in § 1.1504–4(g).

(iv) *Member of an expanded group or expanded group member.* The expanded group parent and each of the other corporations described in paragraphs (c)(4)(i)(A) and (c)(4)(i)(B) of this section is a member of an expanded group (also referred to as an expanded group member). For purposes of the section 385 regulations, a corporation is a member of an expanded group if it is described in this paragraph (c)(4)(iv) of this section immediately before the relevant time for determining membership (for example, immediately before the issuance of an EGI (as defined in § 1.385–2(d)(3)) or a debt instrument (as defined in § 1.385–3(g)(4)) or immediately before a distribution or acquisition that may be subject to § 1.385–3(b)(2) or (3)).

(v) *Brother-sister groups with non-corporate owners.* [Reserved]

(vi) *Special rule for indirect ownership through options for certain members of consolidated groups.* In the case of an option of which a member of a consolidated group, other than the common parent, is the issuing corporation (as defined in § 1.1504–4(c)(1)), section 318(a)(4) only applies (for purposes of applying paragraph (c)(4)(iii)(C) of this section) to the option if the option is treated as stock or as exercised under § 1.1504–4(b) for purposes of determining whether a corporation is a member of an affiliated group.

(vii) *Examples.* The following examples illustrate the rules of this paragraph (c)(4). Except as otherwise stated, for purposes of the examples in this paragraph (c)(4)(vii), all persons described are corporations that have a single class of stock outstanding and file separate federal tax returns and are not described in section 1504(b)(6) or (b)(8). In addition, the stock of each publicly traded corporation is widely held such that no person directly or indirectly owns stock in the publicly traded corporation meeting the requirements of section 1504(a)(2) (as modified by this paragraph (c)(4)).

Example 1. Two different expanded group parents. (i) *Facts.* P has two classes of common stock outstanding: Class A and Class B. X, a publicly traded corporation, directly owns all shares of P's Class A common stock, which is high-vote common stock representing 85% of the vote and 15% of the value of the stock of P. Y, a publicly traded corporation, directly owns all shares of P's Class B common stock, which is low-vote common stock representing 15% of the vote and 85% of the value of the stock of P. P directly owns 100% of the stock of S1.

(ii) *Analysis.* X owns directly 85% of the vote of the stock of P, which is stock meeting the requirements of section 1504(a)(2) (as modified by paragraph (c)(4)(i)(A) of this section). Therefore, X is an expanded group parent described in paragraph (c)(4)(i) of this section with respect to P. Y owns 85% of the value of the stock of P, which is stock meeting the requirements of section 1504(a)(2) (as modified by paragraph (c)(4)(i)(A) of this section). Therefore, Y is also an expanded group parent described in paragraph (c)(4)(i) of this section with respect to P. P owns directly 100% of the voting power and value of the stock of S1, which is stock meeting the requirements of section 1504(a)(2) (as modified by paragraph (c)(4)(i)(B) of this section). Therefore, X, P, and S1 constitute an expanded group as defined in paragraph (c)(4)(i) of this section. Additionally, Y, P, and S1 constitute an expanded group as defined in paragraph (c)(4) of this section. X and Y are not members of the same expanded group under paragraph (c)(4) of this section because X does not directly or indirectly own any of the stock of Y and Y does not directly or indirectly own any of the stock of X, such that X and Y do not comprise a chain of corporations described in paragraph (c)(4)(i) of this section.

Example 2. Inclusion of a REIT within an expanded group. (i) *Facts.* All of the stock of P is publicly traded. In addition to other assets representing 85% of the value of its total assets, P directly owns all of the stock of S1. S1 owns 99% of the stock of S2. The remaining 1% of the stock of S2 is owned by 100 unrelated individuals. In addition to other assets representing 85% of the value of its total assets, S2 owns all of the stock of S3. Both P and S2 are real estate investment trusts described in section 1504(b)(6).

(ii) *Analysis.* P directly owns 100% of the stock of S1. However, under paragraph (c)(4)(i) of this section, P cannot be the expanded group parent because P is a real estate investment trust described in section 1504(b)(6). Because no other corporation owns stock in P meeting the requirements described in paragraph (c)(4)(i) of this section, P is not an expanded group member. S1 directly owns 99% of the stock of S2, which is stock meeting the requirements of section 1504(a)(2) (as modified by paragraph (c)(4)(i)(A) of this section). Although S2 is a corporation described in section 1504(b)(6), a corporation described in section 1504(b)(6) may be a member of an expanded group described under paragraph (c)(4)(i) of this section provided the corporation is not the expanded group parent. In this case, S1 is the expanded group parent. S2 directly owns 100% of the stock of S3, which is stock meeting the requirements of section 1504(a)(2) (as modified by paragraph (c)(4)(i)(B) of this section). Therefore, S1, S2, and S3 constitute an expanded group as defined in paragraph (c)(4) of this section.

Example 3. Attribution of hook stock. (i) *Facts.* P, a publicly traded corporation, directly owns 50% of the stock of S1. S1 directly owns 100% of the stock of S2. S2 directly owns the remaining 50% of the stock of S1.

(ii) *Analysis.* (A) P directly owns 50% of the stock of S1. Under paragraph (c)(4)(iii) of this section (which applies section 318(a)(2)

with modifications), P constructively owns 50% of the stock of S2 because P directly owns 50% of the stock of S1, which directly owns 100% of S2. Under section 318(a)(5)(A), stock constructively owned by P by reason of the application of section 318(a)(2) is, for purposes of section 318(a)(2), considered as actually owned by P.

(B) S2 directly owns 50% of the stock of S1. Thus, under paragraph (c)(4)(iii) of this section, P is treated as constructively owning an additional 25% of the stock of S1. For purposes of determining the expanded group, P's ownership must be recalculated treating the additional 25% of S1 stock as actually owned. Under the second application of section 318(a)(2)(C) as modified by paragraph (c)(4)(iii) of this section, P constructively owns an additional 12.5% of the stock of S1 as follows: 25% (P's new attributed ownership of S1) × 100% (S1's ownership of S2) × 50% (S2's ownership of S1) = 12.5%. After two iterations, P's ownership in S1 is 87.5% (50% direct ownership + 25% first order constructive ownership + 12.5% second order constructive ownership) and thus S1 is a member of the expanded group that includes P and S2. Subsequent iterative calculations of P's ownership, treating constructive ownership as actual ownership, would demonstrate that P owns, directly and indirectly, 100% of the stock of S1. P, S1, and S2 therefore constitute an expanded group as defined in paragraph (c)(4) of this section and P is the expanded group parent.

Example 4. Attribution of hook stock when an intermediary has multiple owners. (i) *Facts.* The facts are the same as in *Example 3,* except that P directly owns only 25% of the stock of S1. X, a corporation unrelated to P, also directly owns 25% of the stock of S1.

(ii) *Analysis.* (A) P and X each directly owns 25% of the stock of S1. Under paragraph (c)(4)(iii) of this section, P and X each constructively owns 25% of the stock of S2 because P and X each directly owns 25% of the stock of S1, which directly owns 100% of the stock of S2. Under section 318(a)(5)(A), stock constructively owned by P or X by reason of the application of section 318(a)(2) is, for purposes of section 318(a)(2), considered as actually owned by P or X, respectively.

(B) S2 directly owns 50% of the stock of S1. Thus, under paragraph (c)(4)(iii) of this section, P and X each is treated as constructively owning an additional 12.5% of the stock of S1. Under a second application of section 318(a)(2)(C) as modified by paragraph (c)(4)(iii) of this section, P and X each constructively owns an additional 6.25% of the stock of S1 as follows: 12.5% (each of P's and X's new attributed ownership of S1) × 100% (S1's ownership of S2) × 50% (S2's ownership of S1) = 6.25%. After two iterations, each of P's and X's ownership in S1 is 43.75% (25% direct ownership + 12.5% first order constructive ownership + 6.25% second order constructive ownership). Subsequent iterative calculations of each of P's and X's ownership, treating constructive ownership as actual ownership, would demonstrate that P and X each owns, directly and indirectly, 50% of the stock of S1.

(C) S1 and S2 constitute an expanded group as defined under paragraph (c)(4)(i) of this section because S1 directly owns 100% of the stock of S2. S1 is the expanded group parent of the expanded group and neither P nor X are a member of the expanded group that includes S1 and S2.

(5) *Regarded owner.* The term *regarded owner* means a person (which cannot be a disregarded entity) that is the single owner (within the meaning of § 301.7701–2(c)(2)(i) of this chapter) of a disregarded entity.

(d) *Treatment of deemed exchanges*—(1) *Debt instrument deemed to be exchanged for stock*—(i) *In general.* If a debt instrument (as defined in § 1.385–3(g)(4)) or an EGI (as defined in § 1.385–2(d)(3)) is deemed to be exchanged under the section 385 regulations, in whole or in part, for stock, the holder is treated for all federal tax purposes as having realized an amount equal to the holder's adjusted basis in that portion of the debt instrument or EGI as of the date of the deemed exchange (and as having basis in the stock deemed to be received equal to that amount), and, except as provided in paragraph (d)(1)(iv)(B) of this section, the issuer is treated for all federal tax purposes as having retired that portion of the debt instrument or EGI for an amount equal to its adjusted issue price as of the date of the deemed exchange. In addition, neither party accounts for any accrued but unpaid qualified stated interest on the debt instrument or EGI or any foreign exchange gain or loss with respect to that accrued but unpaid qualified stated interest (if any) as of the deemed exchange. This paragraph (d)(1)(i) does not affect the rules that otherwise apply to the debt instrument or EGI prior to the date of the deemed exchange (for example, this paragraph (d)(1)(i) does not affect the issuer's deduction of accrued but unpaid qualified stated interest otherwise deductible prior to the date of the deemed exchange). Moreover, the stock issued in the deemed exchange is not treated as a payment of accrued but unpaid original issue discount or qualified stated interest on the debt instrument or EGI for federal tax purposes.

(ii) *Section 988.* Notwithstanding the first sentence of paragraph (d)(1)(i) of this section, the rules of § 1.988–2(b)(13) apply to require the holder and the issuer of a debt instrument or an EGI that is deemed to be exchanged under the section 385 regulations, in whole or in part, for stock to recognize any exchange gain or loss, other than any exchange gain or loss with respect to accrued but unpaid qualified stated interest that is not taken into account under paragraph (d)(1)(i) of this section at the time of the deemed exchange. For purposes of this paragraph (d)(1)(ii), in applying § 1.988–2(b)(13) the exchange gain or loss under section 988 is treated as the total gain or loss on the exchange.

(iii) *Section 108(e)(8).* For purposes of section 108(e)(8), if the issuer of a debt instrument or EGI is treated as having retired all or a portion of the debt instrument or EGI in exchange for stock under paragraph (d)(1)(i) of this section, the stock is treated as having a fair market value equal to the adjusted issue price of that portion of the debt instrument or EGI as of the date of the deemed exchange.

(iv) *Issuer of stock deemed exchanged for debt.* For purposes of applying paragraph (d)(1)(i) of this section—

(A) A debt instrument that is issued by a disregarded entity is deemed to be exchanged for stock of the regarded owner under §§ 1.385–2(e)(4) and 1.385–3T(d)(4);

(B) A debt instrument that is issued by a partnership that becomes a deemed transferred receivable, in whole or in part, is deemed to be exchanged by the holder for deemed partner stock under § 1.385–3T(f)(4) and the partnership is therefore not treated for any federal tax purpose as having retired any portion of the debt instrument; and

(C) A debt instrument that is issued in any situation not described in paragraph (d)(1)(iv)(A) or (B) of this section is deemed to be exchanged for stock of the issuer of the debt instrument.

(2) *Stock deemed to be exchanged for newly-issued debt instrument*—(i) *EGIs.* If an EGI treated as stock under § 1.385–2(e)(1) ceases to be an EGI and is deemed to be exchanged pursuant to § 1.385–2(e)(2), in whole or in part, for a newly-issued debt instrument, the issue price of the newly-issued debt instrument is determined under either section 1273(b)(4) or 1274, as applicable.

(ii) *Debt instruments recharacterized under § 1.385–3.* If a debt instrument treated as stock under § 1.385–3(b) is deemed to be exchanged under § 1.385–3(d)(2), in whole or in part, for a newly-issued debt instrument, the issue price of the newly-issued debt instrument is determined under either section 1273(b)(4) or 1274, as applicable.

(e) *Indebtedness in part.* [Reserved]

(f) *Applicability date.* This section applies to taxable years ending on or after January 19, 2017.

■ **Par. 3.** Section 1.385–2 is added to read as follows:

§ 1.385–2 Treatment of certain interests between members of an expanded group.

(a) *In general*—(1) *Scope.* This section provides rules for the preparation and maintenance of the documentation and information necessary for the

determination of whether certain instruments will be treated as indebtedness for federal tax purposes. It also prescribes presumptions and factors as well as the weighting of certain factors to be taken into account in the making of that determination. For definitions applicable to this section, including the terms ''applicable interest'' and ''expanded group interest'' (EGI), see paragraph (d) of this section.

(2) *Purpose.* The rules in this section have two principal purposes. The first is to provide guidance regarding the documentation and other information that must be prepared, maintained, and provided to be used in the determination of whether an instrument subject to this section will be treated as indebtedness for federal tax purposes. The second is to establish certain operating rules, presumptions, and factors to be taken into account in the making of any such determination. Thus, compliance with this section does not establish that an interest is indebtedness; it serves only to satisfy the minimum documentation for the determination to be made under general federal tax principles.

(3) *Applicability of section.* The application of this section is subject to the following limitations:

(i) *Covered member.* An EGI is subject to this section only if it is issued by a covered member, as defined in § 1.385–1(c)(2), or by a disregarded entity, as defined in § 1.385–1(c)(3), that has a regarded owner that is a covered member.

(ii) *Threshold limitation*—(A) *In general.* An EGI is subject to this section only if on the date that an applicable interest first becomes an EGI—

(*1*) The stock of any member of the expanded group is traded on (or subject to the rules of) an established financial market within the meaning of § 1.1092(d)–1(b);

(*2*) Total assets exceed $100 million on any applicable financial statement (as defined in paragraph (d)(1) of this section) or combination of applicable financial statements; or

(*3*) Annual total revenue exceeds $50 million on any applicable financial statement or combination of applicable financial statements.

(B) *Non-U.S. dollar applicable financial statements.* If an applicable financial statement is denominated in a currency other than the U.S. dollar, the amount of total assets is translated into U.S. dollars at the spot rate (as defined in § 1.988–1(d)) as of the date of the applicable financial statement. The amount of annual total revenue is translated into U.S. dollars at the weighted average exchange rate (as defined in § 1.989(b)–1) for the year for which the annual total revenue was calculated.

(C) *Integration and combination of multiple applicable financial statements*—(*1*) *In general.* If there are multiple applicable financial statements that reflect the assets, portion of the assets, or annual total revenue of different members of the expanded group, the aggregate amount of total assets and annual total revenue must be used to determine whether the threshold limitation in paragraph (a)(3)(ii)(A) of this section applies. For this purpose, the use of the aggregate amount of total assets or annual total revenue in different applicable financial statements is required except to the extent that two or more applicable financial statements reflect the total assets and annual total revenue of a member of the expanded group.

(*2*) *Overlapping applicable financial statements.* To the extent that two or more applicable financial statements reflect the total assets or annual total revenue of the same expanded group member, the applicable financial statement with the higher amount of total assets must be used for purposes of paragraph (a)(3)(ii) of this section.

(*3*) *Overlapping assets and revenue.* If there are multiple applicable financial statements that reflect the assets, portion of the assets, or revenue of the same expanded group member, any duplication (by stock, consolidation, or otherwise) of that expanded group member's assets or revenue may be disregarded for purposes of paragraph (a)(3)(ii) of this section such that the total assets or annual total revenue of that expanded group member are only reflected once.

(4) *Coordination with other rules of law*—(i) *Substance of transaction controls.* Nothing in this section prevents the Commissioner from asserting that the substance of a transaction involving an EGI (or the EGI itself) is different from the form of the transaction (or the EGI) or treating the transaction (or the EGI) in accordance with its substance for federal tax purposes, which may involve disregarding the transaction (or the EGI).

(ii) *Commissioner's authority under section 7602 unaffected.* This section does not otherwise affect the authority of the Commissioner under section 7602 to request and obtain documentation and information regarding transactions and instruments that purport to create an interest in a corporation.

(iii) *Covered debt instruments.* If the requirements of this section are satisfied or otherwise do not apply, see §§ 1.385–3 and 1.385–4T for additional rules for determining whether and the extent to which an interest otherwise treated as indebtedness under general federal tax principles is recharacterized as stock for federal tax purposes.

(5) *Consistency rule*—(i) *In general.* If an issuer (as defined in paragraph (d)(4) of this section) characterizes an EGI as indebtedness, the issuer and the holder are each required to treat the EGI as indebtedness for all federal tax purposes. For purposes of this paragraph (a)(5)(i), an issuer is considered to have characterized an EGI as indebtedness if the legal form of the EGI is debt, as described in paragraph (d)(2)(i)(A) of this section. An issuer is also considered to have characterized an EGI as indebtedness if the issuer claims any federal income tax benefit with respect to an EGI resulting from characterizing the EGI as indebtedness for federal tax purposes, such as by claiming an interest deduction under section 163 in respect of interest paid or accrued on the EGI on a federal income tax return (or, if the issuer is a member of a consolidated group, the issuer or the common parent of the consolidated group claims a federal income tax benefit by claiming such an interest deduction), or if the issuer reports the EGI as indebtedness or amounts paid or accrued on the EGI as interest on an applicable financial statement. Pursuant to section 385(c)(1), the Commissioner is not bound by the issuer's characterization of an EGI.

(ii) *EGI characterized as stock.* The consistency rule in paragraph (a)(5)(i) of this section and section 385(c)(1) does not apply with respect to an EGI to the extent that the EGI is treated as stock under this section or it has been determined that the EGI is treated as stock under applicable federal tax principles. In such case, the issuer and the holder are each required to treat the EGI as stock for all federal tax purposes.

(b) *Documentation rules and weighting of indebtedness factors*—(1) *General rule.* Documentation and information evidencing the indebtedness factors set forth in paragraph (c) of this section must be prepared and maintained in accordance with the provisions of this section with respect to each EGI. If the documentation and information described in paragraph (c) of this section are prepared and maintained as required by this section, the determination of whether an EGI is properly treated as indebtedness (or otherwise) for federal tax purposes will be made under general federal tax principles. If the documentation and information described in paragraph (c) of this section are not prepared and

maintained in respect of an EGI in accordance with this section, and no exception listed in paragraph (b)(2) of this section applies, the EGI is treated as stock for all federal tax purposes. If a taxpayer characterizes an EGI as indebtedness but fails to provide the documentation and information described in paragraph (c)(2) of this section upon request by the Commissioner, the Commissioner will treat such documentation and information as not prepared or maintained.

(2) *Exceptions from per se treatment*—(i) *Rebuttable presumption rules*—(A) *General rule.* If documentation and information evidencing the indebtedness factors set forth in paragraph (c) of this section are not prepared and maintained with respect to a particular EGI but a taxpayer demonstrates that with respect to an expanded group of which the issuer and holder of the EGI are members such expanded group is otherwise highly compliant with the documentation rules (as such compliance is described in paragraph (b)(2)(i)(B) of this section), the EGI is not automatically treated as stock but is presumed, subject to rebuttal, to be stock for federal tax purposes. A taxpayer can overcome the presumption that an EGI is stock if the taxpayer clearly establishes that there are sufficient common law factors present to treat the EGI as indebtedness, including that the issuer intended to create indebtedness when the EGI was issued.

(B) *High percentage of EGIs compliant with this section as evidence that the expanded group is highly compliant with the documentation rules.* The rebuttable presumption in paragraph (b)(2)(i)(A) of this section applies if an expanded group of which the issuer and holder are members has a high percentage of EGIs compliant with paragraph (c) of this section. For this purpose, an expanded group is treated as having a high percentage of EGIs compliant with paragraph (c) of this section if during the calendar year in which an EGI does not meet the requirements of paragraph (c) of this section—

(*1*) The average total adjusted issue price of all EGIs that are undocumented (as defined in paragraph (b)(2)(i)(B)(*3*) of this section) and outstanding as of the close of each calendar quarter is less than 10 percent of the average amount of total adjusted issue price of all EGIs that are outstanding as of the close of each calendar quarter; or

(*2*) If no EGI that is undocumented during the calendar year has an issue price in excess of—

(*i*) $100,000,000, the average total number of EGIs that are undocumented and outstanding as of the close of each calendar quarter is less than 5 percent of the average total number of all EGIs that are outstanding as of the close of each calendar quarter; or

(*ii*) $25,000,000, the average total number of EGIs that are undocumented and outstanding as of the close of each calendar quarter is less than 10 percent of the average total number of all EGIs that are outstanding as of the close of each calendar quarter.

(*3*) *Undocumented EGI.* For purposes of paragraph (b)(2)(i)(B) of this section, an undocumented EGI is an EGI for which documentation has not been both prepared and maintained for one or more of the indebtedness factors in paragraph (c)(2) of this section by the time required under paragraph (c)(4) of this section.

(*4*) *Anti-stuffing rule.* If a member of the expanded group increases the adjusted issue price of EGIs outstanding on a quarterly testing date with a principal purpose of satisfying the requirements of paragraph (b)(2)(i)(B)(*1*) of this section or increases the number of EGIs outstanding on a quarterly testing date with a principal purpose of satisfying the requirements of paragraph (b)(2)(ii)(B)(*2*) of this section, such increase will not be taken into account in calculating whether a taxpayer has met these requirements.

(*5*) *EGIs subject to this section.* For purposes of determining whether the requirements of paragraph (b)(2)(i)(B)(*1*) or (b)(2)(i)(B)(*2*) of this section are met, only EGIs subject to the rules of this section are taken into account. Thus, for example, an EGI issued by an issuer other than a covered member is not taken into account.

(C) *Application of federal tax principles if presumption rebutted.* If the presumption of stock treatment for federal tax purposes under paragraph (b)(2)(i)(A) of this section is rebutted, the determination of whether an EGI is properly treated as indebtedness (or otherwise) for federal tax purposes will be made under general federal tax principles. See paragraph (b)(3) of this section for the weighting of factors that must be made in this determination.

(ii) *Reasonable cause*—(A) *In general.* To the extent a taxpayer establishes that there was reasonable cause for a failure to comply, in whole or in part, with the requirements of this section, such failure will not be taken into account in determining whether the requirements of this section have been satisfied, and the character of the EGI will be determined under general federal tax principles. The principles of § 301.6724–1 of this chapter apply in interpreting whether reasonable cause exists in any particular case.

(B) *Requirement to document once reasonable cause established.* If a taxpayer establishes that there was reasonable cause for a failure to comply, in whole or in part, with the requirements of this section, the documentation and information required under paragraph (c) of this section must be prepared within a reasonable time and maintained for the EGIs for which such reasonable cause was established.

(iii) *Taxpayer discovery and remedy of ministerial or non-material failure or error.* If a taxpayer discovers and corrects a ministerial or non-material failure or error in complying with this section prior to the Commissioner's discovery of the failure or error, such failure or error will not be taken into account in determining whether the requirements of this section have been satisfied.

(3) *Weighting of indebtedness factors.* In applying federal tax principles to the determination of whether an EGI is indebtedness or stock, the indebtedness factors in paragraph (c)(2) of this section are significant factors to be taken into account. Other relevant factors are taken into account in the determination as lesser factors, with the relative weighting of each lesser factor based on facts and circumstances.

(c) *Documentation and information to be prepared and maintained*—(1) *In general*—(i) *Application.* The indebtedness factors and the documentation and information that evidence each indebtedness factor are set forth in paragraph (c)(2) of this section. The requirement to prepare and maintain documentation and information with respect to each indebtedness factor applies to each EGI separately, but the same documentation and information may satisfy the requirements of this section for more than one EGI (see paragraph (c)(2)(iii)(B) of this section for rules relating to documentation that may be applicable to multiple EGIs issued by the same issuer for purposes of the indebtedness factor in paragraph (c)(2)(iii) of this section and paragraph (c)(3)(i) of this section for rules relating to certain master arrangements). Documentation must include complete copies of all instruments, agreements, subordination agreements, and other documents evidencing the material rights and obligations of the issuer and the holder relating to the EGI, and any associated

rights and obligations of other parties, such as guarantees. For documents that are executed, such copies must be copies of documents as executed. Additional documentation and information may be provided to supplement, but not substitute for, the documentation and information required under this section.

(ii) *Market standard safe harbor.* Documentation of a kind customarily used in comparable third-party transactions treated as indebtedness for federal tax purposes may be used to satisfy the indebtedness factors in paragraphs (c)(2)(i) and (c)(2)(ii) of this section. Thus, for example, documentation of a kind that a taxpayer uses for trade payables with unrelated parties will generally satisfy the documentation requirements of this paragraph (c) for documenting trade payables with members of the expanded group.

(iii) *EGIs with terms required by certain regulators.* Notwithstanding any other provision in this paragraph (c), an EGI that is described in this paragraph (c)(1)(iii) is treated as meeting the documentation and information requirements described in this paragraph (c), provided that documentation necessary to establish that the EGI is an instrument described in this paragraph (c)(1)(iii) is prepared and maintained in accordance with paragraph (b) of this section. An EGI described in this paragraph (c)(1)(iii) is—

(A) An EGI issued by an excepted regulated financial company (as defined in § 1.385–3(g)(3)(iv)) that contains terms required by a regulator of that company in order for the EGI to satisfy regulatory capital or similar rules that govern resolution or orderly liquidation of the excepted regulated financial company (including rules that require an excepted regulated financial company to issue EGIs in the form of Total Loss-Absorbing Capacity), provided that at the time of issuance it is expected that the EGI will be paid in accordance with its terms; and

(B) An EGI issued by a regulated insurance company (as defined in § 1.385–3(g)(3)(v)) that requires the issuer to receive approval or consent of an insurance regulatory authority prior to making payments of principal or interest on the EGI, provided that at the time of issuance it is expected that the EGI will be paid in accordance with its terms.

(2) *Indebtedness factors relating to documentation and information to be prepared and maintained in support of indebtedness.* The indebtedness factors that must be documented to establish that an EGI is indebtedness for federal tax purposes, and the documentation and information that must be prepared and maintained with respect to each such factor, are described in paragraphs (c)(2)(i) through (c)(2)(iv) of this section.

(i) *Unconditional obligation to pay a sum certain.* There must be written documentation establishing that the issuer has entered into an unconditional and legally binding obligation to pay a fixed or determinable sum certain on demand or at one or more fixed dates.

(ii) *Creditor's rights.* There must be written documentation establishing that the holder has the rights of a creditor to enforce the obligation. The rights of a creditor typically include, but are not limited to, the right to cause or trigger an event of default or acceleration of the EGI (when the event of default or acceleration is not automatic) for non-payment of interest or principal when due under the terms of the EGI and the right to sue the issuer to enforce payment. The rights of a creditor must include rights that are superior to the rights of shareholders (other than holders of interests treated as stock solely by reason of § 1.385–3) to receive assets of the issuer in case of dissolution. An EGI that is a nonrecourse obligation has creditor's rights for this purpose if it provides sufficient remedies against a specified subset of the issuer's assets. For purposes of this paragraph (c)(2)(ii), creditor's rights may be provided either in the legal agreements that contain the terms of the EGI or under local law. If local law provides for creditor's rights under an EGI even if such rights are not specified in the legal agreements that contain the terms of the EGI, such creditor's rights do not need to be included in the EGI provided that written documentation for purposes of this paragraph (c)(2)(ii) contains a reference to the provisions of local law providing such rights.

(iii) *Reasonable expectation of ability to repay EGI*—(A) *In general.* There must be written documentation containing information establishing that, as of the date of issuance of the applicable interest and taking into account all relevant circumstances (including all other obligations incurred by the issuer as of the date of issuance of the applicable interest or reasonably anticipated to be incurred after the date of issuance of the applicable interest), the issuer's financial position supported a reasonable expectation that the issuer intended to, and would be able to, meet its obligations pursuant to the terms of the applicable interest. Documentation in respect of an EGI that is nonrecourse under its terms must include information on any cash and property that secures the EGI, including—

(*1*) The fair market value of publicly traded property that is recourse property with respect to the EGI; and

(*2*) An appraisal (if any) of recourse property that was prepared pursuant to the issuance of the EGI or within the three years preceding the issuance of the EGI. Thus, the documentation required by this paragraph (c)(2)(iii)(A) does not require that an appraisal be prepared for non-publicly traded property that secures nonrecourse debt, but does require that the documentation include any appraisal that was prepared for any purpose.

(B) *Documentation of ability to pay applicable to multiple EGIs issued by same issuer*—(*1*) *In general.* Written documentation that applies to more than one EGI issued by a single issuer may be prepared on an annual basis to satisfy the requirements in paragraph (c)(2)(iii)(A) of this section (an annual credit analysis). An annual credit analysis can be used to support the reasonable expectation that the issuer has the ability to repay multiple EGIs, including a specified combined amount of indebtedness, provided any such EGIs are issued on any day within the 12-month period beginning on the date the analysis in the annual credit analysis is based on (an analysis date). An annual credit analysis must establish that, as of its analysis date and taking into account all relevant circumstances (including all other obligations incurred by the issuer as of such analysis date or reasonably anticipated to be incurred after such analysis date), the issuer's financial position supported a reasonable expectation that the issuer would be able to pay interest and principal in respect of the amount of indebtedness set forth in the annual credit analysis.

(*2*) *Material event of the issuer.* If there is a material event (as defined in paragraph (d)(5) of this section) with respect to the issuer within the year beginning on the analysis date for written documentation described in paragraph (c)(2)(iii)(B)(*1*) of this section, such written documentation may not be used to satisfy the requirements in paragraph (c)(2)(iii)(A) of this section for EGIs with relevant dates (as described in paragraph (c)(4) of this section) on or after the date of the material event. However, an additional set of written documentation described in paragraph (c)(2)(iii)(B)(*1*) of this section may be prepared with an analysis date on or after the date of the material event of the issuer.

(C) *Third party reports or analysis.* If any member of an expanded group

relied on any report or analysis prepared by a third party in analyzing whether the issuer would be able to meet its obligations pursuant to the terms of the EGI, the documentation must include the report or analysis. If the report or analysis is protected or privileged under law governing an inquiry or proceeding with respect to the EGI and the protection or privilege is asserted, neither the existence nor the contents of the report or analysis is taken into account in determining whether the requirements of this section are satisfied.

(D) *EGI issued by disregarded entity.* For purposes of this paragraph (c)(2)(iii), if a disregarded entity is the issuer of an EGI, and the owner of the disregarded entity has limited liability within the meaning of § 301.7701–3(b)(2)(ii) of this chapter, only the assets and liabilities and the financial position of the disregarded entity are relevant for purposes of paragraph (c)(2)(iii)(A) of this section. If the owner of such a disregarded entity does not have limited liability within the meaning of § 301.7701–3(b)(2)(ii) of this chapter (including by reason of a guarantee, keepwell, or other agreement), all of the assets and liabilities, and the financial position of the disregarded entity and the owner are relevant for purposes of paragraph (c)(2)(iii)(A) of this section.

(E) *Acceptable documentation.* The documentation required under this paragraph (c)(2)(iii) may include cash flow projections, financial statements, business forecasts, asset appraisals, determination of debt-to-equity and other relevant financial ratios of the issuer in relation to industry averages, and other information regarding the sources of funds enabling the issuer to meet its obligations pursuant to the terms of the applicable interest. For this purpose, such documentation may assume that the principal amount of an EGI may be satisfied with the proceeds of another borrowing by the issuer, provided that such assumption is reasonable. Documentation required under paragraph (c)(2) of this section may be prepared by employees of expanded group members, by agents of expanded group members or by third parties.

(F) *Third party financing terms.* Documentation required under this paragraph (c)(2)(iii) may include evidence that a third party lender would have made a loan to the issuer with the same or substantially similar terms as the EGI.

(iv) *Actions evidencing debtor-creditor relationship*—(A) *Payments of principal and interest.* If an issuer made any payment of interest or principal with respect to the EGI (whether in accordance with the terms of the EGI or otherwise, including prepayments), and such payment is claimed to support the treatment of the EGI as indebtedness under federal tax principles, documentation must include written evidence of such payment. Such evidence could include, for example, a wire transfer record or a bank statement. Such evidence could also include a netting of payables or receivables between the issuer and holder, or payments of interest, evidenced by journal entries in a centralized cash management system or in the accounting system of the expanded group (or a subset of the members of the expanded group) reflecting the payment.

(B) *Events of default and similar events*—(*1*) *Enforcement of creditor's rights.* If the issuer did not make a payment of interest or principal that was due and payable under the terms of the EGI, or if any other event of default or similar event has occurred, there must be written documentation evidencing the holder's reasonable exercise of the diligence and judgment of a creditor. Such documentation may include evidence of the holder's assertion of its rights under the terms of the EGI, including the parties' efforts to renegotiate the EGI or to mitigate the breach of an obligation under the EGI, or any change in material terms of the EGI, such as maturity date, interest rate, or obligation to pay interest or principal.

(*2*) *Non-enforcement of creditor's rights.* If the holder does not enforce its rights with respect to a payment of principal or interest, or with respect to an event of default or similar event, there must be documentation that supports the holder's decision to refrain from pursuing any actions to enforce payment as being consistent with the reasonable exercise of the diligence and judgment of a creditor. For example, if the issuer is unable to make a timely payment of principal or interest and the holder reasonably believes that the issuer's business or cash flow will improve such that the issuer will be able to comply with the terms of the EGI, the holder may be exercising the reasonable diligence and judgment of a creditor by granting an extension of time for the issuer to pay such interest or principal. However, if a holder fails to enforce its rights and there is no documentation explaining this failure, the holder will not be treated as exercising the reasonable due diligence and judgment of a creditor. See, however, § 1.1001–3(c)(4)(ii) for rules regarding when a forbearance may be a modification of a debt instrument and therefore may result in an exchange subject to § 1.1001–1(a).

(3) *Special documentation rules*—(i) *Agreements that cover multiple EGIs*—(A) *Revolving credit agreements, omnibus, umbrella, master, cash pool, and similar agreements*—(*1*) *In general.* If an EGI is not evidenced by a separate note or other writing executed with respect to the initial principal balance or any increase in principal balance (for example, an EGI documented as a revolving credit agreement, a cash pool agreement, an omnibus or umbrella agreement that governs open account obligations or any other identified set of payables or receivables, or a master agreement that sets forth general terms of an EGI with an associated schedule or ticket that sets forth the specific terms of an EGI), the EGI is subject to the special rules of this paragraph (c)(3)(i)(A). A notional cash pool is subject to the rules of this paragraph (c)(3)(i) to the extent that the notional cash pool would be treated as an EGI issued directly between expanded group members.

(*2*) *Special rules with respect to paragraphs (c)(2)(i) and (c)(2)(ii) of this section regarding unconditional obligation to pay a sum certain and creditor's rights.* An EGI subject to the special rules of paragraph (c)(3)(i)(A) of this section satisfies the requirements of paragraphs (c)(2)(i) and (c)(2)(ii) of this section only if the material documentation associated with the EGI, including all relevant enabling documents, is prepared and maintained in accordance with the requirements of this section. Relevant enabling documents may include board of directors' resolutions, credit agreements, omnibus agreements, security agreements, or agreements prepared in connection with the execution of the legal documents governing the EGI as well as any relevant documentation executed with respect to an initial principal balance or increase in the principal balance of the EGI.

(*3*) *Special rules under paragraph (c)(2)(iii) of this section regarding reasonable expectation of ability to repay*—(*i*) *In general.* If an EGI is issued under an agreement described in paragraph (c)(3)(i)(A) of this section, written documentation must be prepared with respect to the date used for the analysis (an analysis date) and written documentation with a new analysis date must prepared at least annually to satisfy the requirements in paragraph (c)(2)(iii) of this section for EGIs issued under such an agreement on or after the most recent analysis date. Such written documentation satisfies the requirements in paragraph (c)(2)(iii)

of this section with respect to EGIs issued under such an agreement on any day within the year beginning on the analysis date of the annual credit analysis. Such written documentation must contain information establishing that, as of the analysis date of the annual credit analysis and taking into account all relevant circumstances (including all other obligations incurred by the issuer as of the analysis date of the written documentation or reasonably anticipated to be incurred after the analysis date of the written documentation), the issuer's financial position supported a reasonable expectation that the issuer would be able to pay interest and principal in respect of the maximum principal amount permitted under the terms of the revolving credit agreement, omnibus, umbrella, master, cash pool or similar agreement. Notwithstanding the foregoing, written documentation described in paragraph (c)(2)(iii)(B) of this section can be used to satisfy the requirements in paragraph (c)(2)(iii)(A) of this section with respect to such EGIs.

(*ii*) *Material event of the issuer.* If there is a material event with respect to the issuer within the year beginning on the analysis date for the written documentation described in paragraph (c)(3)(i)(A)(*3*) of this section, such written documentation may not be used to satisfy the requirements in paragraph (c)(3)(i)(A)(*3*) of this section for EGIs with relevant dates (as described in paragraph (c)(4) of this section) on or after the date of the material event. However, an additional set of written documentation as described in paragraph (c)(3)(i)(A)(*3*) of this section may be prepared with an analysis date on the date of the material event of the issuer or if subsequent EGIs are issued, with respect to those issuances.

(B) *Additional requirements for cash pooling arrangements.* Notwithstanding paragraphs (c)(2)(i) and (c)(2)(ii) of this section, and in addition to the requirements in paragraph (c)(3)(i)(A)(2) of this section, if an EGI is issued pursuant to a cash pooling arrangement (including a notional cash pooling arrangement) or internal banking service that involves account sweeps, revolving cash advance facilities, overdraft set-off facilities, operational facilities, or similar features, the EGI satisfies the requirements of paragraphs (c)(2)(i) and (c)(2)(ii) of this section only if the material documentation governing the ongoing operations of the cash pooling arrangement or internal banking service, including any agreements with entities that are not members of the expanded group, are also prepared and maintained in accordance with the requirements of this section. Such documentation must contain the relevant legal rights and obligations of any members of the expanded group and any entities that are not members of the expanded group in conducting the operation of the cash pooling arrangement or internal banking service.

(ii) *Debt not in form.* [Reserved]

(4) *Timely preparation requirement*—(i) *General rule.* Documentation and information required under this section must be timely prepared. For purposes of this section, documentation is treated as timely prepared if it is completed no later than the time for filing the issuer's federal income tax return (taking into account any applicable extensions) for the taxable year that includes the relevant date for such documentation or information, as specified in paragraph (c)(4)(ii) of this section.

(ii) *Relevant date.* For purposes of this paragraph (c)(4), the term relevant date has the following meaning:

(A) *Issuer's obligation, creditor's rights.* For documentation and information described in paragraphs (c)(2)(i) and (ii) of this section (relating to an issuer's unconditional obligation to repay and establishment of holder's creditor's rights), the relevant date is the date on which a covered member becomes an issuer of a new or existing EGI. A relevant date for such documentation and information does not include the date of any deemed issuance of the EGI resulting from as exchange under § 1.1001–3 unless such deemed issuance relates to an alteration in the terms of the EGI reflected in an express written agreement or written amendment to the EGI. In the case of an applicable interest that becomes an EGI subsequent to issuance, including an intercompany obligation, as defined in § 1.1502–13(g)(2)(ii), that ceases to be an intercompany obligation, the relevant date is the day on which the applicable interest becomes an EGI.

(B) *Reasonable expectation of payment*—(*1*) *In general.* For documentation and information described in paragraph (c)(2)(iii) of this section (relating to reasonable expectation of issuer's repayment), each date on which a covered member of the expanded group becomes an issuer with respect to an EGI and any later date on which an issuance is deemed to occur under § 1.1001–3, and any date described in the special rules in paragraph (c)(4)(ii)(E) of this section, is a relevant date for that EGI. In the case of an applicable interest that becomes an EGI subsequent to issuance, the relevant date is the day on which the applicable interest becomes an EGI and any relevant date after the date that the applicable interest becomes an EGI.

(*2*) *Annual credit analysis*—(*i*) With respect to documentation described in paragraph (c)(2)(iii)(B) of this section (documentation of ability to pay applicable to multiple EGIs issued by same issuer), the relevant date is the date used for the analysis in the annual credit analysis that is first prepared and the annual anniversary of such date unless a material event has occurred in respect of the issuer.

(*ii*) *Material event.* With respect to the documentation described in paragraph (c)(2)(iii)(B) of this section, the date on which a material event has occurred in respect of an issuer is also a relevant date. If the precise date on which a material event occurred is uncertain, a taxpayer may choose a date on which the taxpayer reasonably believes that the material event occurred. If documentation described in paragraph (c)(2)(iii)(B) of this section is prepared with the relevant date of a material event, the next relevant date will be the annual anniversary of that relevant date (unless another material event occurs in respect of the issuer).

(C) *Subsequent actions*—(*1*) *Payment.* For documentation and information described in paragraph (c)(2)(iv)(A) of this section (relating to payments of principal and interest), each date on which a payment of interest or principal is due, taking into account all additional time permitted under the terms of the EGI before there is (or holder can declare) an event of default for nonpayment, is a relevant date.

(*2*) *Default.* For documentation and information described in paragraph (c)(2)(iv)(B) of this section (relating to events of default and similar events), each date on which an event of default, acceleration event or similar event occurs under the terms of the EGI is a relevant date. For example, if the terms of the EGI require the issuer to maintain a certain financial ratio, any date on which the issuer fails to maintain the specified financial ratio (and such failure results in an event of default under the terms of the EGI) is a relevant date.

(D) *Applicable interest that becomes an EGI.* In the case of an applicable interest that becomes an EGI subsequent to issuance, no date before the applicable interest becomes an EGI is a relevant date.

(E) *Revolving credit agreements, omnibus, umbrella, master, cash pool, and similar agreements*—(*1*) *Relevant dates for purposes of indebtedness factors in paragraphs (c)(2)(i) and (c)(2)(ii) of this section for overall arrangements.* In the case of an

arrangement described in paragraph (c)(3)(i)(A) of this section for purposes of the indebtedness factors in paragraphs (c)(2)(i) and (c)(2)(ii) of this section, each of the following dates is a relevant date:

(*i*) The date of the execution of the legal documents governing the overall arrangement.

(*ii*) The date of any amendment to those documents that provides for an increase in the maximum amount of principal.

(*iii*) The date of any amendment to those documents that permits an additional entity to borrow under the documents (but only with respect to EGIs issued by that entity).

(*2*) *Relevant dates for purposes of indebtedness factor in paragraph (c)(2)(iii) of this section for overall arrangements.* The relevant dates with respect to the arrangements described in paragraph (c)(3)(i)(A) of this section for purposes of the indebtedness factor in paragraph (c)(2)(iii) of this section are—

(*i*) Each anniversary of the date of execution of the legal documents during the life of the legal documents; and

(*ii*) The date that a material event has occurred in respect of an issuer, unless the precise date on which a material event occurred is uncertain, in which case a taxpayer may use a date on which the taxpayer reasonably believes that the material event occurred.

(*3*) *Relevant dates for EGIs documented under an overall arrangement.* A relevant date of an EGI under paragraphs (c)(4)(ii)(A) through (C) of this section is also a relevant date for each EGI documented under an overall arrangement described in paragraph (c)(2)(iii) of this section.

(5) *Maintenance requirements.* The documentation and information described in paragraph (c) of this section must be maintained for all taxable years that the EGI is outstanding and until the period of limitations expires for any federal tax return with respect to which the treatment of the EGI is relevant. See section 6001 (requirement to keep books and records).

(d) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Applicable financial statement.* The term applicable financial statement means a financial statement that is described in paragraphs (d)(1)(i) through (iii) of this section, that includes the assets, portion of the assets, or annual total revenue of any member of the expanded group, and that is prepared as of any date within 3 years prior to the date the applicable interest at issue first becomes an EGI. The financial statement may be a separate company financial statement of any member of the expanded group, if done in the ordinary course; otherwise, it is the consolidated financial statement that includes the assets, portion of the assets, or annual total revenue of any member of the expanded group. A financial statement includes—

(i) A financial statement required to be filed with the Securities and Exchange Commission (the Form 10–K or the Annual Report to Shareholders);

(ii) A certified audited financial statement that is accompanied by the report of an independent certified public accountant (or in the case of a foreign entity, by the report of a similarly qualified independent professional) that is used for—

(A) Credit purposes;

(B) Reporting to shareholders, partners, or similar persons; or

(C) Any other substantial non-tax purpose; or

(iii) A financial statement (other than a tax return) required to be provided to the federal, state, or foreign government or any federal, state, or foreign agency.

(2) *Applicable interest*—(i) *In general.* Except to the extent provided in paragraph (d)(2)(ii) and (iii) of this section, the term applicable interest means—

(A) Any interest that is issued or deemed issued in the legal form of a debt instrument, which therefore does not include, for example, a sale-repurchase agreement treated as indebtedness under federal tax principles; or

(B) An intercompany payable and receivable documented as debt in a ledger, accounting system, open account intercompany debt ledger, trade payable, journal entry or similar arrangement if no written legal instrument or written legal arrangement governs the legal treatment of such payable and receivable.

(ii) *Certain intercompany obligations and statutory or regulatory debt instruments excluded.* The term applicable interest does not include—

(A) An intercompany obligation as defined in § 1.1502–13(g)(2)(ii) or an interest issued by a member of a consolidated group and held by another member of the same consolidated group, but only for the period during which both parties are members of the same consolidated group; for this purpose, a member includes any disregarded entity owned by a member;

(B) Production payments treated as a loan under section 636(a) or (b);

(C) A ''regular interest'' in a real estate mortgage investment conduit described in section 860G(a)(1);

(D) A debt instrument that is deemed to arise under § 1.482–1(g)(3) (including adjustments made pursuant to Revenue Procedure 99–32, 1999–2 C.B. 296); or

(E) Any other instrument or interest that is specifically treated as indebtedness for federal tax purposes under a provision of the Internal Revenue Code or the regulations thereunder.

(iii) *Interests issued before January 1, 2018.* The term applicable interest does not include any interest issued or deemed issued before January 1, 2018.

(3) *Expanded Group Interest* (*EGI*). The term expanded group interest (EGI) means an applicable interest the issuer of which is a member of an expanded group (or a disregarded entity whose regarded owner is a member of an expanded group) and the holder of which is another member of the same expanded group, a disregarded entity whose regarded owner is another member of the same expanded group, or a controlled partnership (as defined in § 1.385–1(c)(1)) with respect to the same expanded group.

(4) *Issuer.* Solely for purposes of this section, the term issuer means a person (including a disregarded entity defined in § 1.385–1(c)(3)) that is obligated to satisfy any material obligations created under the terms of an EGI. A person can be an issuer if that person is expected to satisfy a material obligation under an EGI, even if that person is not the primary obligor. A guarantor, however, is not an issuer unless the guarantor is expected to be the primary obligor. An issuer may include a person that, after the date that the EGI is issued, becomes obligated to satisfy a material obligation created under the terms of an EGI. For example, a person that becomes a co-obligor on an EGI after the date of issuance of the EGI is an issuer of the EGI for purposes of this section if such person is expected to satisfy the obligations thereunder without indemnification.

(5) *Material event.* The term material event means, with respect to an entity—

(i) The entity comes under the jurisdiction of a court in a case under—

(A) Title 11 of the United States Code (relating to bankruptcy); or

(B) A receivership, foreclosure, or similar proceeding in a federal or state court;

(ii) The entity becomes insolvent within the meaning of section 108(d)(3);

(iii) The entity materially changes its line of business;

(iv) The entity sells, alienates, distributes, leases, or otherwise disposes of 50 percent or more of the total fair market value of its included assets; or

(v) The entity consolidates or merges into another person and the person formed by or surviving such merger or consolidation does not assume liability for any of the entity's outstanding EGIs as of the time of the merger or consolidation.

(6) *Included assets.* The term included assets means, with respect to an entity all assets other than—

(i) Inventory sold in the ordinary course of business;

(ii) Assets contributed to another entity in exchange for equity in such entity; and

(iii) Investment assets such as portfolio stock investments to the extent that other investment assets or cash of equivalent value is substituted.

(7) *Regarded owner.* For purposes of this section, the term regarded owner means a person (that is that is not a disregarded entity) that is the single owner (within the meaning of § 301.7701–2(c)(2) of this chapter) of a disregarded entity.

(e) *Operating rules*—(1) *Applicable interest that becomes an EGI.* If an applicable interest that is not an EGI becomes an EGI, this section applies to the applicable interest immediately after the applicable interest becomes an EGI and at all times thereafter during which the applicable interest remains an EGI.

(2) *EGI treated as stock ceases to be an EGI.* If an EGI treated as stock due to the application of this section ceases to be an EGI, the character of the applicable interest is determined under general federal tax principles at the time that the applicable interest ceases to be an EGI. If the applicable interest is characterized as indebtedness under general federal tax principles, the issuer is treated for federal tax purposes as issuing a new debt instrument to the holder in exchange for the EGI immediately before the transaction that causes the EGI to cease to be treated as an EGI in a transaction that is disregarded for purposes of § 1.385–3(b)(2) and (3). See § 1.385–1(d).

(3) *Date of characterizations under this section*—(i) *In general.* If an applicable interest that is an EGI when issued is determined to be stock due to the application of this section, the EGI is treated as stock from the date it was issued. However, if an applicable interest that is not an EGI when issued subsequently becomes an EGI and is then determined to be stock due to the application of this section, the EGI is treated as stock as of the date it becomes an EGI.

(ii) *Recharacterization of EGI based on behavior of issuer or holder after issuance.* Notwithstanding paragraph (e)(3)(i) of this section, if an EGI initially treated as indebtedness is recharacterized as stock as a result of failing to satisfy paragraph (c)(2)(iv) of this section (actions evidencing debtor-creditor relationship), the EGI will cease to be treated as indebtedness as of the time the facts and circumstances regarding the behavior of the issuer or the holder with respect to the EGI cease to evidence a debtor-creditor relationship. For purposes of determining whether an EGI originally treated as indebtedness ceases to be treated as indebtedness by reason of paragraph (c)(2)(iv) of this section, the rules of this section apply before the rules of § 1.1001–3. Thus, an EGI initially treated as indebtedness may be recharacterized as stock regardless of whether the indebtedness is altered or modified (as defined in § 1.1001–3(c)) and, in determining whether indebtedness is recharacterized as stock, § 1.1001–3(f)(7)(ii)(A) does not apply.

(4) *Disregarded entities of regarded corporate owners.* This paragraph (e)(4) applies to an EGI issued by a disregarded entity, the regarded owner of which is a covered member, if such EGI would, absent the application of this paragraph (e)(4), be treated as stock under this section. In this case, rather than the EGI being treated as stock, the covered member that is the regarded owner of the disregarded entity is deemed to issue its stock in the manner described in this paragraph (e)(4). If the EGI would have been recharacterized as stock from the date it was issued under paragraph (e)(3)(i) of this section, then the covered member is deemed to issue its stock to the actual holder to which the EGI was, in form, issued. If the EGI would have been recharacterized as stock at any other time, then the covered member is deemed to issue its stock to the holder of the EGI in exchange for the EGI. In each case, the covered member that is the regarded owner of the disregarded entity is treated as the holder of the EGI issued by the disregarded entity, and the actual holder is treated as the holder of the stock deemed to be issued by the regarded owner. Under federal tax principles, the EGI issued by the disregarded entity generally is disregarded. The stock deemed issued is deemed to have the same terms as the EGI issued by the disregarded entity, other than the identity of the issuer, and payments on the stock are determined by reference to payments made on the EGI issued by the disregarded entity.

(f) *Anti-avoidance.* If an applicable interest that is not an EGI is issued with a principal purpose of avoiding the application of this section, the applicable interest is treated as an EGI subject to this section.

(g) *Affirmative use.* [Reserved]

(h) *Example.* The following example illustrates the rules of this section. Except as otherwise stated, the following facts are assumed for purposes of the example in this paragraph (h):

(1) FP is a foreign corporation that owns 100% of the stock of USS1, a domestic corporation, and 100% of the stock of USS2, a domestic corporation.

(2) USS1 and USS2 file separate federal income tax returns and have a calendar year taxable year.

(3) USS1 and USS2 timely file their federal income tax returns on September 15 of the calendar year following each taxable year.

(4) FP is traded on an established financial market within the meaning of § 1.1092(d)–1(b).

Example. Application of paragraphs (c)(2)(iii) and (c)(4) of this section to an EGI-(i) *Facts.* USS1 issues an EGI (EGI A) to FP on Date A in Year 1. USS1 issues an EGI (EGI B) to USS2 on Date B in Year 1. Date B is after Date A. USS1 issues another EGI (EGI C) to FP on Date A in Year 2. USS1 prepares documentation sufficient to meet the requirements of paragraphs (c)(2)(i) and (ii) of this section on or before September 15 of Year 2. USS1, FP and USS2 also contemporaneously document the timely payment of interest by USS1 on EGI A and EGI B sufficient to meet the requirements of paragraph (c)(2)(iv) of this section. USS1 prepares documentation on Date C in Year 2, which is prior to September 15, to satisfy the requirements of paragraph (c)(2)(iii)(B) of this section (the credit analysis). The credit analysis concludes that as of Date B in Year 1, USS1 would be able to pay interest and principal on an amount greater than the combined principal amounts of EGI A, EGI B and EGI C.

(ii) *Analysis.* (A) P, USS1, and USS2 are members of an expanded group. Because FP is traded on an established financial market within the meaning of § 1.1092(d)-1(b) and USS1 is a covered issuer, EGI A, EGI B, and EGI C are subject to the rules of this section.

(B) The documentation evidencing USS1's obligation to pay a sum certain and the creditor's rights of the holders was prepared by September 15, Year 2, which is the time for filing USS1's federal income tax return (taking into account any applicable extensions) for the taxable year that includes the relevant date specified in paragraph (c)(4)(ii)(A) of this section. Thus, USS1 is treated as having timely documented its obligation to pay a sum certain and the creditor's rights of the holders of EGI A and EGI B for purposes of paragraph (c)(4)(i) of this section.

(C) The credit analysis was prepared with a relevant date of Date B of Year 1. EGI A was issued prior to Date B in Year 1. Under paragraph (c)(4)(ii)(B) of this section, the date when USS1 became an issuer of EGI A (Date A of Year 1) is a relevant date for the

documentation and information described in paragraph (c)(2)(iii) of this section. As a result, EGI A does not satisfy the indebtedness factor in paragraph (c)(2)(iii) of this section (reasonable expectation of ability to repay EGI).

(D) Similarly, under paragraph (c)(4)(ii)(B) of this section, the date when USS1 became an issuer of EGI B (Date B of Year 1) is a relevant date for the documentation and information described in paragraph (c)(2)(iii) of this section. The credit analysis was timely prepared under paragraph (c)(4)(i) of this section because it was prepared before the filing of the USS1 federal income tax return for Year 1. As a result, EGI B does satisfy the indebtedness factor in paragraph (c)(2)(iii) of this section (reasonable expectation of ability to repay EGI).

(E) Finally, the date when USS1 became an issuer of EGI C (Date A of Year 2) is also a relevant date for the documentation and information described in paragraph (c)(2)(iii) of this section. Under paragraph (c)(2)(iii)(B) of this section, the credit analysis can be used to support the reasonable expectation that USS1 has the ability to repay multiple EGIs issued on any day within the 12-month period following the analysis date. Date A of Year 2 is within the 12-month period following the analysis date. The credit analysis was timely prepared under paragraph (c)(4)(i) of this section because it was prepared before the filing of the USS1 federal income tax return for Year 2. As a result, EGI C does satisfy the indebtedness factor in paragraph (c)(2)(iii) of this section (reasonable expectation of ability to repay EGI).

(i) *Applicability date.* This section applies to taxable years ending on or after January 19, 2017.

■ **Par. 4.** Section 1.385–3 is added to read as follows:

§ 1.385–3 Transactions in which debt proceeds are distributed or that have a similar effect.

(a) *Scope.* This section sets forth factors that control the determination of whether an interest is treated as stock or indebtedness. Specifically, this section addresses the issuance of a covered debt instrument to a related person as part of a transaction or series of transactions that does not result in new investment in the operations of the issuer. Paragraph (b) of this section sets forth rules for determining when these factors are present, such that a covered debt instrument is treated as stock under this section. Paragraph (c) of this section provides exceptions to the application of paragraph (b) of this section. Paragraph (d) of this section provides operating rules. Paragraph (e) of this section reserves on the affirmative use of this section. Paragraph (f) of this section provides rules for the aggregate treatment of controlled partnerships. Paragraph (g) of this section provides definitions. Paragraph (h) of this section provides examples illustrating the application of the rules of this section. Paragraph (j) of this section provides dates of applicability. For rules regarding the application of this section to members of a consolidated group, see generally § 1.385–4T.

(b) *Covered debt instrument treated as stock*—(1) *Effect of characterization as stock.* Except as otherwise provided in paragraph (d)(7) of this section, to the extent a covered debt instrument is treated as stock under paragraphs (b)(2), (3), or (4) of this section, it is treated as stock for all federal tax purposes.

(2) *General rule.* Except as otherwise provided in paragraphs (c) and (e) of this section, a covered debt instrument is treated as stock to the extent the covered debt instrument is issued by a covered member to a member of the covered member's expanded group in one or more of the following transactions:

(i) In a distribution;

(ii) In exchange for expanded group stock, other than in an exempt exchange; or

(iii) In exchange for property in an asset reorganization, but only to the extent that, pursuant to the plan of reorganization, a shareholder in the transferor corporation that is a member of the issuer's expanded group immediately before the reorganization receives the covered debt instrument with respect to its stock in the transferor corporation.

(3) *Funding rule*—(i) *In general.* Except as otherwise provided in paragraphs (c) and (e) of this section, a covered debt instrument that is not a qualified short-term debt instrument (as defined in paragraph (b)(3)(vii) of this section) is treated as stock to the extent that it is both issued by a covered member to a member of the covered member's expanded group in exchange for property and, pursuant to paragraph (b)(3)(iii) or (b)(3)(iv) of this section, treated as funding a distribution or acquisition described in one or more of paragraphs (b)(3)(i)(A) through (C) of this section. A covered member that makes a distribution or acquisition described in paragraphs (b)(3)(i)(A) through (C) is referred to as a ''funded member,'' regardless of when it issues a covered debt instrument in exchange for property.

(A) A distribution of property by the funded member to a member of the funded member's expanded group, other than in an exempt distribution;

(B) An acquisition of expanded group stock, other than an exempt exchange, by the funded member from a member of the funded member's expanded group in exchange for property other than expanded group stock; or

(C) An acquisition of property by the funded member in an asset reorganization but only to the extent that, pursuant to the plan of reorganization, a shareholder in the transferor corporation that is a member of the funded member's expanded group immediately before the reorganization receives other property or money within the meaning of section 356 with respect to its stock in the transferor corporation.

(ii) *Transactions described in more than one paragraph.* For purposes of this section, to the extent that a distribution or acquisition by a funded member is described in more than one of paragraphs (b)(3)(i)(A) through (C) of this section, the funded member is treated as making only a single distribution or acquisition described in paragraph (b)(3)(i) of this section. In the case of an asset reorganization, to the extent an acquisition by the transferee corporation is described in paragraph (b)(3)(i)(C) of this section, a distribution or acquisition by the transferor corporation is not also described in paragraph (b)(3)(i)(A) through (C) of this section. For purposes of this paragraph (b)(3)(ii), whether a distribution or acquisition is described in paragraphs (b)(3)(i)(A) through (C) of this section is determined without regard to paragraph (c) of this section.

(iii) *Per se funding rule*—(A) *In general.* A covered debt instrument is treated as funding a distribution or acquisition described in paragraphs (b)(3)(i)(A) through (C) of this section if the covered debt instrument is issued by a funded member during the period beginning 36 months before the date of the distribution or acquisition, and ending 36 months after the date of the distribution or acquisition (*per se period*).

(B) *Multiple interests.* If, pursuant to paragraph (b)(3)(iii)(A) of this section, two or more covered debt instruments may be treated as stock by reason of this paragraph (b)(3), the covered debt instruments are tested under paragraph (b)(3)(iii)(A) of this section based on the order in which they are issued, with the earliest issued covered debt instrument tested first. See paragraph (h)(3) of this section, *Example 6,* for an illustration of this rule.

(C) *Multiple distributions or acquisitions.* If, pursuant to paragraph (b)(3)(iii)(A) of this section, a covered debt instrument may be treated as funding more than one distribution or acquisition described in paragraphs (b)(3)(i)(A) through (C) of this section, the covered debt instrument is treated as funding one or more distributions or

acquisitions based on the order in which the distributions or acquisitions occur, with the earliest distribution or acquisition treated as the first distribution or acquisition that is funded. See paragraph (h)(3) of this section, *Example 9,* for an illustration of this rule.

(D) *Transactions that straddle different expanded groups*—(*1*) *In general.* For purposes of paragraph (b)(3)(iii)(A) of this section, a covered debt instrument is not treated as issued by a funded member during the per se period with respect to a distribution or acquisition described in paragraphs (b)(3)(i)(A) through (C) of this section if all of the conditions described in paragraphs (b)(3)(iii)(D)(*1*)(*i*) through (*iii*) of this section are satisfied.

(*i*) The distribution or acquisition occurs prior to the issuance of the covered debt instrument by the funded member or, if the funded member is treated as making the distribution or acquisition of a predecessor or a successor, the predecessor or successor is not a member of the expanded group of which the funded member is a member on the date on which the distribution or the acquisition occurs.

(*ii*) The distribution or acquisition is made by the funded member when the funded member is a member of an expanded group that does not have an expanded group parent that is the funded member's expanded group parent when the covered debt instrument is issued. For purposes of the preceding sentence, a reference to an expanded group parent includes a reference to a predecessor or successor of the expanded group parent.

(*iii*) On the date of the issuance of the covered debt instrument, the recipient member (as defined in paragraph (b)(3)(iii)(D)(*2*) of this section) is neither a member nor a controlled partnership of an expanded group of which the funded member is a member.

(*2*) *Recipient member.* For purposes of this paragraph (b)(3)(iii)(D), the term *recipient member* means, with respect to a distribution or acquisition by a funded member described in paragraphs (b)(3)(i)(A) through (C) of this section, the expanded group member that receives a distribution of property, property in exchange for expanded group stock, or other property or money within the meaning of section 356 with respect to its stock in the transferor corporation. For purposes of this paragraph (b)(3)(iii)(D), a reference to the recipient member includes a predecessor or successor of the recipient member or one or more other entities that, in the aggregate, acquire substantially all of the property of the recipient member.

(E) *Modifications of a covered debt instrument*—(*1*) *In general.* For purposes of paragraph (b)(3)(iii)(A) of this section, if a covered debt instrument is treated as exchanged for a modified covered debt instrument pursuant to § 1.1001–3(b), the modified covered debt instrument is treated as issued on the original issue date of the covered debt instrument.

(*2*) *Effect of certain modifications.* Notwithstanding paragraph (b)(3)(iii)(E)(*1*) of this section, if a covered debt instrument is treated as exchanged for a modified covered debt instrument pursuant to § 1.1001–3(b) and the modification, or one of the modifications, that results in the deemed exchange includes the substitution of an obligor on the covered debt instrument, the addition or deletion of a co-obligor on the covered debt instrument, or the material deferral of scheduled payments due under the covered debt instrument, then the covered debt instrument is treated as issued on the date of the deemed exchange for purposes of paragraph (b)(3)(iii)(A) of this section.

(*3*) *Additional principal amount.* For purposes of paragraph (b)(3)(iii)(A) of this section, if the principal amount of a covered debt instrument is increased, the portion of the covered debt instrument attributable to such increase is treated as issued on the date of such increase.

(iv) *Principal purpose rule.* For purposes of this paragraph (b)(3), a covered debt instrument that is not issued by a funded member during the per se period with respect to a distribution or acquisition described in paragraphs (b)(3)(i)(A) through (C) of this section is treated as funding the distribution or acquisition to the extent that it is issued by a funded member with a principal purpose of funding a distribution or acquisition described in paragraphs (b)(3)(i)(A) through (C) of this section. Whether a covered debt instrument is issued with a principal purpose of funding a distribution or acquisition described in paragraphs (b)(3)(i)(A) through (C) of this section is determined based on all the facts and circumstances. A covered debt instrument may be treated as issued with a principal purpose of funding a distribution or acquisition described in paragraphs (b)(3)(i)(A) through (C) of this section regardless of whether it is issued before or after the distribution or acquisition.

(v) *Predecessors and successors*—(A) *In general.* Subject to the limitations in paragraph (b)(3)(v)(B) of this section, for purposes of this paragraph (b)(3), references to a funded member include references to any predecessor or successor of such member. See paragraph (h)(3) of this section, *Examples 9* and *10,* for illustrations of this rule.

(B) *Limitations to the application of the per se funding rule.* For purposes of paragraph (b)(3)(iii)(A) of this section, a covered debt instrument issued by a funded member that satisfies the condition described in paragraph (b)(3)(iii)(A) with respect to a distribution or acquisition described in paragraphs (b)(3)(i)(A) through (C) of this section made by a predecessor or successor of the funded member is not treated as issued during the per se period with respect to the distribution or acquisition unless the conditions described in paragraphs (b)(3)(v)(B)(*1*) and (*2*) of this section are satisfied:

(*1*) The covered debt instrument is issued by the funded member during the period beginning 36 months before the date of the transaction in which the predecessor or successor becomes a predecessor or successor and ending 36 months after the date of the transaction.

(*2*) The distribution or acquisition is made by the predecessor or successor during the period beginning 36 months before the date of the transaction in which the predecessor or successor becomes a predecessor or successor of the funded member and ending 36 months after the date of the transaction.

(vi) *Treatment of funded transactions.* When a covered debt instrument is treated as stock pursuant to paragraph (b)(3) of this section, the distribution or acquisition described in paragraphs (b)(3)(i)(A) through (C) of this section that is treated as funded by such covered debt instrument is not recharacterized as a result of the treatment of the covered debt instrument as stock.

(vii) *Qualified short-term debt instrument.* [Reserved]. For further guidance, see § 1.385–3T(b)(3)(vii).

(viii) *Distributions or acquisitions occurring before April 5, 2016.* A distribution or acquisition that occurs before April 5, 2016, is not taken into account for purposes of applying this paragraph (b)(3).

(4) *Anti-abuse rule.* If a member of an expanded group enters into a transaction with a principal purpose of avoiding the purposes of this section or § 1.385–3T, an interest issued or held by that member or another member of the member's expanded group may, depending on the relevant facts and circumstances, be treated as stock. Paragraphs (b)(4)(i) and (ii) of this section include a non-exhaustive list of

transactions that could result in an interest being treated as stock under this paragraph (b)(4).

(i) *Interests.* An interest is treated as stock if it is issued with a principal purpose of avoiding the purposes of this section or § 1.385–3T. Interests subject to this paragraph (b)(4)(i) may include:

(A) An interest that is not a covered debt instrument for purposes of this section (for example, a contract to which section 483 applies that is not otherwise a covered debt instrument or a non-periodic swap payment that is not otherwise a covered debt instrument).

(B) A covered debt instrument issued to a person that is not a member of the issuer's expanded group, if the covered debt instrument is later acquired by a member of the issuer's expanded group or such person later becomes a member of the issuer's expanded group.

(C) A covered debt instrument issued to an entity that is not taxable as a corporation for federal tax purposes.

(D) A covered debt instrument issued in connection with a reorganization or similar transaction.

(E) A covered debt instrument issued as part of a plan or a series of transactions to expand the applicability of the transition rules described in § 1.385–3(j)(2) or § 1.385–3T(k)(2).

(ii) *Other transactions.* A covered debt instrument is treated as stock if the funded member or any member of the expanded group engages in a transaction (including a distribution or acquisition) with a principal purpose of avoiding the purposes of this section or § 1.385–3T. Transactions subject to this paragraph (b)(4)(ii) may include:

(A) A member of the issuer's expanded group is substituted as a new obligor or added as a co-obligor on an existing covered debt instrument.

(B) A covered debt instrument is transferred in connection with a reorganization or similar transaction.

(C) A covered debt instrument funds a distribution or acquisition where the distribution or acquisition is made by a member other than the funded member and the funded member acquires the assets of the other member in a transaction that does not make the other member a predecessor to the funded member.

(D) Members of a consolidated group engage in transactions as part of a plan or a series of transactions through the use of the consolidated group rules set forth in § 1.385–4T, including through the use of the departing member rules.

(5) *Coordination between general rule and funding rule in an asset reorganization.* For purposes of this section, a distribution or acquisition described in paragraph (b)(2) of this section is not also described in paragraph (b)(3)(i) of this section. In the case of an asset reorganization, an acquisition described in paragraph (b)(2)(iii) of this section by the transferee corporation is not also a distribution or acquisition described in paragraph (b)(3)(i) of this section by the transferor corporation. For purposes of this paragraph (b)(5), whether a distribution or acquisition is described in paragraphs (b)(2)(i) through (iii) of this section is determined without regard to paragraph (c) of this section.

(6) *Non-duplication.* Except as otherwise provided in paragraph (d)(2) of this section, to the extent a distribution or acquisition described in paragraphs (b)(3)(i)(A) through (C) of this section is treated as funded by a covered debt instrument under paragraph (b)(3) of this section, the distribution or acquisition is not treated as funded by another covered debt instrument and the covered debt instrument is not treated as funding another distribution or acquisition for purposes of paragraph (b)(3).

(c) *Exceptions*—(1) *In general.* This paragraph (c) provides exceptions for purposes of applying paragraphs (b)(2) and (b)(3) of this section to a covered member. These exceptions are applied in the following order: First, paragraph (c)(2) of this section; second, paragraph (c)(3) of this section; and, third, paragraph (c)(4) of this section. The exceptions under § 1.385–3(c)(2) and (c)(3) apply to distributions and acquisitions that are otherwise described in paragraph (b)(2) or (b)(3)(i) of this section after applying paragraphs (b)(3)(ii) and (b)(5) of this section. Except as otherwise provided, the exceptions are applied by taking into account the aggregate treatment of controlled partnerships described in § 1.385–3T(f).

(2) *Exclusions for transactions otherwise described in paragraph (b)(2) or (b)(3)(i) of this section*—(i) *Exclusion for certain acquisitions of subsidiary stock*—(A) *In general.* An acquisition of expanded group stock (including by issuance) is not treated as described in paragraph (b)(2)(ii) or (b)(3)(i)(B) of this section if, immediately after the acquisition, the covered member that acquires the expanded group stock (acquirer) controls the member of the expanded group from which the expanded group stock is acquired (seller), and the acquirer does not relinquish control of the seller pursuant to a plan that existed on the date of the acquisition, other than in a transaction in which the seller ceases to be a member of the expanded group of which the acquirer is a member. For purposes of the preceding sentence, an acquirer and seller do not cease to be members of the same expanded group by reason of a complete liquidation described in section 331.

(B) *Control.* For purposes of this paragraph (c)(2)(i) and paragraph (c)(3)(ii)(E) of this section, control of a corporation means the direct or indirect ownership of more than 50 percent of the total combined voting power of all classes of stock of the corporation entitled to vote and more than 50 percent of the total value of the stock of the corporation. For purposes of the preceding sentence, indirect ownership is determined by applying the principles of section 958(a) without regard to whether an intermediate entity is foreign or domestic.

(C) *Rebuttable presumption.* For purposes of paragraph (c)(2)(i)(A) of this section, the acquirer is presumed to have a plan to relinquish control of the seller on the date of the acquisition if the acquirer relinquishes control of the seller within the 36-month period following the date of the acquisition. The presumption created by the previous sentence may be rebutted by facts and circumstances clearly establishing that the loss of control was not contemplated on the date of the acquisition and that the avoidance of the purposes of this section or § 1.385–3T was not a principal purpose for the subsequent loss of control.

(ii) *Exclusion for compensatory stock acquisitions.* An acquisition of expanded group stock is not treated as described in paragraph (b)(2)(ii) or (b)(3)(i)(B) of this section if the expanded group stock is delivered to individuals that are employees, directors, or independent contractors in consideration for services rendered by such individuals to a member of the expanded group or a controlled partnership in which a member of the expanded group is an expanded group partner.

(iii) *Exclusion for distributions or acquisitions resulting from transfer pricing adjustments.* A distribution or acquisition deemed to occur under § 1.482–1(g) (including adjustments made pursuant to Revenue Procedure 99–32, 1999–2 C.B. 296) is not treated as described in paragraph (b)(3)(i)(A) or (B) of this section.

(iv) *Exclusion for acquisitions of expanded group stock by a dealer in securities.* An acquisition of expanded group stock by a dealer in securities (within the meaning of section 475(c)(1)), or by an expanded group partner treated as acquiring expanded group stock pursuant to § 1.385–3T(f)(2) if the relevant controlled partnership is

a dealer in securities, is not treated as described in paragraph (b)(2)(ii) or (b)(3)(i)(B) of this section to the extent the expanded group stock is acquired in the ordinary course of the dealer's business of dealing in securities. The preceding sentence applies solely to the extent that—

(A) The dealer accounts for the stock as securities held primarily for sale to customers in the ordinary course of business;

(B) The dealer disposes of the stock within a period of time that is consistent with the holding of the stock for sale to customers in the ordinary course of business, taking into account the terms of the stock and the conditions and practices prevailing in the markets for similar stock during the period in which it is held; and

(C) The dealer does not sell or otherwise transfer the stock to a person in the same expanded group, other than in a sale to a dealer that in turn satisfies the requirements of paragraph (c)(2)(iv) of this section.

(v) *Exclusion for certain acquisitions of expanded group stock resulting from application of this section.* The following deemed acquisitions are not treated as acquisitions of expanded group stock described in paragraph (b)(3)(i)(B) of this section, provided that they are not part of a plan or arrangement to prevent the application of paragraph (b)(3)(i) to a covered debt instrument:

(A) An acquisition of a covered debt instrument that is treated as stock by means of paragraph (b)(3) of this section.

(B) An acquisition of stock of a regarded owner that is deemed to be issued under § 1.385–3T(d)(4).

(C) An acquisition of deemed partner stock pursuant to a deemed transfer or a specified event described in § 1.385–3T(f)(4) or (5).

(3) *Reductions for transactions described in paragraph (b)(2) or (b)(3)(i) of this section*—(i) *Reduction for expanded group earnings*—(A) *In general.* The aggregate amount of any distributions or acquisitions by a covered member described in paragraph (b)(2) or (b)(3)(i) of this section in a taxable year during the covered member's expanded group period is reduced by the covered member's expanded group earnings account (as defined in paragraph (c)(3)(i)(B) of this section) for the expanded group period as of the close of the taxable year. The reduction described in this paragraph (c)(3)(i)(A) applies to one or more distributions or acquisitions based on the order in which the distributions or acquisitions occur, regardless of whether any distribution or acquisition would be treated as funded by a covered debt instrument without regard to this paragraph (c)(3).

(B) *Expanded group earnings account.* The term *expanded group earnings account* means, with respect to a covered member and an expanded group period (as defined in paragraph (c)(3)(i)(E) of this section) of the covered member, the excess, if any, of the covered member's expanded group earnings (as defined in paragraph (c)(3)(i)(C) of this section) for the expanded group period over the covered member's expanded group reductions (as defined in paragraph (c)(3)(i)(D) of this section) for the expanded group period.

(C) *Expanded group earnings*—(*1*) *In general.* The term *expanded group earnings* means, with respect to a covered member and an expanded group period of the covered member, the earnings and profits accumulated by the covered member during the expanded group period, computed as of the close of the taxable year of the covered member, without regard to any distributions or acquisitions by the covered member described in paragraphs (b)(2) and (b)(3)(i) of this section. Notwithstanding the preceding sentence, the expanded group earnings of a covered member do not include earnings and profits accumulated by the covered member in any taxable year ending before April 5, 2016.

(*2*) *Special rule for change in expanded group within a taxable year.* For purposes of calculating a covered member's expanded group earnings for a taxable year that is not wholly included in an expanded group period, the covered member's expanded group earnings are ratably allocated among the portion of the taxable year included in the expanded group period and the portion of the taxable year not included in the expanded group period. For purposes of the preceding sentence, the expanded group period is determined by excluding the day on which the covered member becomes a member of an expanded group with the same expanded group parent and including the day on which the covered member ceases to be a member of an expanded group with the same expanded group parent.

(*3*) *Look-thru rule for dividends*—(*i*) *In general.* For purposes of paragraph (c)(3)(i)(C)(*1*) of this section, a dividend from a member of the same expanded group (*distributing member*) is not taken into account for purposes of calculating a covered member's expanded group earnings, except to the extent the dividend is attributable to earnings and profits accumulated by the distributing member in a taxable year ending after April 4, 2016, during its expanded group period (*qualified earnings and profits*). For purposes of the preceding sentence, a dividend received from a member (*intermediate distributing member*) is not taken into account for purposes of calculating the qualified earnings and profits of a distributing member (or another intermediate distributing member), except to the extent the dividend is attributable to qualified earnings and profits of the intermediate distributing member. A dividend from distributing member or an intermediate distributing member is considered to be attributable to qualified earnings and profits to the extent thereof. If a controlled partnership receives a dividend from a distributing member and a portion of the dividend is allocated (including through one or more partnerships) to a covered member, then, for purposes of this paragraph (c)(3)(i)(C)(*3*), the covered member is treated as receiving the dividend from the distributing member.

(*ii*) *Dividend.* For purposes of paragraph (c)(3)(i)(C)(*3*)(*i*) of this section, the term dividend has the meaning specified in section 316, including the portion of gain recognized under section 1248 that is treated as a dividend and deemed dividends under section 367(b) and the regulations thereunder. In addition, the term dividend includes inclusions with respect to stock (for example, inclusions under sections 951(a) and 1293).

(*4*) *Effect of interest deductions.* For purposes of calculating the expanded group earnings of a covered member for a taxable year, expanded group earnings are calculated without regard to the application of this section during the taxable year to a covered debt instrument issued by the covered member that was not treated as stock under paragraph (b) of this section as of the close of the preceding taxable year, or, if the covered member is an expanded group partner in a controlled partnership that is the issuer of a debt instrument, without regard to the application of § 1.385–3T(f)(4)(i) during the taxable year with respect to the covered member's share of the debt instrument. To the extent that the application of this paragraph (c)(3)(i)(C)(*4*) reduces the expanded group earnings of the covered member for the taxable year, the expanded group earnings of the covered member are increased as of the beginning of the succeeding taxable year during the expanded group period.

(D) *Expanded group reductions.* The term expanded group reductions means,

with respect to a covered member and an expanded group period of the covered member, the amounts by which acquisitions or distributions described in paragraph (b)(2) or (b)(3)(i) of this section were reduced by reason of paragraph (c)(3)(i)(A) of this section during the portion of the expanded group period preceding the taxable year.

(E) *Expanded group period*—(*1*) *In general.* For purposes of this paragraph (c)(3)(i) and paragraph (c)(3)(ii) of this section, the term expanded group period means, with respect to a covered member, the period during which a covered member is a member of an expanded group with the same expanded group parent.

(*2*) *Mere change.* For purposes of paragraph (c)(3)(i)(E)(*1*) of this section, an expanded group parent that is a resulting corporation (within the meaning of § 1.368–2(m)(1)) in a reorganization described in section 368(a)(1)(F) is treated as the same expanded group parent as an expanded group parent that is a transferor corporation (within the meaning of § 1.368–2(m)(1)) in the same reorganization, provided that either—

(*i*) The transferor corporation is not a covered member; or

(*ii*) Both the transferor corporation and the resulting corporation are covered members.

(F) *Special rules for certain corporate transactions*—(*1*) *Reduction for expanded group earnings in an asset reorganization.* For purposes of applying paragraph (c)(3)(i) of this section, a distribution or acquisition described in paragraph (b)(2) or (b)(3)(i) of this section that occurs pursuant to a reorganization described in section 381(a)(2) is reduced solely by the expanded group earnings account of the acquiring member after taking into account the adjustment to its expanded group earnings account provided in paragraph (c)(3)(i)(F)(*2*)(*ii*) of this section.

(*2*) *Effect of certain corporate transactions on the calculation of expanded group earnings account*—(*i*) *In general.* Section 381 and § 1.312–10 are not taken into account for purposes of calculating a covered member's expanded group earnings account for an expanded group period. The expanded group earnings account that a covered member succeeds to under paragraphs (c)(3)(i)(F)(*2*)(*ii*) through (*iv*) of this section is attributed to the covered member's expanded group period as of the close of the date of the distribution or transfer.

(*ii*) *Section 381 transactions.* If a covered member (*acquiring member*) acquires the assets of another covered member (*acquired member*) in a transaction described in section 381(a), and, immediately before the transaction, both corporations are members of the same expanded group, then the acquiring member succeeds to the expanded group earnings account of the acquired member, if any, determined after application of paragraph (c)(3)(i) of this section with respect to the final taxable year of the acquired member.

(*iii*) *Section 1.312–10(a) transactions.* If a covered member (*transferor member*) transfers property to another covered member (*transferee member*) in a transaction described in § 1.312–10(a), the expanded group earnings account of the transferor member is allocated between the transferor member and the transferee member in the same proportion as the earnings and profits of the transferor member are allocated between the transferor member and the transferee member under § 1.312–10(a).

(*iv*) *Section 1.312–10(b) transactions.* If a covered member (*distributing member*) distributes the stock of another covered member (*controlled member*) in a transaction described in § 1.312–10(b), the expanded group earnings account of the distributing member is decreased by the amount that the expanded group earnings account of the distributing member would have been decreased under paragraph (c)(3)(i)(F)(*2*)(*iii*) of this section if the distributing member had transferred the stock of the controlled member to a newly formed corporation in a transaction described in § 1.312–10(a). If the amount of the decrease described in the preceding sentence exceeds the expanded group earnings account of the controlled member immediately before the transaction described in § 1.312–10(b), then the expanded group earnings account of the controlled member after the transaction is equal to the amount of the decrease.

(G) *Overlapping expanded groups.* A covered member that is a member of two expanded groups at the same time has a single expanded group earnings account with respect to a single expanded group period. In this case, the expanded group period is determined by reference to the shorter of the two periods during which the covered member is a member of an expanded group with the same expanded group parent.

(ii) *Reduction for qualified contributions*—(A) *In general.* The amount of a distribution or acquisition by a covered member described in paragraph (b)(2) or (b)(3)(i) of this section is reduced by the aggregate fair market value of the stock issued by the covered member in one or more qualified contributions (as defined in paragraph (c)(3)(ii)(B) of this section) during the qualified period (as defined in paragraph (c)(3)(ii)(C) of this section), but only to the extent the qualified contribution or qualified contributions have not reduced another distribution or acquisition. The reduction described in this paragraph (c)(3)(ii)(A) applies to one or more distributions or acquisitions based on the order in which the distributions or acquisitions occur, regardless of whether any distribution or acquisition would be treated as funded by a covered debt instrument without regard to this paragraph (c)(3).

(B) *Qualified contribution.* The term *qualified contribution* means, with respect to a covered member, except as provided in paragraph (c)(3)(ii)(E) of this section, a contribution of property, other than excluded property (defined in paragraph (c)(3)(ii)(D) of this section), to the covered member by a member of the covered member's expanded group (or by a controlled partnership of the expanded group) in exchange for stock.

(C) *Qualified period.* The term *qualified period* means, with respect to a covered member, a qualified contribution, and a distribution or acquisition described in paragraph (b)(2) or (b)(3)(i) of this section, the period beginning on the later of the beginning of the periods described in paragraphs (c)(3)(ii)(C)(*1*) and (*2*) of this section, and ending on the earlier of the ending of the periods described in paragraphs (c)(3)(ii)(C)(*1*) and (*2*) of this section or the date described in paragraph (c)(3)(ii)(C)(*3*) of this section.

(*1*) The period beginning 36 months before the date of the distribution or acquisition, and ending 36 months after the date of the distribution or acquisition.

(*2*) The covered member's expanded group period (as defined in paragraph (c)(3)(i)(E) of this section) that includes the distribution or acquisition.

(*3*) The last day of the first taxable year that a covered debt instrument issued by the covered member would, absent the application of this paragraph (c)(3)(ii) with respect to the distribution or acquisition, be treated, in whole or in part, as stock under paragraph (b) of this section or, in the case of a covered debt instrument issued by a controlled partnership in which the covered member is an expanded group partner, the covered debt instrument would be treated, in whole or in part, as a specified portion.

(D) *Excluded property.* The term *excluded property* means—

(*1*) Expanded group stock;

(*2*) Property acquired by the covered member in an asset reorganization from

a member of the expanded group of which the covered member is a member;

(*3*) A covered debt instrument of any member of the same expanded group, including a covered debt instrument issued by the covered member;

(*4*) Property acquired by the covered member in exchange for a covered debt instrument issued by the covered member that is recharacterized under paragraph (b)(3) of this section;

(*5*) A debt instrument issued by a controlled partnership of the expanded group of which the covered member is a member, including the portion of such a debt instrument that is a deemed transferred receivable or a retained receivable; and

(*6*) Any other property acquired by the covered member with a principal purpose to avoid the purposes of this section or § 1.385–3T, including a transaction involving an indirect transfer of property described in paragraphs (c)(3)(ii)(D)(*1*) through (*5*) of this section.

(E) *Excluded contributions*—(*1*) *Upstream contributions from certain subsidiaries.* For purposes of paragraph (c)(3)(ii)(B) of this section, a contribution of property from a corporation (*controlled member*) that the covered member controls, within the meaning of paragraph (c)(2)(i)(B) of this section, is not a qualified contribution.

(*2*) *Contributions to a predecessor or successor.* For purposes of paragraph (c)(3)(ii)(B) of this section, a contribution of property to a covered member from a corporation of which the covered member is a predecessor or successor, or from a corporation controlled by that corporation within the meaning of paragraph (c)(2)(i)(B) of this section, is not a qualified contribution.

(*3*) *Contributions that do not increase fair market value.* A contribution of property to a covered member that is not described in paragraph (c)(3)(ii)(E)(*1*) or (*2*) of this section is not a qualified contribution to the extent that the contribution does not increase the aggregate fair market value of the outstanding stock of the covered member immediately after the transaction and taking into account all related transactions, other than distributions and acquisitions described in paragraphs (b)(2) and (b)(3)(i) of this section.

(*4*) *Contributions that become excluded contributions after the date of the contribution.* If a contribution of property described in paragraph (c)(3)(ii)(E)(*1*) or (*2*) of this section occurs before the covered member acquires control of the controlled member described in paragraph (c)(3)(ii)(E)(*1*) or before the transaction in which the corporation described in paragraph (c)(3)(ii)(E)(*2*) becomes a predecessor or successor to the covered member, the contribution of property ceases to be a qualified contribution on the date that the covered member acquires control of the controlled member or on the date of the transaction in which the corporation becomes a predecessor or successor to the covered member (*transaction date*). If the contribution of property occurs within 36 months before the transaction date, the covered member is treated as making a distribution described in paragraph (b)(3)(i)(A) of this section on the transaction date equal to the amount by which any distribution or acquisition described in paragraph (b)(2) or (b)(3)(i) of this section was reduced under paragraph (c)(3)(ii)(A) of this section because the contribution of property was treated as a qualified contribution.

(F) *Special rules for certain corporate transactions*—(*1*) *Reduction for qualified contributions in an asset reorganization.* For purposes of applying paragraph (c)(3)(ii)(A) of this section, a distribution or acquisition described in paragraph (b)(2) or (b)(3)(i) of this section that occurs pursuant to a reorganization described in section 381(a)(2) is reduced solely by the qualified contributions of the acquiring member after taking into account the adjustment to its qualified contributions provided in paragraph (c)(3)(ii)(F)(*2*) of this section.

(*2*) *Effect of certain corporate transactions on the calculation of qualified contributions*—(*i*) *In general.* This paragraph (c)(3)(ii)(F)(*2*) provides rules for allocating or reducing the qualified contributions of a covered member as a result of certain corporation transactions. For purposes of paragraph (c)(3)(ii)(C)(*1*) of this section, a qualified contribution that a covered member succeeds to under paragraphs (c)(3)(ii)(F)(*2*)(*ii*) and (*iii*) of this section is treated as made to the covered member on the date on which the qualified contribution was made to the covered member that received the qualified contribution. For purposes of paragraph (c)(3)(ii)(C)(*2*) of this section, a qualified contribution that a covered member succeeds to under paragraphs (c)(3)(ii)(F)(*2*)(*ii*) and (*iii*) of this section is attributed to the covered member's expanded group period as of the close of the date of the distribution or transfer. For purposes of paragraph (c)(3)(ii)(C)(*3*) of this section, a qualified contribution a covered member succeeds to under paragraphs (c)(3)(ii)(F)(*2*)(*ii*) and (*iii*) of this section is treated as made to the covered member as of the close of the date of the distribution or transfer.

(*ii*) *Section 381 transactions.* If a covered member (acquiring member) acquires the assets of another covered member (acquired member) in a transaction described in section 381(a), and, immediately before the transaction, both corporations are members of the same expanded group, the acquiring member succeeds to the qualified contributions of the acquired member, if any, adjusted for the application of paragraph (c)(3)(ii)(E)(*4*) of this section.

(*iii*) *Section 1.312–10(a) transactions.* If a covered member (transferor member) transfers property to another covered member (transferee member) in a transaction described in § 1.312–10(a), each qualified contribution of the transferor member is allocated between the transferor member and the transferee member in the same proportion as the earnings and profits of the transferor member are allocated between the transferor member and the transferee member under § 1.312–10(a).

(*iv*) *Section 1.312–10(b) transactions.* If a covered member (distributing member) distributes the stock of another covered member (controlled member) in a transaction described in § 1.312–10(b), each qualified contribution of the distributing member is decreased by the amount that each qualified contribution of the distributing member would have been decreased under paragraph (c)(3)(ii)(F)(*2*)(*iii*) of this section if the distributing member had transferred the stock of the controlled member to a newly formed corporation in a transaction described in § 1.312–10(a). No amount of the qualified contributions of the distributing member is allocated to the controlled member.

(iii) *Predecessors and successors.* For purposes of this paragraph (c)(3), references to a covered member do not include references to any corporation of which the covered member is a predecessor or successor. Accordingly, a distribution or acquisition by a covered member described in paragraphs (b)(3)(i)(A) through (C) is reduced solely by the expanded group earnings account of the covered member (taking into account the application of paragraph (c)(3)(i)(F)(*2*) of this section) and the qualified contributions of the covered member (taking into account the application of paragraph (c)(3)(ii)(F)(*2*) of this section), notwithstanding that the distribution or acquisition is treated as made by a funded member of which the covered member is a predecessor or successor.

(iv) *Ordering rule.* The exceptions described in this paragraph (c)(3) are

applied in the following order: First, paragraph (c)(3)(i) of this section; and, second, paragraph (c)(3)(ii) of this section.

(4) *Threshold exception.* A covered debt instrument is not treated as stock under this section if, immediately after the covered debt instrument would be treated as stock under this section but for the application of this paragraph (c)(4), the aggregate adjusted issue price of covered debt instruments held by members of the issuer's expanded group that would be treated as stock under this section but for the application of this paragraph (c)(4) does not exceed $50 million. To the extent a debt instrument issued by a controlled partnership would be treated as a specified portion (as defined in paragraph (g)(23) of this section) but for the application of this paragraph (c)(4), the debt instrument is treated as a covered debt instrument described in the preceding sentence for purposes of this paragraph (c)(4). To the extent that, immediately after a covered debt instrument would be treated as stock under this section but for the application of this paragraph (c)(4), the aggregate adjusted issue price of covered debt instruments held by members of the issuer's expanded group that would be treated as stock under this section but for the application of this paragraph (c)(4) exceeds $50 million, only the amount of the covered debt instrument in excess of $50 million is treated as stock under this section. For purposes of this rule, any covered debt instrument that is not denominated in U.S. dollars is translated into U.S. dollars at the spot rate (as defined in § 1.988–1(d)) on the date that the covered debt instrument is issued.

(d) *Operating rules*—(1) *Timing.* This paragraph (d)(1) provides rules for determining when a covered debt instrument is treated as stock under paragraph (b) of this section. For special rules regarding the treatment of a deemed exchange of a covered debt instrument that occurs pursuant to paragraphs (d)(1)(ii), (d)(1)(iii), or (d)(1)(iv) of this section, see § 1.385–1(d).

(i) *General timing rule.* Except as otherwise provided in this paragraph (d)(1), when paragraph (b) of this section applies to treat a covered debt instrument as stock, the covered debt instrument is treated as stock when the covered debt instrument is issued. When paragraph (b)(3) of this section applies to treat a covered debt instrument as stock when the covered debt instrument is issued, see also paragraph (b)(3)(vi) of this section.

(ii) *Exception when a covered debt instrument is treated as funding a distribution or acquisition that occurs after the issuance of the covered debt instrument.* When paragraph (b)(3)(iii) of this section applies to treat a covered debt instrument as funding a distribution or acquisition described in paragraph (b)(3)(i)(A) through (C) of this section that occurs after the covered debt instrument is issued, the covered debt instrument is deemed to be exchanged for stock on the date that the distribution or acquisition occurs. See paragraph (h)(3) of this section, *Examples 4* and *9,* for an illustration of this rule.

(iii) *Exception for certain predecessor and successor transactions.* To the extent that a covered debt instrument would not be treated as stock but for the fact that a funded member is treated as the predecessor or successor of another expanded group member under paragraph (b)(3)(v) of this section, the covered debt instrument is deemed to be exchanged for stock on the later of the date that the funded member completes the transaction causing it to become a predecessor or successor of the other expanded group member or the date that the covered debt instrument would be treated as stock under paragraph (d)(1)(i) or (ii) of this section.

(iv) *Exception when a covered debt instrument is re-tested under paragraph (d)(2) of this section.* When paragraph (b)(3)(iii) of this section applies to treat a covered debt instrument as funding a distribution or acquisition described in paragraphs (b)(3)(i)(A) through (C) of this section as a result of a re-testing described in paragraph (d)(2)(ii) of this section that occurs in a taxable year subsequent to the taxable year in which the covered debt instrument is issued, the covered debt instrument is deemed to be exchanged for stock on the later of the date of the re-testing or the date that the covered debt instrument would be treated as stock under paragraph (d)(1)(i) or (ii) of this section. See paragraph (h)(3) of this section, *Example 7,* for an illustration of this rule.

(2) *Covered debt instrument treated as stock that leaves the expanded group*—(i) *Events that cause a covered debt instrument to cease to be treated as stock.* Subject to paragraph (b)(4) of this section, this paragraph (d)(2)(i) applies with respect to a covered debt instrument that is treated as stock under this section when the holder and issuer of a covered debt instrument cease to be members of the same expanded group, either because the covered debt instrument is transferred to a person that is not a member of the expanded group that includes the issuer or because the holder or the issuer ceases to be a member of the same expanded group, or in the case of a holder that is a controlled partnership, when the holder ceases to be a controlled partnership with respect to the expanded group of which the issuer is a member, either because the partnership ceases to be a controlled partnership or because the issuer ceases to be a member of the same expanded group with respect to which the holder is a controlled partnership. In such a case, the covered debt instrument ceases to be treated as stock under this section. For this purpose, immediately before the transaction that causes the holder and issuer of the covered debt instrument to cease to be members of the same expanded group, or, if the holder is a controlled partnership, that causes the holder to cease to be a controlled partnership with respect to the expanded group of which the issuer is a member, the issuer is deemed to issue a new covered debt instrument to the holder in exchange for the covered debt instrument that was treated as stock in a transaction that is disregarded for purposes of paragraphs (b)(2) and (b)(3) of this section.

(ii) *Re-testing of covered debt instruments and certain distributions and acquisitions*—(A) *General rule.* For purposes of paragraph (b)(3)(iii) of this section, when paragraph (d)(2)(i) of this section or § 1.385–4T(c)(2) causes a covered debt instrument that previously was treated as stock pursuant to paragraph (b)(3) of this section to cease to be treated as stock, all other covered debt instruments of the issuer that are not treated as stock on the date that the transaction occurs that causes paragraph (d)(2)(i) of this section to apply are re-tested to determine whether those other covered debt instruments are treated as funding the distribution or acquisition that previously was treated as funded by the covered debt instrument that ceases to be treated as stock pursuant to paragraph (d)(2)(i) of this section. In addition, a covered debt instrument that is issued after an application of paragraph (d)(2)(i) of this section and within the per se period may also be treated as funding that distribution or acquisition. See paragraph (h)(3) of this section, *Example 7,* for an illustration of this rule.

(B) *Re-testing upon a specified event with respect to a debt instrument issued by a controlled partnership.* If, with respect to a covered member that is an expanded group partner and a debt instrument issued by the controlled partnership, there is reduction in the covered member's specified portion under § 1.385–3T(f)(5)(i) by reason of a specified event, the covered member

must re-test its debt instruments as described in paragraph (d)(2)(ii)(A) of this section.

(3) *Inapplicability of section 385(c)(1).* Section 385(c)(1) does not apply with respect to a covered debt instrument to the extent that it is treated as stock under this section.

(4) *Treatment of disregarded entities.* [Reserved]. For further guidance, see § 1.385–3T(d)(4).

(5) *Payments with respect to partially recharacterized covered debt instruments*—(i) *General rule.* Except as otherwise provided in paragraph (d)(5)(ii) of this section, a payment with respect to an instrument that is partially recharacterized as stock is treated as made pro rata to the portion treated as stock and to the portion treated as indebtedness.

(ii) *Special rule for payments not required pursuant to the terms of the instrument.* A payment with respect to an instrument that is partially recharacterized as stock and that is a payment that is not required to be made pursuant to the terms of the instrument (for example, a prepayment of principal) may be designated by the issuer and the holder as with respect to the portion treated as stock or to the portion treated as indebtedness, in whole or in part. In the absence of such designation, see paragraph (d)(5)(i) of this section.

(6) *Treatment of a general rule transaction to which an exception applies.* To the extent a covered member would, absent the application of paragraph (c)(2) or (c)(3) of this section, be treated as making a distribution or acquisition described in paragraph (b)(2) of this section, then, solely for purposes of applying paragraph (b)(3) of this section, the covered member is treated as issuing the covered debt instrument issued in the distribution or acquisition to a member of the covered member's expanded group in exchange for property.

(7) *Treatment for purposes of section 1504(a)*—(i) *Debt instruments treated as stock.* A covered debt instrument that is treated as stock under paragraph (b)(2), (3), or (4) of this section and that is not described in section 1504(a)(4) is not treated as stock for purposes of determining whether the issuer is a member of an affiliated group (within the meaning of section 1504(a)).

(ii) *Deemed partner stock and stock deemed issued by a regarded owner.* If deemed partner stock or stock that is deemed issued by a regarded owner under § 1.385–3T(d)(4) is not described in section 1504(a)(4), then that stock is not treated as stock for purposes of determining whether the issuer of the stock is a member of an affiliated group (within the meaning of section 1504(a)).

(e) *No affirmative use.* [Reserved]

(f) *Treatment of controlled partnerships.* [Reserved]. For further guidance, see § 1.385–3T(f).

(g) *Definitions.* The definitions in this paragraph (g) apply for purposes of this section and §§ 1.385–3T and 1.385–4T.

(1) *Asset reorganization.* The term asset reorganization means a reorganization described in section 368(a)(1)(A), (C), (D), (F), or (G).

(2) *Consolidated group.* The term consolidated group has the meaning specified in § 1.1502–1(h).

(3) *Covered debt instrument*—(i) *In general.* The term covered debt instrument means a debt instrument issued after April 4, 2016, that is not a qualified dealer debt instrument (as defined in paragraph (g)(3)(ii) of this section) or an excluded statutory or regulatory debt instrument (as defined in paragraph (g)(3)(iii) of this section), and that is issued by a covered member that is not an excepted regulated financial company (as defined in paragraph (g)(3)(iv) of this section) or a regulated insurance company (as defined in paragraph (g)(3)(v) of this section).

(ii) For purposes of this paragraph (g)(3), the term qualified dealer debt instrument means a debt instrument that is issued to or acquired by an expanded group member that is a dealer in securities (within the meaning of section 475(c)(1)) in the ordinary course of the dealer's business of dealing in securities. The preceding sentence applies solely to the extent that—

(A) The dealer accounts for the debt instruments as securities held primarily for sale to customers in the ordinary course of business;

(B) The dealer disposes of the debt instruments (or the debt instruments mature) within a period of time that is consistent with the holding of the debt instruments for sale to customers in the ordinary course of business, taking into account the terms of the debt instruments and the conditions and practices prevailing in the markets for similar debt instruments during the period in which it is held; and

(C) The dealer does not sell or otherwise transfer the debt instrument to a member of the dealer's expanded group unless that sale or transfer is to a dealer that satisfies the requirements of this paragraph (g)(3)(ii).

(iii) For purposes of this paragraph (g)(3), the term excluded statutory or regulatory debt instrument means a debt instrument that is described in any of the following paragraphs:

(A) Production payments treated as a loan under section 636(a) or (b).

(B) A ''regular interest'' in a real estate mortgage investment conduit described in section 860G(a)(1).

(C) A debt instrument that is deemed to arise under § 1.482–1(g)(3) (including adjustments made pursuant to Revenue Procedure 99–32, 1999–2 C.B. 296).

(D) A stripped bond or coupon described in section 1286, unless such instrument was issued with a principal purpose of avoiding the purposes of this section or § 1.385–3T.

(E) A lease treated as a loan under section 467.

(iv) For purposes of this paragraph (g)(3), the term excepted regulated financial company means a covered member that is a regulated financial company (as defined in paragraph (g)(3)(iv)(A) of this section) or a member of a regulated financial group (as defined in paragraph (g)(3)(iv)(B) of this section).

(A) *Regulated financial company.* For purposes of paragraph (g)(3)(iv), the term regulated financial company means—

(*1*) A bank holding company, as defined in 12 U.S.C. 1841;

(*2*) A covered savings and loan holding company, as defined in 12 CFR 217.2;

(*3*) A national bank;

(*4*) A bank that is a member of the Federal Reserve System and is incorporated by special law of any State, or organized under the general laws of any State, or of the United States, including a Morris Plan bank, or other incorporated banking institution engaged in a similar business;

(*5*) An insured depository institution, as defined in 12 U.S.C. 1813(c)(2);

(*6*) A nonbank financial company subject to a determination under 12 U.S.C. 5323(a)(1) or (b)(1);

(*7*) A U.S. intermediate holding company formed by a foreign banking organization in compliance with 12 CFR 252.153;

(*8*) An Edge Act corporation organized under section 25A of the Federal Reserve Act (12 U.S.C. 611–631);

(*9*) Corporations having an agreement or undertaking with the Board of Governors of the Federal Reserve System under section 25 of the Federal Reserve Act (12 U.S.C. 601–604a);

(*10*) A supervised securities holding company, as defined in 12 U.S.C. 1850a(a)(5);

(*11*) A broker or dealer that is registered with the Securities and Exchange Commission under 15 U.S.C. 78o(b);

(*12*) A futures commission merchant, as defined in 7 U.S.C. 1a(28);

(*13*) A swap dealer, as defined in 7 U.S.C. 1a(49);

(*14*) A security-based swap dealer, as defined in 15 U.S.C. 78c(a)(71);

(*15*) A Federal Home Loan Bank, as defined in 12 U.S.C. 1422(1)(A);

(*16*) A Farm Credit System Institution chartered and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*); or

(*17*) A small business investment company, as defined in 15 U.S.C. 662(3).

(B) *Regulated financial group*—(*1*) *General rule.* For purposes of paragraph (g)(3)(iv) of this section, except as otherwise provided in paragraph (g)(3)(iv)(B)(*2*) of this section, the term regulated financial group means any expanded group of which a covered member that is a regulated financial company within the meaning of paragraphs (g)(3)(iv)(A)(*1*) through (*10*) of this section would be the expanded group parent if no person owned, directly or indirectly (as defined in § 1.385–1(c)(4)(iii)), the regulated financial company.

(*2*) *Exception for certain non-financial entities.* A corporation is not a member of a regulated financial group if it is held by a regulated financial company pursuant to 12 U.S.C. 1843(k)(1)(B), 12 U.S.C. 1843(k)(4)(H), or 12 U.S.C. 1843(o).

(v) For purposes of this paragraph (g)(3), the term regulated insurance company means a covered member that is—

(A) Subject to tax under subchapter L of chapter 1 of the Internal Revenue Code;

(B) Domiciled or organized under the laws of one of the 50 states or the District of Columbia (for purposes of paragraph (g)(3)(v) of this section, each being a ''state'');

(C) Licensed, authorized, or regulated by one or more states to sell insurance, reinsurance, or annuity contracts to persons other than related persons (within the meaning of section 954(d)(3)) in such states, but in no case will a corporation satisfy the requirements of this paragraph (g)(3)(v)(C) if a principal purpose for obtaining such license, authorization, or regulation was to qualify the issuer as a regulated insurance company; and

(D) Engaged in regular issuances of (or subject to ongoing liability with respect to) insurance, reinsurance, or annuity contracts with persons that are not related persons (within the meaning of section 954(d)(3)).

(4) *Debt instrument.* The term debt instrument means an interest that would, but for the application of this section, be treated as a debt instrument as defined in section 1275(a) and § 1.1275–1(d), provided that the interest is not recharacterized as stock under § 1.385–2.

(5) *Deemed holder.* [Reserved]. For further guidance, see § 1.385–3T(g)(5).

(6) *Deemed partner stock.* [Reserved]. For further guidance, see § 1.385–3T(g)(6).

(7) *Deemed transfer.* [Reserved]. For further guidance, see § 1.385–3T(g)(7).

(8) *Deemed transferred receivable.* [Reserved]. For further guidance, see § 1.385–3T(g)(8).

(9) *Distribution.* The term distribution means any distribution made by a corporation with respect to its stock.

(10) *Exempt distribution.* The term exempt distribution means either—

(i) A distribution of stock that is permitted to be received without the recognition of gain or income under section 354(a)(1) or 355(a)(1), or, if section 356 applies, that is not treated as other property or money described in section 356; or

(ii) A distribution of property in a complete liquidation under section 336(a) or 337(a).

(11) *Exempt exchange.* The term exempt exchange means an acquisition of expanded group stock in which either—

(i) In a case in which the transferor and transferee of the expanded group stock are parties to an asset reorganization, either—

(A) Section 361(a) or (b) applies to the transferor of the expanded group stock and the stock is not transferred by issuance; or

(B) Section 1032 or § 1.1032–2 applies to the transferor of the expanded group stock and the stock is distributed by the transferee pursuant to the plan of reorganization;

(ii) The transferor of the expanded group stock is a shareholder that receives property in a complete liquidation to which section 331 or 332 applies; or

(iii) The transferor of the expanded group stock is an acquiring entity that is deemed to issue the stock in exchange for cash from an issuing corporation in a transaction described in § 1.1032–3(b).

(12) *Expanded group partner.* The term expanded group partner means, with respect to a controlled partnership of an expanded group, a member of the expanded group that is a partner (directly or indirectly through one or more partnerships).

(13) *Expanded group stock.* The term expanded group stock means, with respect to a member of an expanded group, stock of a member of the same expanded group.

(14) *Funded member.* The term funded member has the meaning provided in paragraph (b)(3)(i) of this section.

(15) *Holder-in-form.* [Reserved]. For further guidance, see § 1.385–3T(g)(15).

(16) *Issuance percentage.* [Reserved]. For further guidance, see § 1.385–3T(g)(16).

(17) *Liquidation value percentage.* [Reserved]. For further guidance, see § 1.385–3T(g)(17).

(18) *Member of a consolidated group.* The term member of a consolidated group means a corporation described in § 1.1502–1(b).

(19) *Per se period.* The term per se period has the meaning provided in paragraph (b)(3)(iii)(A) of this section.

(20) *Predecessor*—(i) *In general.* Except as otherwise provided in paragraph (g)(20)(ii) of this section, the term predecessor means, with respect to a corporation—

(A) The distributor or transferor corporation in a transaction described in section 381(a) in which the corporation is the acquiring corporation; or

(B) The distributing corporation in a distribution or exchange to which section 355 (or so much of section 356 that relates to section 355) applies in which the corporation is a controlled corporation.

(ii) *Predecessor ceasing to be a member of the same expanded group as corporation.* The term predecessor does not include the distributing corporation described in paragraph (g)(20)(i)(B) of this section from the date that the distributing corporation ceases to be a member of the expanded group of which the controlled corporation is a member.

(iii) *Multiple predecessors.* A corporation may have more than one predecessor, including by reason of a predecessor of the corporation having a predecessor or successor. Accordingly, references to a corporation also include references to a predecessor or successor of a predecessor of the corporation.

(21) *Property.* The term property has the meaning specified in section 317(a).

(22) *Retained receivable.* [Reserved]. For further guidance, see § 1.385–3T(g)(22).

(23) *Specified portion.* [Reserved]. For further guidance, see § 1.385–3T(g)(23).

(24) *Successor*—(i) *In general.* Except as otherwise provided in paragraph (g)(24)(iii) of this section, the term successor means, with respect to a corporation—

(A) The acquiring corporation in a transaction described in section 381(a) in which the corporation is the distributor or transferor corporation;

(B) A controlled corporation in a distribution or exchange to which section 355 (or so much of section 356 that relates to section 355) applies in

which the corporation is the distributing corporation; or

(C) Subject to the rules in paragraph (g)(24)(ii) of this section, a seller in an acquisition described in paragraph (c)(2)(i)(A) of this section in which the corporation is the acquirer.

(ii) *Special rules for certain acquisitions of subsidiary stock.* The following rules apply with respect to a successor described in paragraph (g)(24)(i)(C) of this section:

(A) The seller is a successor to the acquirer only to the extent of the value (adjusted as described in paragraph (g)(24)(ii)(C) of this section) of the expanded group stock acquired from the seller in exchange for property (other than expanded group stock) in the acquisition described in paragraph (c)(2)(i)(A) of this section.

(B) A distribution or acquisition by the seller to or from the acquirer is not taken into account for purposes of applying paragraph (b)(3) of this section to a covered debt instrument of the acquirer.

(C) To the extent that a covered debt instrument of the acquirer is treated as funding a distribution or acquisition by the seller described in paragraphs (b)(3)(i)(A) through (C) of this section, or would be treated but for the exceptions described in paragraphs (c)(3)(i) and (ii) of this section, the value of the expanded group stock described in paragraph (g)(24)(ii)(A) of this section is reduced by an amount equal to the distribution or acquisition for purposes of any further application of paragraph (g)(24)(ii)(A) of this section with respect to the acquirer and seller.

(iii) *Successor ceasing to be a member of the same expanded group as corporation.* The term successor does not include a controlled corporation described in paragraph (g)(24)(i)(B) of this section with respect to a distributing corporation or a seller described in paragraph (g)(24)(i)(C) of this section with respect to an acquirer from the date that the controlled corporation or the seller ceases to be a member of the expanded group of which the controlled corporation or acquirer, respectively, is a member.

(iv) *Multiple successors.* A corporation may have more than one successor, including by reason of a successor of the corporation having a predecessor or successor. Accordingly, references to a corporation also include references to a predecessor or successor of a successor of the corporation.

(25) *Taxable year.* The term taxable year refers to the taxable year of the issuer of the covered debt instrument.

(h) *Examples*—(1) *Assumed facts.* Except as otherwise stated, the following facts are assumed for purposes of the examples in paragraph (h)(3) of this section:

(i) FP is a foreign corporation that owns 100% of the stock of USS1, a covered member, 100% of the stock of USS2, a covered member, and 100% of the stock of FS, a foreign corporation;

(ii) USS1 owns 100% of the stock of DS, a covered member, and CFC, which is a controlled foreign corporation within the meaning of section 957;

(iii) At the beginning of Year 1, FP is the common parent of an expanded group comprised solely of FP, USS1, USS2, FS, DS, and CFC (the FP expanded group);

(iv) The FP expanded group has more than $50 million of covered debt instruments described in paragraph (c)(4) of this section at all times;

(v) No issuer of a covered debt instrument has a positive expanded group earnings account within the meaning of paragraph (c)(3)(i)(B) of this section or has received qualified contributions within the meaning of paragraph (c)(3)(ii) of this section;

(vi) All notes are covered debt instruments (as defined in paragraph (g)(3 of this section) and are not qualified short-term debt instruments (as defined in paragraph (b)(3)(vii) of this section);

(vii) Each entity has as its taxable year the calendar year;

(viii) PRS is a partnership for federal income tax purposes;

(ix) No corporation is a member of a consolidated group;

(x) No domestic corporation is a United States real property holding corporation within the meaning of section 897(c)(2);

(xi) Each note is issued with adequate stated interest (as defined in section 1274(c)(2)); and

(xii) Each transaction occurs after January 19, 2017.

(2) *No inference.* Except as otherwise provided in this section, it is assumed for purposes of the examples in paragraph (h)(3) of this section that the form of each transaction is respected for federal tax purposes. No inference is intended, however, as to whether any particular note would be respected as indebtedness or as to whether the form of any particular transaction described in an example in paragraph (h)(3) of this section would be respected for federal tax purposes.

(3) *Examples.* The following examples illustrate the rules of this section.

Example 1. Distribution of a covered debt instrument. (i) *Facts.* On Date A in Year 1, FS lends $100x to USS1 in exchange for USS1 Note A. On Date B in Year 2, USS1 issues USS1 Note B, which is has a value of $100x, to FP in a distribution.

(ii) *Analysis.* USS1 Note B is a covered debt instrument that is issued by USS1 to FP, a member of the expanded group of which USS1 is a member, in a distribution. Accordingly, USS1 Note B is treated as stock under paragraph (b)(2)(i) of this section. Under paragraph (d)(1)(i) of this section, USS1 Note B is treated as stock when it is issued by USS1 to FP on Date B in Year 2. Accordingly, USS1 is treated as distributing USS1 stock to its shareholder FP in a distribution that is subject to section 305. Under paragraph (b)(5) of this section, because the distribution of USS1 Note B is described in paragraph (b)(2)(i) of this section, the distribution of USS1 Note B is not treated as a distribution of property described in paragraph (b)(3)(i)(A) of this section. Accordingly, USS1 Note A is not treated as funding the distribution of USS1 Note B for purposes of paragraph (b)(3)(i)(A) of this section.

Example 2. Covered debt instrument issued for expanded group stock that is exchanged for stock in a corporation that is not a member of the same expanded group. (i) *Facts.* UST is a publicly traded domestic corporation. On Date A in Year 1, USS1 issues USS1 Note to FP in exchange for FP stock. Subsequently, on Date B of Year 1, USS1 transfers the FP stock to UST's shareholders, which are not members of the FP expanded group, in exchange for all of the stock of UST.

(ii) *Analysis.* (A) Because USS1 and FP are both members of the FP expanded group, USS1 Note is treated as stock when it is issued by USS1 to FP in exchange for FP stock on Date A in Year 1 under paragraphs (b)(2)(ii) and (d)(1)(i) of this section. This result applies even though, pursuant to the same plan, USS1 transfers the FP stock to persons that are not members of the FP expanded group. The exchange of USS1 Note for FP stock is not an exempt exchange within the meaning of paragraph (g)(11) of this section.

(B) Because USS1 Note is treated as stock for federal tax purposes when it is issued by USS1, pursuant to section § 1.367(b)-10(a)(3)(ii) (defining property for purposes of § 1.367(b)-10) there is no potential application of § 1.367(b)-10(a) to USS1's acquisition of the FP stock.

Example 3. Issuance of a note in exchange for expanded group stock. (i) *Facts.* On Date A in Year 1, USS1 issues USS1 Note to FP in exchange for 40% of the FS stock owned by FP.

(ii) *Analysis.* (A) Because USS1 and FP are both members of the FP expanded group, USS1 Note is treated as stock when it is issued by USS1 to FP in exchange for FS stock on Date A in Year 1 under paragraphs (b)(2)(ii) and (d)(1)(i) of this section. The exchange of USS1 Note for FS stock is not an exempt exchange within the meaning of paragraph (g)(11) of this section.

(B) Because USS1 Note is treated as stock for federal tax purposes when it is issued by USS1, USS1 Note is not treated as property for purposes of section 304(a) because it is not property within the meaning specified in section 317(a). Therefore, USS1's acquisition of FS stock from FP in exchange for USS1 Note is not an acquisition described in section 304(a)(1).

Example 4. Funding occurs in same taxable year as distribution. (i) *Facts.* On Date A in Year 1, FP lends $200x to DS in exchange for DS Note A. On Date B in Year 1, DS distributes $400x of cash to USS1 in a distribution.

(ii) *Analysis.* Under paragraph (b)(3)(iii)(A) of this section, DS Note A is treated as funding the distribution by DS to USS1 because DS Note A is issued to a member of the FP expanded group during the per se period with respect to DS's distribution to USS1. Accordingly, under paragraphs (b)(3)(i)(A) and (d)(1)(ii) of this section, DS Note A is treated as stock on Date B in Year 1.

Example 5. Additional funding. (i) *Facts.* The facts are the same as in *Example 4* of this paragraph (h)(3), except that, in addition, on Date C in Year 2, FP lends an additional $300x to DS in exchange for DS Note B.

(ii) *Analysis.* The analysis is the same as in *Example 4* of this paragraph (h)(3) with respect to DS Note A. DS Note B is also issued to a member of the FP expanded group during the per se period with respect to DS's distribution to USS1. Under paragraphs (b)(3)(iii)(A) and (b)(6) of this section, DS Note B is treated as funding only the remaining portion of DS's distribution to USS1, which is $200x. Accordingly, $200x of DS Note B is treated as stock under paragraph (b)(3)(i)(A) of this section. Under paragraph (d)(1)(i) of this section, $200x of DS Note B is treated as stock when it is issued by DS to FP on Date C in Year 2. The remaining $100x of DS Note B continues to be treated as indebtedness.

Example 6. Funding involving multiple interests. (i) *Facts.* On Date A in Year 1, FP lends $300x to USS1 in exchange for USS1 Note A. On Date B in Year 2, USS1 distributes $300x of cash to FP. On Date C in Year 3, FP lends another $300x to USS1 in exchange for USS1 Note B.

(ii) *Analysis.* (A) Under paragraph (b)(3)(iii)(B) of this section, USS1 Note A is tested under paragraph (b)(3) of this section before USS1 Note B is tested. USS1 Note A is issued during the per se period with respect to USS1's $300x distribution to FP and, therefore, is treated as funding the distribution under paragraph (b)(3)(iii)(A) of this section. Beginning on Date B in Year 2, USS1 Note A is treated as stock under paragraphs (b)(3)(i)(A) and (d)(1)(ii) of this section.

(B) Under paragraph (b)(3)(iii)(B) of this section, USS1 Note B is tested under paragraph (b)(3) of this section after USS1 Note A is tested. Because USS1 Note A is treated as funding the entire $300x distribution by USS1 to FP, USS1 Note B will continue to be treated as indebtedness. See paragraph (b)(6) of this section.

Example 7. Re-testing. (i) *Facts.* The facts are the same as in *Example 6* of this paragraph (h)(3), except that on Date D in Year 4, FP sells USS1 Note A to Bank.

(ii) *Analysis.* (A) Under paragraph (d)(2)(i) of this section, USS1 Note A ceases to be treated as stock when FP sells USS1 Note A to Bank on Date D in Year 4. Immediately before FP sells USS1 Note A to Bank, USS1 is deemed to issue a debt instrument to FP in exchange for USS1 Note A in a transaction that is disregarded for purposes of paragraphs (b)(2) and (b)(3) of this section.

(B) Under paragraph (d)(2)(ii) of this section, after USS1 Note A is deemed exchanged for a new debt instrument, USS1's other covered debt instruments that are not treated as stock as of Date D in Year 4 (USS1 Note B) are re-tested for purposes of paragraph (b)(3)(iii) of this section to determine whether the instruments are treated as funding the $300x distribution by USS1 to FP on Date B in Year 2. USS1 Note B was issued by USS1 to FP during the per se period. Accordingly, USS1 Note B is re-tested under paragraph (b)(3)(iii) of this section. Under paragraph (b)(3)(iii) of this section, USS1 Note B is treated as funding the distribution on Date C in Year 3 and, accordingly, is treated as stock under paragraph (b)(3)(i)(A) of this section. USS1 Note B is deemed to be exchanged for stock on Date D in Year 4, the re-testing date, under paragraph (d)(1)(iv) of this section. See § 1.385–1(d) for rules regarding the treatment of this deemed exchange.

Example 8. Distribution of expanded group stock and covered debt instrument in a reorganization that qualifies under section 355. (i) *Facts.* On Date A in Year 1, FP lends $200x to USS2 in exchange for USS2 Note. In a transaction that is treated as independent from the transaction on Date A in Year 1, on Date B in Year 2, USS2 transfers a portion of its assets to DS2, a newly formed domestic corporation, in exchange for all of the stock of DS2 and DS2 Note. Immediately afterwards, USS2 distributes all of the DS2 stock and the DS2 Note to FP with respect to FP's USS2 stock in a transaction that qualifies under section 355. USS2's transfer of a portion of its assets to DS2 qualifies as a reorganization described in section 368(a)(1)(D). The DS2 stock has a value of $150x and DS2 Note has a value of $50x. The DS2 stock is not non-qualified preferred stock as defined in section 351(g)(2). Absent the application of this section, DS2 Note would be treated by FP as other property within the meaning of section 356.

(ii) *Analysis.* (A) The contribution and distribution transaction is a reorganization described in section 368(a)(1)(D) involving a transfer of property by USS2 to DS2 in exchange for DS2 stock and DS2 Note. The transfer of property by USS2 to DS2 is a contribution of excluded property described in paragraph (c)(3)(ii)(D)(*2*) of this section and an excluded contribution described in paragraph (c)(3)(ii)(E)(*2*) of this section. Accordingly, USS2's contribution of property to DS2 is not a qualified contribution described in paragraph (c)(3)(ii)(B) of this section.

(B) DS2 Note is a covered debt instrument that is issued by DS2 to USS2, both members of the FP expanded group, in exchange for property of USS2 in an asset reorganization (as defined in paragraph (g)(1) of this section), and received by FP, another FP expanded group member immediately before the reorganization, as other property with respect to FP's USS2 stock. Accordingly, the transaction is described in paragraph (b)(2)(iii) of this section, and DS2 Note is treated as stock when it is issued by DS2 to USS2 on Date B in Year 2 pursuant to paragraphs (b)(2)(iii) and (d)(1)(i) of this section.

(C) Because the issuance of DS2 Note by DS2 in exchange for the property of USS2 in an asset reorganization is described in paragraph (b)(2)(iii) of this section, the distribution and acquisition of DS2 Note by USS2 is not treated as a distribution or acquisition described in paragraph (b)(3)(i) of this section. Accordingly, USS2 Note is not treated as funding the distribution of DS2 Note for purposes of paragraph (b)(3)(i) of this section.

(D) USS2's acquisition of DS2 stock is not an acquisition described in paragraph (b)(3)(i)(B) of this section because it is an exempt exchange (as defined in paragraph (g)(11) of this section). USS2's acquisition of DS2 stock is an exempt exchange because USS2 and DS2 are both parties to a reorganization that is an asset reorganization, section 1032 applies to DS2, the transferor of the expanded group stock, and the DS2 stock is distributed by USS2, the transferee of the expanded group stock, pursuant to the plan of reorganization.

(E) USS2's distribution of $150x of the DS2 stock is a distribution of stock that is permitted to be received by FP without recognition of gain under section 355(a)(1). Accordingly, USS2's distribution of the DS2 stock (other than the DS2 Note) to FP is an exempt distribution, and is not described in paragraph (b)(3)(i)(A) of this section.

(F) Because USS2 has not made a distribution or acquisition that is described in paragraph (b)(3)(i)(A), (B), or (C) of this section, USS2 Note is not treated as stock.

Example 9. Funding a distribution by a successor to funded member. (i) *Facts.* The facts are the same as in *Example 8* of this paragraph (h)(3), except that on Date C in Year 3, DS2 distributes $200x of cash to FP and, subsequently, on Date D in Year 3, USS2 distributes $100x of cash to FP.

(ii) *Analysis.* (A) USS2 is a predecessor of DS2 under paragraph (g)(20)(i)(B) of this section and DS2 is a successor to USS2 under paragraph (g)(24)(i)(B) of this section because USS2 is the distributing corporation and DS2 is the controlled corporation in a distribution to which section 355 applies. Accordingly, under paragraph (b)(3)(v) of this section, a distribution by DS2 is treated as a distribution by USS2. Under paragraphs (b)(3)(iii)(A) and (b)(3)(v)(B) of this section, USS2 Note is treated as funding the distribution by DS2 to FP because USS2 Note was issued during the per se period with respect to DS2's $200x cash distribution, and because both the issuance of USS2 Note and the distribution by DS2 occur during the per se period with respect to the section 355 distribution. Accordingly, under paragraphs (b)(3)(i)(A) and (d)(1)(ii) of this section, USS2 Note is treated as stock beginning on Date C in Year 3. See § 1.385–1(d) for rules regarding the treatment of this deemed exchange.

(B) Because the entire amount of USS2 Note is treated as funding DS2's $200x distribution to FP, under paragraph (b)(3)(iii)(C) of this section, USS2 Note is not treated as funding the subsequent distribution by USS2 on Date D in Year 3.

Example 10. Asset reorganization; section 354 qualified property. (i) *Facts.* On Date A

in Year 1, FS lends $100x to USS2 in exchange for USS2 Note. On Date B in Year 2, in a transaction that qualifies as a reorganization described in section 368(a)(1)(D), USS2 transfers all of its assets to USS1 in exchange for stock of USS1 and the assumption by USS1 of all of the liabilities of USS2, and USS2 distributes to FP, with respect to FP's USS2 stock, all of the USS1 stock that USS2 receives. FP does not recognize gain under section 354(a)(1).

(ii) *Analysis.* (A) USS1 is a successor to USS2 under paragraph (g)(24)(i)(A) of this section. For purposes of paragraph (b)(3) of this section, USS2 and, under paragraph (b)(3)(v)(A) of this section, its successor, USS1, are funded members with respect to USS2 Note. Although USS2, a funded member, distributes property (USS1 stock) to its shareholder, FP, pursuant to the reorganization, the distribution of USS1 stock is not described in paragraph (b)(3)(i)(A) of this section because the stock is distributed in an exempt distribution (as defined in paragraph (g)(10) of this section). In addition, neither USS1's acquisition of the assets of USS2 nor USS2's acquisition of USS1 stock is described in paragraph (b)(3)(i)(C) of this section because FP does not receive other property within the meaning of section 356 with respect to its stock in USS2.

(B) USS2's acquisition of USS1 stock is not an acquisition described in paragraph (b)(3)(i)(B) of this section because it is an exempt exchange (as defined in paragraph (g)(11) of this section). USS2's acquisition of USS1 stock is an exempt exchange because USS1 and USS2 are both parties to an asset reorganization, section 1032 applies to USS1, the transferor of the USS1 stock, and the USS1 stock is distributed by USS2, the transferee, pursuant to the plan of reorganization. Furthermore, USS2's acquisition of its own stock from FS is not an acquisition described in paragraph (b)(3)(i)(B) of this section because USS2 acquires its stock in exchange for USS1 stock.

(C) Because neither USS1 nor USS2 has made a distribution or acquisition described in paragraph (b)(3)(i)(A), (B), or (C) of this section, USS2 Note is not treated as stock under paragraph (b)(3)(iii)(A) of this section.

Example 11. Distribution of a covered debt instrument and issuance of a covered debt instrument with a principal purpose of avoiding the purposes of this section. (i) Facts. On Date A in Year 1, USS1 issues USS1 Note A, which has a value of $100x, to FP in a distribution. On Date B in Year 1, with a principal purpose of avoiding the purposes of this section, FP sells USS1 Note A to Bank for $100x of cash and lends $100x to USS1 in exchange for USS1 Note B.

(ii) *Analysis.* USS1 Note A is a covered debt instrument that is issued by USS1 to FP, a member of USS1's expanded group, in a distribution. Accordingly, under paragraphs (b)(2)(i) and (d)(1)(i) of this section, USS1 Note A is treated as stock when it is issued by USS1 to FP on Date A in Year 1. Accordingly, USS1 is treated as distributing USS1 stock to FP. Because the distribution of USS1 Note A is described in paragraph (b)(2)(i) of this section, the distribution of USS1 Note A is not described in paragraph (b)(3)(i)(A) of this section under paragraph (b)(5) of this section. Under paragraph (d)(2)(i) of this section, USS1 Note A ceases to be treated as stock when FP sells USS1 Note A to Bank on Date B in Year 1. Immediately before FP sells USS1 Note A to Bank, USS1 is deemed to issue a debt instrument to FP in exchange for USS1 Note A in a transaction that is disregarded for purposes of paragraphs (b)(2) and (b)(3)(i) of this section. USS1 Note B is not treated as stock under paragraph (b)(3)(i)(A) of this section because the funded member, USS1, has not made a distribution of property. However, because the transactions occurring on Date B of Year 1 were undertaken with a principal purpose of avoiding the purposes of this section, USS1 Note B is treated as stock on Date B of Year 1 under paragraph (b)(4) of this section.

Example 12. [Reserved]. For further guidance, see § 1.385–3T(h)(3), *Example 12.*

Example 13. [Reserved]. For further guidance, see § 1.385–3T(h)(3), *Example 13.*

Example 14. [Reserved]. For further guidance, see § 1.385–3T(h)(3), *Example 14.*

Example 15. [Reserved]. For further guidance, see § 1.385–3T(h)(3), *Example 15.*

Example 16. [Reserved]. For further guidance, see § 1.385–3T(h)(3), *Example 16.*

Example 17. [Reserved]. For further guidance, see § 1.385–3T(h)(3), *Example 17.*

Example 18. [Reserved]. For further guidance, see § 1.385–3T(h)(3), *Example 18.*

Example 19. [Reserved]. For further guidance, see § 1.385–3T(h)(3), *Example 19.*

(i) [Reserved]

(j) *Applicability date and transition rules*—(1) *In general.* This section applies to taxable years ending on or after January 19, 2017.

(2) *Transition rules*—(i) *Transition rule for covered debt instruments that would be treated as stock in taxable years ending before January 19, 2017.* If paragraphs (b) and (d)(1) of this section, taking into account §§ 1.385–1, 1.385–3T, and 1.385–4T, would have treated a covered debt instrument as stock in a taxable year ending before January 19, 2017 but for the application of paragraph (j)(1) of this section, to the extent that the covered debt instrument is held by a member of the expanded group of which the issuer is a member immediately after January 19, 2017, then the covered debt instrument is deemed to be exchanged for stock immediately after January 19, 2017.

(ii) *Transition rule for certain covered debt instruments treated as stock in taxable years ending on or after* January 19, 2017. If paragraphs (b) and (d)(1) of this section, taking into account §§ 1.385–1, 1.385–3T, and 1.385–4T, would treat a covered debt instrument as stock on or before January 19, 2017 but in a taxable year ending on or after January 19, 2017, that covered debt instrument is not treated as stock during the 90-day period after October 21, 2016. Instead, to the extent that the covered debt instrument is held by a member of the expanded group of which the issuer is a member immediately after January 19, 2017, the covered debt instrument is deemed to be exchanged for stock immediately after January 19, 2017.

(iii) *Transition funding rule.* When a covered debt instrument would be recharacterized as stock after April 4, 2016, and on or before January 19, 2017 (the *transition period*), but that covered debt instrument is not recharacterized as stock on such date due to the application of paragraph (j)(1), (j)(2)(i), or (j)(2)(ii) of this section, any payments made with respect to such covered debt instrument (other than stated interest), including pursuant to a refinancing, after the date that the covered debt instrument would have been recharacterized as stock and through the remaining portion of the transition period are treated as distributions for purposes of applying paragraph (b)(3) of this section for taxable years ending on or after January 19, 2017. In addition, to the extent that the holder and the issuer of the covered debt instrument cease to be members of the same expanded group during the transition period, the distribution or acquisition that would have caused the covered debt instrument to be treated as stock is available to be treated as funded by other covered debt instruments of the issuer for purposes of paragraph (b)(3) of this section (to the extent provided in paragraph (b)(3)(iii) of this section). The prior sentence is applied in a manner that is consistent with the rules set forth in paragraph (d)(2) of this section.

(iv) *Coordination between the general rule and funding rule.* When a covered debt instrument would be recharacterized as stock pursuant to paragraph (b)(2) of this section after April 4, 2016, and on or before January 19, 2017, but that covered debt instrument is not recharacterized as stock on such date due to the application of paragraph (j)(1), (j)(2)(i), or (j)(2)(ii) of this section, the issuance of such covered debt instrument is not treated as a distribution or acquisition described in § 1.385–3(b)(3)(i), but only to the extent that the covered debt instrument is held by a member of the expanded group of which the issuer is a member immediately after January 19, 2017.

(v) *Option to apply proposed regulations.* In lieu of applying §§ 1.385–1, 1.385–3, 1.385–3T, and 1.385–4T, taxpayers may apply the provisions matching §§ 1.385–1, 1.385–3, and 1.385–4 from the Internal Revenue Bulletin (IRB) 2016–17 (*https://www.irs.gov/pub/irs-irbs/irb16-17.pdf*) to all debt instruments issued by

a particular issuer (and members of its expanded group that are covered members) after April 4, 2016, and before October 13, 2016, solely for purposes of determining whether a debt instrument is treated as stock, provided that those sections are consistently applied.

■ **Par. 5.** Section 1.385–3T is added to read as follows:

§ 1.385–3T Certain distributions of debt instruments and similar transactions (temporary).

(a) [Reserved]. For further guidance, see § 1.385–3(a).

(b)(1) through (b)(2). [Reserved]. For further guidance, see § 1.385–3(b)(1) through (b)(2).

(b)(3)(i) through (vi). [Reserved]. For further guidance, see § 1.385–3(b)(3)(i) through (vi).

(vii) *Qualified short-term debt instrument.* The term *qualified short-term debt instrument* means a covered debt instrument that is described in paragraph (b)(3)(vii)(A), (b)(3)(vii)(B), (b)(3)(vii)(C), or (b)(3)(vii)(D) of this section.

(A) *Short-term funding arrangement.* A covered debt instrument is described in this paragraph (b)(3)(vii)(A) if the requirements of the specified current assets test described in paragraph (b)(3)(vii)(A)(*1*) of this section or the 270-day test described in paragraph (b)(3)(vii)(A)(*2*) of this section (the alternative tests) are satisfied, provided that an issuer may only claim the benefit of one of the alternative tests with respect to covered debt instruments issued by the issuer in the same taxable year.

(*1*) *Specified current assets test*—(*i*) *In general.* The requirements of this paragraph (b)(3)(vii)(A)(*1*) are satisfied with respect to a covered debt instrument if the requirement of paragraph (b)(3)(vii)(A)(*1*)(*ii*) of this section is satisfied, but only to the extent the requirement of paragraph (b)(3)(vii)(A)(*1*)(*iii*) of this section is satisfied.

(*ii*) *Maximum interest rate.* The rate of interest charged with respect to the covered debt instrument does not exceed an arm's length interest rate, as determined under section 482 and the regulations thereunder, that would be charged with respect to a comparable debt instrument of the issuer with a term that does not exceed the longer of 90 days and the issuer's normal operating cycle.

(*iii*) *Maximum outstanding balance.* The amount owed by the issuer under covered debt instruments issued to members of the issuer's expanded group that satisfy the requirements of paragraph (b)(3)(vii)(A)(*1*)(*ii*), (b)(3)(vii)(A)(*2*) (if the covered debt instrument was issued in a prior taxable year), (b)(3)(vii)(B), or (b)(3)(vii)(C) of this section immediately after the covered debt instrument is issued does not exceed the maximum of the amounts of specified current assets reasonably expected to be reflected, under applicable accounting principles, on the issuer's balance sheet as a result of transactions in the ordinary course of business during the subsequent 90-day period or the issuer's normal operating cycle, whichever is longer. For purposes of the preceding sentence, in the case of an issuer that is a qualified cash pool header, the amount owed by the issuer shall not take into account deposits described in paragraph (b)(3)(vii)(D) of this section. Additionally, the amount owned by any issuer shall be reduced by the amount of the issuer's deposits with a qualified cash pool header, but only to the extent of amounts borrowed from the same qualified cash pool header that satisfy the requirements of paragraph (b)(3)(vii)(A)(*2*) (if the covered debt instrument was issued in a prior taxable year) or (b)(3)(vii)(A)(*1*)(*ii*) of this section.

(*iv*) *Specified current assets.* For purposes of paragraph (b)(3)(vii)(A)(*1*)(*iii*) of this section, the term specified current assets means assets that are reasonably expected to be realized in cash or sold (including by being incorporated into inventory that is sold) during the normal operating cycle of the issuer, other than cash, cash equivalents, and assets that are reflected on the books and records of a qualified cash pool header.

(*v*) *Normal operating cycle.* For purposes of paragraph (b)(3)(vii)(A)(*1*) of this section, the term normal operating cycle means the issuer's normal operating cycle as determined under applicable accounting principles, except that if the issuer has no single clearly defined normal operating cycle, then the normal operating cycle is determined based on a reasonable analysis of the length of the operating cycles of the multiple businesses and their sizes relative to the overall size of the issuer.

(*vi*) *Applicable accounting principles.* For purposes of paragraph (b)(3)(vii)(A)(*1*) of this section, the term applicable accounting principles means the financial accounting principles generally accepted in the United States, or an international financial accounting standard, that is applicable to the issuer in preparing its financial statements, computed on a consistent basis.

(*2*) *270-day test*—(*i*) *In general.* A covered debt instrument is described in this paragraph (b)(3)(vii)(A)(*2*) if the requirements of paragraphs (b)(3)(vii)(A)(*2*)(*ii*) through (b)(3)(vii)(A)(*2*)(*iv*) of this section are satisfied.

(*ii*) *Maximum term and interest rate.* The covered debt instrument must have a term of 270 days or less or be an advance under a revolving credit agreement or similar arrangement and must bear a rate of interest that does not exceed an arm's length interest rate, as determined under section 482 and the regulations thereunder, that would be charged with respect to a comparable debt instrument of the issuer with a term that does not exceed 270 days.

(*iii*) *Lender-specific indebtedness limit.* The issuer is a net borrower from the lender for no more than 270 days during the taxable year of the issuer, and in the case of a covered debt instrument outstanding during consecutive tax years, the issuer is a net borrower from the lender for no more than 270 consecutive days, in both cases taking into account only covered debt instruments that satisfy the requirement of paragraph (b)(3)(vii)(A)(*2*)(*ii*) of this section other than covered debt instruments described in paragraph (b)(3)(vii)(B) or (b)(3)(vii)(C) of this section.

(*iv*) *Overall indebtedness limit.* The issuer is a net borrower under all covered debt instruments issued to members of the issuer's expanded group that satisfy the requirements of paragraphs (b)(3)(vii)(A)(*2*)(*ii*) and (*iii*) of this section, other than covered debt instruments described in paragraph (b)(3)(vii)(B) or (b)(3)(vii)(C) of this section, for no more than 270 days during the taxable year of the issuer, determined without regard to the identity of the lender under such covered debt instruments.

(*v*) *Inadvertent error.* An issuer's failure to satisfy the 270-day test will be disregarded if the failure is reasonable in light of all the facts and circumstances and the failure is promptly cured upon discovery. A failure to satisfy the 270-day test will be considered reasonable if the taxpayer maintains due diligence procedures to prevent such failures, as evidenced by having written policies and operational procedures in place to monitor compliance with the 270-day test and management-level employees of the expanded group having undertaken reasonable efforts to establish, follow, and enforce such policies and procedures.

(B) *Ordinary course loans.* A covered debt instrument is described in this paragraph (b)(3)(vii)(B) if the covered debt instrument is issued as consideration for the acquisition of property other than money in the

ordinary course of the issuer's trade or business, provided that the obligation is reasonably expected to be repaid within 120 days of issuance.

(C) *Interest-free loans.* A covered debt instrument is described in this paragraph (b)(3)(vii)(C) if the instrument does not provide for stated interest or no interest is charged on the instrument, the instrument does not have original issue discount (as defined in section 1273 and the regulations thereunder), interest is not imputed under section 483 or section 7872 and the regulations thereunder, and interest is not required to be charged under section 482 and the regulations thereunder.

(D) *Deposits with a qualified cash pool header*—(*1*) *In general.* A covered debt instrument is described in this paragraph (b)(3)(vii)(D) if it is a demand deposit received by a qualified cash pool header described in paragraph (b)(3)(vii)(D)(*2*) of this section pursuant to a cash-management arrangement described in paragraph (b)(3)(vii)(D)(*3*) of this section. This paragraph (b)(3)(vii)(D) does not apply if a purpose for making the demand deposit is to facilitate the avoidance of the purposes of this section or § 1.385–3 with respect to a qualified business unit (as defined in section 989(a) and the regulations thereunder) (QBU) that is not a qualified cash pool header.

(*2*) *Qualified cash pool header.* The term qualified cash pool header means an expanded group member, controlled partnership, or QBU described in § 1.989(a)–1(b)(2)(ii), that has as its principal purpose managing a cash-management arrangement for participating expanded group members, provided that the excess (if any) of funds on deposit with such expanded group member, controlled partnership, or QBU (header) over the outstanding balance of loans made by the header is maintained on the books and records of the header in the form of cash or cash equivalents, or invested through deposits with, or the acquisition of obligations or portfolio securities of, persons that do not have a relationship to the header (or, in the case of a header that is a QBU described in § 1.989(a)–1(b)(2)(ii), its owner) described in section 267(b) or section 707(b).

(*3*) *Cash-management arrangement.* The term *cash-management arrangement* means an arrangement the principal purpose of which is to manage cash for participating expanded group members. For purposes of the preceding sentence, managing cash means borrowing excess funds from participating expanded group members and lending funds to participating expanded group members, and may also include foreign exchange management, clearing payments, investing excess cash with an unrelated person, depositing excess cash with another qualified cash pool header, and settling intercompany accounts, for example through netting centers and pay-on-behalf-of programs.

(b)(viii) [Reserved]. For further guidance, see § 1.385–3(b)(viii).

(c) [Reserved]. For further guidance, see § 1.385–3(c).

(d)(1) through (d)(3) [Reserved]. For further guidance, see § 1.385–3(d)(1) through (d)(3).

(4) *Treatment of disregarded entities.* This paragraph (d)(4) applies to the extent that a covered debt instrument issued by a disregarded entity, the regarded owner of which is a covered member, would, absent the application of this paragraph (d)(4), be treated as stock under § 1.385–3. In this case, rather than the covered debt instrument being treated as stock to such extent (*applicable portion*), the covered member that is the regarded owner of the disregarded entity is deemed to issue its stock in the manner described in this paragraph (d)(4). If the applicable portion otherwise would have been treated as stock under § 1.385–3(b)(2), then the covered member is deemed to issue its stock to the expanded group member to which the covered debt instrument was, in form, issued (or transferred) in the transaction described in § 1.385–3(b)(2). If the applicable portion otherwise would have been treated as stock under § 1.385–3(b)(3)(i), then the covered member is deemed to issue its stock to the holder of the covered debt instrument in exchange for a portion of the covered debt instrument equal to the applicable portion. In each case, the covered member that is the regarded owner of the disregarded entity is treated as the holder of the applicable portion of the debt instrument issued by the disregarded entity, and the actual holder is treated as the holder of the remaining portion of the covered debt instrument and the stock deemed to be issued by the regarded owner. Under federal tax principles, the applicable portion of the debt instrument issued by the disregarded entity generally is disregarded. This paragraph (d)(4) must be applied in a manner that is consistent with the principles of paragraph (f)(4) of this section. Thus, for example, stock deemed issued is deemed to have the same terms as the covered debt instrument issued by the disregarded entity, other than the identity of the issuer, and payments on the stock are determined by reference to payments made on the covered debt instrument issued by the disregarded entity. See § 1.385–4T(b)(3) for additional rules that apply if the regarded owner of the disregarded entity is a member of a consolidated group. If the regarded owner of a disregarded entity is a controlled partnership, then paragraph (f) of this section applies as though the controlled partnership were the issuer in form of the debt instrument.

(d)(5) through (d)(7). [Reserved]. For further guidance, see § 1.385–3(d)(5) through (d)(7).

(e) [Reserved]. For further guidance, see § 1.385–3(e).

(f) *Treatment of controlled partnerships*—(1) *In general.* For purposes of this section and §§ 1.385–3 and 1.385–4T, a controlled partnership is treated as an aggregate of its partners in the manner described in this paragraph (f). Paragraph (f)(2) of this section sets forth rules concerning the aggregate treatment when a controlled partnership acquires property from a member of the expanded group. Paragraph (f)(3) of this section sets forth rules concerning the aggregate treatment when a controlled partnership issues a debt instrument. Paragraph (f)(4) of this section deems a debt instrument issued by a controlled partnership to be held by an expanded group partner rather than the holder-in-form in certain cases. Paragraph (f)(5) of this section sets forth the rules concerning events that cause the deemed results described in paragraph (f)(4) of this section to cease. Paragraph (f)(6) of this section exempts certain issuances of a controlled partnership's debt to a partner and a partner's debt to a controlled partnership from the application of this section and § 1.385–3. For definitions applicable for this section, see paragraph (g) of this section and § 1.385–3(g). For examples illustrating the application of this section, see paragraph (h) of this section.

(2) *Acquisitions of property by a controlled partnership*—(i) *Acquisitions of property when a member of the expanded group is a partner on the date of the acquisition*—(A) *Aggregate treatment.* Except as otherwise provided in paragraphs (f)(2)(i)(C) and (f)(6) of this section, if a controlled partnership, with respect to an expanded group, acquires property from a member of the expanded group (*transferor member*), then, for purposes of this section and § 1.385–3, a member of the expanded group that is an expanded group partner on the date of the acquisition is treated as acquiring its share (as determined under paragraph (f)(2)(i)(B) of this section) of the property. The expanded group partner is treated as acquiring its share of the property from the transferor member in the manner (for example, in

a distribution, in an exchange for property, or in an issuance), and on the date on which, the property is actually acquired by the controlled partnership from the transferor member. Accordingly, this section and § 1.385–3 apply to a member's acquisition of property described in this paragraph (f)(2)(i)(A) in the same manner as if the member actually acquired the property from the transferor member, unless explicitly provided otherwise.

(B) *Expanded group partner's share of property.* For purposes of paragraph (f)(2)(i)(A) of this section, a partner's share of property acquired by a controlled partnership is determined in accordance with the partner's liquidation value percentage (as defined in paragraph (g)(17) of this section) with respect to the controlled partnership. The liquidation value percentage is determined on the date on which the controlled partnership acquires the property.

(C) *Exception if transferor member is an expanded group partner.* If a transferor member is an expanded group partner in the controlled partnership, paragraph (f)(2)(i)(A) of this section does not apply to such partner.

(ii) *Acquisitions of expanded group stock when a member of the expanded group becomes a partner after the acquisition*—(A) *Aggregate treatment.* Except as otherwise provided in paragraph (f)(2)(ii)(C) of this section, if a controlled partnership, with respect to an expanded group, owns expanded group stock, and a member of the expanded group becomes an expanded group partner in the controlled partnership, then, for purposes of this section and § 1.385–3, the member is treated as acquiring its share (as determined under paragraph (f)(2)(ii)(B) of this section) of the expanded group stock owned by the controlled partnership. The member is treated as acquiring its share of the expanded group stock on the date on which the member becomes an expanded group partner. Furthermore, the member is treated as if it acquires its share of the expanded group stock from a member of the expanded group in exchange for property other than expanded group stock, regardless of the manner in which the partnership acquired the stock and in which the member acquires its partnership interest. Accordingly, this section and § 1.385–3 apply to a member's acquisition of expanded group stock described in this paragraph (f)(2)(ii)(A) in the same manner as if the member actually acquired the stock from a member of the expanded group in exchange for property other than expanded group stock, unless explicitly provided otherwise.

(B) *Expanded group partner's share of expanded group stock.* For purposes of paragraph (f)(2)(ii)(A) of this section, a partner's share of expanded group stock owned by a controlled partnership is determined in accordance with the partner's liquidation value percentage with respect to the controlled partnership. The liquidation value percentage is determined on the date on which a member of the expanded group becomes an expanded group partner in the controlled partnership.

(C) *Exception if an expanded group partner acquires its interest in a controlled partnership in exchange for expanded group stock.* Paragraph (f)(2)(ii)(A) of this section does not apply to a member of an expanded group that acquires its interest in a controlled partnership either from another partner in exchange solely for expanded group stock or upon a partnership contribution to the controlled partnership comprised solely of expanded group stock.

(3) *Issuances of debt instruments by a controlled partnership to a member of an expanded group*—(i) *Aggregate treatment.* If a controlled partnership, with respect to an expanded group, issues a debt instrument to a member of the expanded group, then, for purposes of this section and § 1.385–3, a covered member that is an expanded group partner is treated as the issuer with respect to its share (as determined under paragraph (f)(3)(ii of this section) of the debt instrument issued by the controlled partnership. This section and § 1.385–3 apply to the portion of the debt instrument treated as issued by the covered member as described in this paragraph (f)(3)(i) in the same manner as if the covered member actually issued the debt instrument to the holder-in-form, unless otherwise provided. See paragraph (f)(4) of this section, which deems a debt instrument issued by a controlled partnership to be held by an expanded group partner rather than the holder-in-form in certain cases.

(ii) *Expanded group partner's share of a debt instrument issued by a controlled partnership*—(A) *General rule.* An expanded group partner's share of a debt instrument issued by a controlled partnership is determined on each date on which the partner makes a distribution or acquisition described in § 1.385–3(b)(2) or (b)(3)(i) (testing date). An expanded group partner's share of a debt instrument issued by a controlled partnership to a member of the expanded group is determined in accordance with the partner's issuance percentage (as defined in paragraph (g)(16) of this section) on the testing date. A partner's share determined under this paragraph (f)(3)(ii)(A) is adjusted as described in paragraph (f)(3)(ii)(B) of this section.

(B) *Additional rules if there is a specified portion with respect to a debt instrument*—(*1*) An expanded group partner's share (as determined under paragraph (f)(3)(ii)(A) of this section) of a debt instrument issued by a controlled partnership is reduced, but not below zero, by the sum of all of the specified portions (as defined in paragraph (g)(23) of this section), if any, with respect to the debt instrument that correspond to one or more deemed transferred receivables (as defined in paragraph (g)(8) of this section) that are deemed to be held by the partner.

(*2*) If the aggregate of all of the expanded group partners' shares (as determined under paragraph (f)(3)(ii)(A) of this section and reduced under paragraph (f)(3)(ii)(B)(*1*) of this section) of the debt instrument exceeds the adjusted issue price of the debt, reduced by the sum of all of the specified portions with respect to the debt instrument that correspond to one or more deemed transferred receivables that are deemed to be held by one or more expanded group partners (*excess amount*), then each expanded group partner's share (as determined under paragraph (f)(3)(ii)(A) of this section and reduced under paragraph (f)(3)(ii)(B)(*1*) of this section) of the debt instrument is reduced. The amount of an expanded group partner's reduction is the excess amount multiplied by a fraction, the numerator of which is the partner's share, and the denominator of which is the aggregate of all of the expanded group partners' shares.

(iii) *Qualified short-term debt instrument.* The determination of whether a debt instrument is a qualified short-term debt instrument for purposes of § 1.385–3(b)(3)(vii) is made at the partnership-level without regard to paragraph (f)(3)(i) of this section.

(4) *Recharacterization when there is a specified portion with respect to a debt instrument issued by a controlled partnership*—(i) *General rule.* A specified portion, with respect to a debt instrument issued by a controlled partnership and an expanded group partner, is not treated as stock under § 1.385–3(b)(2) or (b)(3)(i). Except as otherwise provided in paragraphs (f)(4)(ii) and (f)(4)(iii) of this section, the holder-in-form (as defined in paragraph (g)(15) of this section) of the debt instrument is deemed to transfer a portion of the debt instrument (a deemed transferred receivable, as defined in paragraph (g)(8) of this

section) with a principal amount equal to the adjusted issue price of the specified portion to the expanded group partner in exchange for stock in the expanded group partner (deemed partner stock, as defined in paragraph (g)(6) of this section) with a fair market value equal to the principal amount of the deemed transferred receivable. Except as otherwise provided in paragraph (f)(4)(vi) of this section (concerning the treatment of a deemed transferred receivable for purposes of section 752) and paragraph (f)(5) of this section (concerning specified events subsequent to the deemed transfer), the deemed transfer described in this paragraph (f)(4)(i) is deemed to occur for all federal tax purposes.

(ii) *Expanded group partner is the holder-in-form of a debt instrument.* If the specified portion described in paragraph (f)(4)(i) of this section is with respect to an expanded group partner that is the holder-in-form of the debt instrument, then paragraph (f)(4)(i) of this section will not apply with respect to that specified portion except that only the first sentence of paragraph (f)(4)(i) of this section is applicable.

(iii) *Expanded group partner is a consolidated group member.* This paragraph (f)(4)(iii) applies when one or more expanded group partners is a member of a consolidated group that files (or is required to file) a consolidated U.S. federal income tax return. In this case, notwithstanding § 1.385–4T(b)(1) (which generally treats members of a consolidated group as one corporation for purposes of this section and § 1.385–3), the holder-in-form of the debt instrument issued by the controlled partnership is deemed to transfer the deemed transferred receivable or receivables to the expanded group partner or partners that are members of a consolidated group that make, or are treated as making under paragraph (f)(2) of this section, the regarded distributions or acquisitions (within the meaning of § 1.385–4T(e)(5)) described in § 1.385–3(b)(2) or (b)(3)(i) in exchange for deemed partner stock in such partner or partners. To the extent those regarded distributions or acquisitions are made by a member of the consolidated group that is not an expanded group partner (excess amount), the holder-in-form is deemed to transfer a portion of the deemed transferred receivable or receivables to each member of the consolidated group that is an expanded group partner in exchange for deemed partner stock in the expanded group partner. The portion is the excess amount multiplied by a fraction, the numerator of which is the portion of the consolidated group's share (as determined under paragraph (f)(3)(ii) of this section) of the debt instrument issued by the controlled partnership that would have been the expanded group partner's share if the partner was not a member of a consolidated group, and the denominator of which is the consolidated group's share of the debt instrument issued by the controlled partnership.

(iv) *Rules regarding deemed transferred receivables and deemed partner stock*—(A) *Terms of deemed partner stock.* Deemed partner stock has the same terms as the deemed transferred receivable with respect to the deemed transfer, other than the identity of the issuer.

(B) *Treatment of payments with respect to a debt instrument for which there is one or more deemed transferred receivables.* When a payment is made with respect to a debt instrument issued by a controlled partnership for which there is one or more deemed transferred receivables, then, if the amount of the retained receivable (as defined in paragraph (g)(22) of this section) held by the holder-in-form is zero and a single deemed holder is deemed to hold all of the deemed transferred receivables, the entire payment is allocated to the deemed transferred receivables held by the single deemed holder. If the amount of the retained receivable held by the holder-in-form is greater than zero or there are multiple deemed holders of deemed transferred receivables, or both, the payment is apportioned among the retained receivable, if any, and each deemed transferred receivable in proportion to the principal amount of all the receivables. The portion of a payment allocated or apportioned to a retained receivable or a deemed transferred receivable reduces the principal amount of, or accrued interest with respect to, as applicable depending on the payment, the retained receivable or deemed transferred receivable. When a payment allocated or apportioned to a deemed transferred receivable reduces the principal amount of the receivable, the expanded group partner that is the deemed holder with respect to the deemed transferred receivable is deemed to redeem the same amount of deemed partner stock, and the specified portion with respect to the debt instrument is reduced by the same amount. When a payment allocated or apportioned to a deemed transferred receivable reduces accrued interest with respect to the receivable, the expanded group partner that is the deemed holder with respect to the deemed transferred receivable is deemed to make a matching distribution in the same amount with respect to the deemed partner stock. The controlled partnership is treated as the paying agent with respect to the deemed partner stock.

(v) *Holder-in-form transfers debt instrument in a transaction that is not a specified event.* If the holder-in-form transfers the debt instrument (which is disregarded for federal tax purposes) to a member of the expanded group or a controlled partnership (and therefore the transfer is not a specified event described in paragraph (f)(5)(iii)(F) of this section), then, for federal tax purposes, the holder-in-form is deemed to transfer the retained receivable and the deemed partner stock to the transferee.

(vi) *Allocation of deemed transferred receivable under section 752.* A partnership liability that is a debt instrument with respect to which there is one or more deemed transferred receivables is allocated for purposes of section 752 without regard to any deemed transfer.

(5) *Specified events affecting ownership following a deemed transfer*—(i) *General rule.* If a specified event (within the meaning of paragraph (f)(5)(iii) of this section) occurs with respect to a deemed transfer, then, immediately before the specified event, the expanded group partner that is both the issuer of the deemed partner stock and the deemed holder of the deemed transferred receivable is deemed to distribute the deemed transferred receivable (or portion thereof, as determined under paragraph (f)(5)(iv) of this section) to the holder-in-form in redemption of the deemed partner stock (or portion thereof, as determined under paragraph (f)(5)(iv) of this section) deemed to be held by the holder-in-form. The deemed distribution is deemed to occur for all federal tax purposes, except that the distribution is disregarded for purposes of § 1.385–3(b). Except when the deemed transferred receivable (or portion thereof, as determined under paragraph (f)(5)(iv) of this section) is deemed to be retransferred under paragraph (f)(5)(ii) of this section, the principal amount of the retained receivable held by the holder-in-form is increased by the principal amount of the deemed transferred receivable, the deemed transferred receivable ceases to exist for federal tax purposes, and the specified portion (or portion thereof) that corresponds to the deemed transferred receivable (or portion thereof) ceases to be treated as a specified portion for purposes of this section and § 1.385–3.

(ii) *New deemed transfer when a specified event involves a transferee*

that is a covered member that is an expanded group partner. If the specified event is described in paragraph (f)(5)(iii)(E) of this section, the holder-in-form of the debt instrument is deemed to retransfer the deemed transferred receivable (or portion thereof, as determined under paragraph (f)(5)(iv) of this section) that the holder-in-form is deemed to have received pursuant to paragraph (f)(5)(i) of this section, to the transferee expanded group partner in exchange for deemed partner stock issued by the transferee expanded group partner with a fair market value equal to the principal amount of the deemed transferred receivable (or portion thereof) that is retransferred. For purposes of this section, this deemed transfer is treated in the same manner as a deemed transfer described in paragraph (f)(4)(i) of this section.

(iii) *Specified events.* A specified event, with respect to a deemed transfer, occurs when, immediately after the transaction and taking into account all related transactions:

(A) The controlled partnership that is the issuer of the debt instrument either ceases to be a controlled partnership or ceases to have an expanded group partner that is a covered member.

(B) The holder-in-form is a member of the expanded group immediately before the transaction, and the holder-in-form and the deemed holder cease to be members of the same expanded group for the reasons described in § 1.385–3(d)(2).

(C) The holder-in-form is a controlled partnership immediately before the transaction, and the holder-in-form ceases to be a controlled partnership.

(D) The expanded group partner that is both the issuer of deemed partner stock and the deemed holder transfers (directly or indirectly through one or more partnerships) all or a portion of its interest in the controlled partnership to a person that neither is a covered member nor a controlled partnership with an expanded group partner that is a covered member. If there is a transfer of only a portion of the interest, see paragraph (f)(5)(iv) of this section.

(E) The expanded group partner that is both the issuer of deemed partner stock and the deemed holder transfers (directly or indirectly through one or more partnerships) all or a portion of its interest in the controlled partnership to a covered member or a controlled partnership with an expanded group partner that is a covered member. If there is a transfer of only a portion of the interest, see paragraph (f)(5)(iv) of this section.

(F) The holder-in-form transfers the debt instrument (which is disregarded for federal tax purposes) to a person that is neither a member of the expanded group nor a controlled partnership. See paragraph (f)(4)(v) of this section if the holder-in-form transfers the debt instrument to a member of the expanded group or a controlled partnership.

(iv) *Specified event involving a transfer of only a portion of an interest in a controlled partnership.* If, with respect to a specified event described in paragraph (f)(5)(iii)(D) or (E) of this section, an expanded group partner transfers only a portion of its interest in a controlled partnership, then, only a portion of the deemed transferred receivable that is deemed to be held by the expanded group partner is deemed to be distributed in redemption of an equal portion of the deemed partner stock. The portion of the deemed transferred receivable referred to in the preceding sentence is equal to the product of the entire principal amount of the deemed transferred receivable deemed to be held by the expanded group partner multiplied by a fraction, the numerator of which is the portion of the expanded group partner's capital account attributable to the interest that is transferred, and the denominator of which is the expanded group partner's capital account with respect to its entire interest, determined immediately before the specified event.

(6) *Issuance of a partnership's debt instrument to a partner and a partner's debt instrument to a partnership.* If a controlled partnership, with respect to an expanded group, issues a debt instrument to an expanded group partner, or if a covered member that is an expanded group partner issues a covered debt instrument to a controlled partnership, and in each case, no partner deducts or receives an allocation of expense with respect to the debt instrument, then this section and 1.385–3 do not apply to the debt instrument.

(g)(1) through (4) [Reserved]. For further guidance, see § 1.385–3(g)(1) through (4).

(5) *Deemed holder.* The term deemed holder means, with respect to a deemed transfer, the expanded group partner that is deemed to hold a deemed transferred receivable by reason of the deemed transfer.

(6) *Deemed partner stock.* The term deemed partner stock means, with respect to a deemed transfer, the stock deemed issued by an expanded group partner as described in paragraphs (f)(4)(i), (f)(4)(iii), and (f)(5)(ii) of this section. The amount of deemed partner stock is reduced as described in paragraphs (f)(4)(iv)(B) and (f)(5)(i) of this section.

(7) *Deemed transfer.* The term deemed transfer means, with respect to a specified portion, the transfer described in paragraph (f)(4)(i), (f)(4)(iii), or (f)(5)(ii) of this section.

(8) *Deemed transferred receivable.* The term deemed transferred receivable means, with respect to a deemed transfer, the portion of the debt instrument described in paragraph (f)(4)(i), (f)(4)(iii), or (f)(5)(ii) of this section. The deemed transferred receivable is reduced as described in paragraphs (f)(4)(iv)(B) and (f)(5)(i) of this section.

(g)(9) through (14) [Reserved]. For further guidance, see § 1.385–3(g)(9) through (14).

(15) *Holder-in-form.* The term holder-in-form means, with respect to a debt instrument issued by a controlled partnership, the person that, absent the application of paragraph (f)(4) of this section, would be the holder of the debt instrument for federal tax purposes. Therefore, the term holder-in-form does not include a deemed holder (as defined in paragraph (g)(5) of this section).

(16) *Issuance percentage.* The term issuance percentage means, with respect to a controlled partnership and an expanded group partner, the ratio (expressed as a percentage) of the partner's reasonably anticipated distributive share of all the partnership's interest expense over a reasonable period, divided by all of the partnership's reasonably anticipated interest expense over that same period, taking into account any and all relevant facts and circumstances. The relevant facts and circumstances include, without limitation, the term of the debt instrument; whether the partnership anticipates issuing other debt instruments; and the partnership's anticipated section 704(b) income and expense, and the partners' respective anticipated allocation percentages, taking into account anticipated changes to those allocation percentages over time resulting, for example, from anticipated contributions, distributions, recapitalizations, or provisions in the controlled partnership agreement.

(17) *Liquidation value percentage.* The term liquidation value percentage means, with respect to a controlled partnership and an expanded group partner, the ratio (expressed as a percentage) of the liquidation value of the expanded group partner's interest in the partnership divided by the aggregate liquidation value of all the partners' interests in the partnership. The liquidation value of an expanded group partner's interest in a controlled

partnership is the amount of cash the partner would receive with respect to the interest if the partnership (and any partnership through which the partner indirectly owns an interest in the controlled partnership) sold all of its property for an amount of cash equal to the fair market value of the property (taking into account section 7701(g)), satisfied all of its liabilities (other than those described in § 1.752–7), paid an unrelated third party to assume all of its § 1.752–7 liabilities in a fully taxable transaction, and then the partnership (and any partnership through which the partner indirectly owns an interest in the controlled partnership) liquidated.

(g)(18) through (g)(21) [Reserved]. For further guidance, see § 1.385–3(g)(18) through (g)(21).

(22) *Retained receivable.* The term retained receivable means, with respect to a debt instrument issued by a controlled partnership, the portion of the debt instrument that is not transferred by the holder-in-form pursuant to one or more deemed transfers. The retained receivable is adjusted for decreases described in paragraph (f)(4)(iv)(B) of this section and increases described in paragraph (f)(5)(i) of this section.

(23) *Specified portion.* The term specified portion means, with respect to a debt instrument issued by a controlled partnership and a covered member that is an expanded group partner, the portion of the debt instrument that is treated under paragraph (f)(3)(i) of this section as issued on a testing date (within the meaning of paragraph (f)(3)(ii) of this section) by the covered member and that, absent the application of paragraph (f)(4)(i) of this section, would be treated as stock under § 1.385–3(b)(2) or (b)(3)(i) on the testing date. A specified portion is reduced as described in paragraphs (f)(4)(iv)(B) and (5)(i) of this section.

(g)(24) through (25) [Reserved]. For further guidance, see § 1.385–3(g)(24) through (25).

(h) Introductory text through (h)(3), *Example 11* [Reserved]. For further guidance, see § 1.385–3(h) introductory text through (h)(3), *Example 11*.

Example 12. Distribution of a covered debt instrument to a controlled partnership. (i) *Facts.* CFC and FS are equal partners in PRS. PRS owns 100% of the stock in X Corp, a domestic corporation. On Date A in Year 1, X Corp issues X Note to PRS in a distribution.

(ii) *Analysis.* (A) Under § 1.385–1(c)(4), in determining whether X Corp is a member of the FP expanded group that includes CFC and FS, CFC and FS are each treated as owning 50% of the X Corp stock held by PRS. Accordingly, 100% of X Corp's stock is treated as owned by CFC and FS, and X Corp is a member of the FP expanded group.

(B) Together CFC and FS own 100% of the interests in PRS capital and profits, such that PRS is a controlled partnership under § 1.385–1(c)(1). CFC and FS are both expanded group partners on the date on which PRS acquired X Note. Therefore, pursuant to paragraph (f)(2)(i)(A) of this section, each of CFC and FS is treated as acquiring its share of X Note in the same manner (in this case, by a distribution of X Note), and on the date on which, PRS acquired X Note. Likewise, X Corp is treated as issuing to each of CFC and FS its share of X Note. Under paragraph (f)(2)(i)(B) of this section, each of CFC's and FS's share of X Note, respectively, is determined in accordance with its liquidation value percentage determined on Date A in Year 1, the date X Corp distributed X Note to PRS. On Date A in Year 1, pursuant to paragraph (g)(17) of this section, each of CFC's and FS's liquidation value percentages is 50%. Accordingly, on Date A in Year 1, under paragraph (f)(2)(i)(A) of this section, for purposes of this section and § 1.385–3, CFC and FS are each treated as acquiring 50% of X Note in a distribution.

(C) Under § 1.385–3(b)(2)(i) and (d)(1)(i), X Note is treated as stock on the date of issuance, which is Date A in Year 1. Under paragraph (f)(2)(i)(A) of this section, each of CFC and FS are treated as acquiring 50% of X Note in a distribution for purposes of this section and § 1.385–3. Therefore, X Corp is treated as distributing its stock to PRS in a distribution described in section 305.

Example 13. Loan to a controlled partnership; proportionate distributions by expanded group partners. (i) *Facts.* DS, USS2, and USP are partners in PRS. USP is a domestic corporation that is not a member of the FP expanded group. Each of DS and USS2 own 45% of the interests in PRS profits and capital, and USP owns 10% of the interests in PRS profits and capital. The PRS partnership agreement provides that all items of PRS income, gain, loss, deduction, and credit are allocated in accordance with the percentages in the preceding sentence. On Date A in Year 1, FP lends $200x to PRS in exchange for PRS Note. PRS uses all $200x in its business and does not distribute any money or other property to a partner. Subsequently, on Date B in Year 1, DS distributes $90x to USS1, USS2 distributes $90x to FP, and USP distributes $20x to its shareholder. Each of DS's and USS2's issuance percentage is 45% on Date B in Year 1, the date of the distributions and therefore a testing date under paragraph (f)(3)(ii)(A) of this section.

(ii) *Analysis.* (A) DS and USS2 together own 90% of the interests in PRS profits and capital and therefore PRS is a controlled partnership under § 1.385–1(c)(1). Under § 1.385–1(c)(2), each of DS and USS2 is a covered member.

(B) Under paragraph (f)(3)(i) of this section, each of DS and USS2 is treated as issuing its share of PRS Note, and under paragraph (f)(3)(ii)(A) of this section, DS's and USS2's share is each $90x (45% of $200x). USP is not an expanded group partner and therefore has no issuance percentage and is not treated as issuing any portion of PRS Note.

(C) The $90x distributions made by DS to USS1 and by USS2 to FP are described in § 1.385–3(b)(3)(i)(A). Under § 1.385–3(b)(3)(iii)(A), the portions of PRS Note treated as issued by each of DS and USS2 are treated as funding the distribution made by DS and USS2 because the distributions occurred within the per se period with respect to PRS Note. Under § 1.385–3(b)(3)(i), the portions of PRS Note treated as issued by each of DS and USS2 would, absent the application of (f)(4)(i) of this section, be treated as stock of DS and USS2 on Date B in Year 1, the date of the distributions. See § 1.385–3(d)(1)(ii). Under paragraph (g)(23) of this section, each of the $90x portions is a specified portion.

(D) Under paragraph (f)(4)(i) of this section, the specified portions are not treated as stock under § 1.385–3(b)(3)(i). Instead, FP is deemed to transfer a portion of PRS Note with a principal amount equal to $90x (the adjusted issue price of the specified portion with respect to DS) to DS in exchange for deemed partner stock in DS with a fair market value of $90x. Similarly, FP is deemed to transfer a portion of PRS Note with a principal amount equal to $90 (the adjusted issue price of the specified portion with respect to USS2) to USS2 in exchange for deemed partner stock in USS2 with a fair market value of $90x. The principal amount of the retained receivable held by FP is $20x ($200x—$90x—$90x).

Example 14. Loan to a controlled partnership; disproportionate distributions by expanded group partners. (i) *Facts.* The facts are the same as in *Example 13* of this paragraph (h)(3), except that on Date B in Year 1, DS distributes $45x to USS1 and USS2 distributes $135x to FP.

(ii) *Analysis.* (A) The analysis is the same as in paragraph (ii)(A) of *Example 13* of this paragraph (h)(3).

(B) The analysis is the same as in paragraph (ii)(B) of *Example 13* of this paragraph (h)(3).

(C) The $45x and $135x distributions made by DS to USS1 and by USS2 to FP, respectively, are described in § 1.385–3(b)(3)(i)(A). Under § 1.385–3(b)(3)(iii)(A), the portion of PRS Note treated as issued by DS is treated as funding the distribution made by DS because the distribution occurred within the per se period with respect to PRS Note, but under § 1.385–3(b)(3)(i), only to the extent of DS's $45x distribution. USS2 is treated as issuing $90x of PRS Note, all of which is treated as funding $90x of USS2's $135x distribution under § 1.385–3(b)(3)(iii)(A). Under § 1.385–3(b)(3)(i), absent the application of (f)(4)(i) of this section, $45x of PRS Note would be treated as stock of DS and $90x of PRS Note would be treated as stock of USS2 on Date B in Year 1, the date of the distributions. See § 1.385–3(d)(1)(ii). Under paragraph (g)(23) of this section, $45x of PRS Note is a specified portion with respect to DS and $90x of PRS Note is a specified portion with respect to USS2.

(D) Under paragraph (f)(4)(i) of this section, the specified portions are not treated as stock under § 1.385–3(b)(3)(i). Instead, FP is deemed to transfer a portion of PRS Note with a principal amount equal to $45x (the

adjusted issue price of the specified portion with respect to DS) to DS in exchange for stock of DS with a fair market value of $90x. Similarly, FP is deemed to transfer a portion of PRS Note with a principal amount equal to $90 (the adjusted issue price of the specified portion with respect to USS2) to USS2 in exchange for stock of USS2 with a fair market value of $90x. The principal amount of the retained receivable held by FP is $65x ($200x − $45x − $90x).

Example 15. Loan to partnership; distribution in later year. (i) *Facts.* The facts are the same as in *Example 13* of this paragraph (h)(3), except that USS2 does not distribute $90x to FP until Date C in Year 2, which is less than 36 months after Date A in Year 1. No principal or interest payments are made or required until Year 3. On Date C in Year 2, DS's, USS2's, and USP's issuance percentages under paragraph (g)(16) of this section are unchanged at 45%, 45%, and 10%, respectively.

(ii) *Analysis.* (A) The analysis is the same as in paragraph (ii)(A) of *Example 13* of this paragraph (h)(3).

(B) The analysis is the same as in paragraph (ii)(B) of *Example 13* of this paragraph (h)(3).

(C) With respect to the distribution made by DS, the analysis is the same as in paragraph (ii)(C) of *Example 13* of this paragraph (h)(3).

(D) With respect to the deemed transfer to DS, the analysis is the same as in paragraph (ii)(D) of *Example 13* of this paragraph (h)(3). Accordingly, the amount of the retained receivable held by FP as of Date B in Year 1 is $110x ($200x − $90x).

(E) Under paragraph (f)(3)(ii)(A) of this section, USS2's share of PRS Note is determined on Date C in Year 2. On Date C in Year 2, DS's, USS2's, and USP's respective shares of PRS Note under paragraph (f)(3)(ii)(A) of this section $90x, $90x, and $20x. However, because DS is treated as the issuer with respect to a $90x specified portion of PRS Note, DS's share of PRS Note is reduced by $90x to $0 under paragraph (f)(3)(ii)(B)(*1*) of this section. No reduction to either of USS2's or USP's share of PRS Note is required under paragraph (f)(3)(ii)(B)(*2*) of this section because the aggregate of DS's, USS2's, and USP's shares of PRS Note as reduced is $110x (DS has a $0 share, USS2 has a $90x share, and USP has a $20x share), which does not exceed $110x (the $200x adjusted issue price of PRS Note reduced by the $90x specified portion with respect to DS). Under paragraph (f)(3)(i) of this section, USS2 is treated as issuing its share of PRS Note.

(F) The $90x distribution made by USS2 to FP is described in § 1.385–3(b)(3)(i)(A). Under § 1.385–3(b)(3)(iii)(A), the portion of PRS Note treated as issued by USS2 is treated as funding the distribution made by USS2, because the distribution occurred within the per se period with respect to PRS Note. Accordingly, the portion of PRS Note treated as issued by USS2 would, absent the application of paragraph (f)(4)(i) of this section, be treated as stock of USS2 under § 1.385–3(b)(3)(i) on Date C in Year 2. See § 1.385–3(d)(1)(ii). Under paragraph (g)(23) of this section, the $90x portion is a specified portion.

(G) Under paragraph (f)(4)(i) of this section, the specified portion of PRS Note treated as issued by USS2 is not treated as stock under § 1.385–3(b)(3)(i). Instead, on Date C in Year 2, FP is deemed to transfer a portion of PRS Note with a principal amount equal to $90x (the adjusted issue price of the specified portion with respect to USS2) to USS2 in exchange for stock in USS2 with a fair market value of $90x. The principal amount of the retained receivable held by FP is reduced from $110x to $20x.

Example 16. Loan to a controlled partnership; partnership ceases to be a controlled partnership. (i) *Facts.* The facts are the same as in *Example 13* of this paragraph (h)(3), except that on Date C in Year 4, USS2 sells its entire interest in PRS to an unrelated person.

(ii) *Analysis.* (A) On date C in Year 4, PRS ceases to be a controlled partnership with respect to the FP expanded group under § 1.385–1(c)(1). This is the case because DS, the only remaining partner that is a member of the FP expanded group, only owns 45% of the total interest in PRS profits and capital. Because PRS ceases to be a controlled partnership, a specified event (within the meaning of paragraph (f)(5)(iii)(A) of this section) occurs with respect to the deemed transfers with respect to each of DS and USS2.

(B) Under paragraph (f)(5)(i) of this section, on Date C in Year 4, immediately before PRS ceases to be a controlled partnership, each of DS and USS2 is deemed to distribute its deemed transferred receivable to FP in redemption of FP's deemed partner stock in DS and USS2. The specified portion that corresponds to each of the deemed transferred receivables ceases to be treated as a specified portion. Furthermore, the deemed transferred receivables cease to exist, and the retained receivable held by FP increases from $20x to $200x.

Example 17. Transfer of an interest in a partnership to a covered member. (i) *Facts.* The facts are the same as in *Example 13* of this paragraph (h)(3), except that on Date C in Year 4, USS2 sells its entire interest in PRS to USS1.

(ii) *Analysis.* (A) After USS2 sells its interest in PRS to USS1, DS and USS1 together own 90% of the interests in PRS profits and capital and therefore PRS continues to be a controlled partnership under § 1.385–1(c)(1). A specified event (within the meaning of paragraph (f)(5)(iii)(E) of this section) occurs as result of the sale only with respect to the deemed transfer with respect to USS2.

(B) Under paragraph (f)(5)(i) of this section, on Date C in Year 4, immediately before USS2 sells its entire interest in PRS to USS1, USS2 is deemed to distribute its deemed transferred receivable to FP in redemption of FP's deemed partner stock in USS2. Because the specified event is described in paragraph (f)(5)(iii)(E) of this section, under paragraph (f)(5)(ii) of this section, FP is deemed to retransfer the deemed transferred receivable deemed received from USS2 to USS1 in exchange for deemed partner stock in USS1 with a fair market value equal to the principal amount of the deemed transferred receivable that is retransferred to USS1.

Example 18. Loan to partnership and all partners are members of a consolidated group. (i) *Facts.* USS1 and DS are equal partners in PRS. USS1 and DS are members of a consolidated group, as defined in § 1.1502–1(h). The PRS partnership agreement provides that all items of PRS income, gain, loss, deduction, and credit are allocated equally between USS1 and DS. On Date A in Year 1, FP lends $200x to PRS in exchange for PRS Note. PRS uses all $200x in its business and does not distribute any money or other property to any partner. On Date B in Year 1, DS distributes $200x to USS1, and USS1 distributes $200x to FP. If neither of USS1 or DS were a member of the consolidated group, each would have an issuance percentage under paragraph (g)(16) of this section, determined as of Date A in Year 1, of 50%.

(ii) *Analysis.* (A) Pursuant to § 1.385–4T(b)(6), PRS is treated as a partnership for purposes of § 1.385–3. Under § 1.385–4T(b)(1), DS and USS1 are treated as one corporation for purposes of this section and § 1.385–3, and thus a single covered member under § 1.385–1(c)(2). For purposes of this section, the single covered member owns 100% of the PRS profits and capital and therefore PRS is a controlled partnership under § 1.385–1(c)(1). Under paragraph (f)(3)(i) of this section, the single covered member is treated as issuing all $200x of PRS Note to FP, a member of the same expanded group as the single covered member. DS's distribution to USS1 is a disregarded distribution because it is a distribution between members of a consolidated group that is disregarded under the one-corporation rule of § 1.385–4T(b)(1). However, under § 1.385–3(b)(3)(iii)(A), PRS Note, treated as issued by the single covered member, is treated as funding the distribution by USS1 to FP, which is described in § 1.385–3(b)(3)(i)(A) and which is a regarded distribution. Accordingly, PRS Note, absent the application of (f)(4)(i) of this section, would be treated as stock under § 1.385–3(b) on Date B in Year 1. Thus, pursuant to paragraph (g)(23) of this section, the entire PRS Note is a specified portion.

(B) Under paragraphs (f)(4)(i) and (iii) of this section, the specified portion is not treated as stock and, instead, FP is deemed to transfer PRS Note with a principal amount equal to $200x to USS1 in exchange for stock of USS1 with a fair market value of $200x. Under paragraph (f)(4)(iii) of this section, FP is deemed to transfer PRS Note to USS1 because only USS1 made a regarded distribution described in § 1.385–3(b)(3)(i).

Example 19. (i) *Facts.* DS owns DRE, a disregarded entity within the meaning of § 1.385–1(c)(3). On Date A in Year 1, FP lends $200x to DRE in exchange for DRE Note. Subsequently, on Date B in Year 1, DS distributes $100x of cash to USS1.

(ii) *Analysis.* Under § 1.385–3(b)(3)(iii)(A), $100x of DRE Note would be treated as funding the distribution by DS to USS1 because DRE Note is issued to a member of the FP expanded group during the per se period with respect to DS's distribution0 to USS1. Accordingly, under § 1.385–3(b)(3)(i)(A) and (d)(1)(ii), $100x of DRE Note would be treated as stock on Date B in Year

1. However, under paragraph (d)(4) of this section, DS, as the regarded owner, within the meaning of § 1.385–1(c)(5), of DRE is deemed to issue its stock to FP in exchange for a portion of DRE Note equal to the $100x applicable portion (as defined in paragraph (d)(4) of this section). Thus, DS is treated as the holder of $100x of DRE Note, which is disregarded, and FP is treated as the holder of the remaining $100x of DRE Note. The $100x of stock deemed issued by DS to FP has the same terms as DRE Note, other than the issuer, and payments on the stock are determined by reference to payments on DRE Note.

(i) through (j) [Reserved]

(k) *Applicability date*—(1) *In general.* This section applies to taxable years ending on or after January 19, 2017.

(2) *Transition rules*—(i) *Transition rule for covered debt instruments issued by partnerships that would have had a specified portion in taxable years ending before January 19, 2017.* If the application of paragraphs (f)(3) through (5) of this section and § 1.385–3 would have resulted in a covered debt instrument issued by a controlled partnership having a specified portion in a taxable year ending before January 19, 2017 but for the application of paragraph (k)(1) of this section and § 1.385–3(j)(1), then, to the extent of the specified portion immediately after January 19, 2017, there is a deemed transfer immediately after January 19, 2017.

(ii) *Transition rule for certain covered debt instruments treated as having a specified portion in taxable years ending on or after January 19, 2017.* If the application of paragraphs (f)(3) through (5) of this section and § 1.385–3 would treat a covered debt instrument issued by a controlled partnership as having a specified portion that gives rise to a deemed transfer on or before January 19, 2017 but in a taxable year ending on or after January 19, 2017, that specified portion does not give rise to a deemed transfer during the 90-day period after October 21, 2016. Instead, to the extent of the specified portion immediately after January 19, 2017, there is a deemed transferred immediately after January 19, 2017.

(iii) *Transition funding rule.* This paragraph (k)(2)(iii) applies if the application of paragraphs (f)(3) through (5) of this section and § 1.385–3 would have resulted in a deemed transfer with respect to a specified portion of a debt instrument issued by a controlled partnership on a date after April 4, 2016, and on or before January 19, 2017 (the transition period) but for the application of paragraph (k)(1), (k)(2)(i), or (k)(2)(ii) of this section and § 1.385–3(j). In this case, any payments made with respect to the covered debt instrument (other than stated interest), including pursuant to a refinancing, a portion of which would be treated as made with respect to deemed partner stock if there would have been a deemed transfer, after the date that there would have been a deemed transfer and through the remaining portion of the transition period are treated as distributions for purposes of applying § 1.385–3(b)(3) for taxable years ending on or after January 19, 2017. In addition, if an event occurs during the transition period that would have been a specified event with respect to the deemed transfer described in the preceding sentence but for the application of paragraph (k)(1) of this section and § 1.385–3(j), the distribution or acquisition that would have resulted in the deemed transfer is available to be treated as funded by other covered debt instruments of the covered member for purposes of § 1.385–3(b)(3) (to the extent provided in § 1.385–3(b)(3)(iii)). The prior sentence shall be applied in a manner that is consistent with the rules set forth in paragraph (f)(5) of this section and § 1.385–3(d)(2)(ii).

(iv) *Coordination between the general rule and funding rule.* This paragraph (k)(2)(iv) applies when a covered debt instrument issued by a controlled partnership in a transaction described in § 1.385–3(b)(2) would have resulted in a specified portion that gives rise to a deemed transfer on a date after April 4, 2016, and on or before January 19, 2017, but there is not a deemed transfer on such date due to the application of paragraph (k)(1), (k)(2)(i), or (k)(2)(ii) of this section and § 1.385–3(j). In this case, the issuance of such covered debt instrument is not treated as a distribution or acquisition described in § 1.385–3(b)(3)(i), but only to the extent of the specified portion immediately after January 19, 2017.

(v) *Option to apply proposed regulations.* See § 1.385–3(j)(2)(v).

(l) *Expiration date.* This section expires on October 11, 2019.

■ **Par. 6.** Section 1.385–4T is added to read as follows:

§ 1.385–4T Treatment of consolidated groups.

(a) *Scope.* This section provides rules for applying §§ 1.385–3 and 1.385–3T to members of consolidated groups. Paragraph (b) of this section sets forth rules concerning the extent to which, solely for purposes of applying §§ 1.385–3 and 1.385–3T, members of a consolidated group that file (or that are required to file) a consolidated U.S. federal income tax return are treated as one corporation. Paragraph (c) of this section sets forth rules concerning the treatment of a debt instrument that ceases to be, or becomes, a consolidated group debt instrument. Paragraph (d) of this section provides rules for applying the funding rule of § 1.385–3(b)(3) to members that depart a consolidated group. For definitions applicable to this section, see paragraph (e) of this section and §§ 1.385–1(c) and 1.385–3(g). For examples illustrating the application of this section, see paragraph (f) of this section.

(b) *Treatment of consolidated groups*—(1) *Members treated as one corporation.* For purposes of this section and §§ 1.385–3 and 1.385–3T, and except as otherwise provided in this section and § 1.385–3T, all members of a consolidated group (as defined in § 1.1502–1(h)) that file (or that are required to file) a consolidated U.S. federal income tax return are treated as one corporation. Thus, for example, when a member of a consolidated group issues a covered debt instrument that is not a consolidated group debt instrument, the consolidated group generally is treated as the issuer of the covered debt instrument for purposes of this section and §§ 1.385–3 and 1.385–3T. Also, for example, when one member of a consolidated group issues a covered debt instrument that is not a consolidated group debt instrument and therefore is treated as issued by the consolidated group, and another member of the consolidated group makes a distribution or acquisition described in § 1.385–3(b)(3)(i)(A) through (C) with an expanded group member that is not a member of the consolidated group, § 1.385–3(b)(3)(i) may treat the covered debt instrument as funding the distribution or acquisition made by the consolidated group. In addition, except as otherwise provided in this section, acquisitions and distributions described in § 1.385–3(b)(2) and (b)(3)(i) in which all parties to the transaction are members of the same consolidated group both before and after the transaction are disregarded for purposes of this section and §§ 1.385–3 and 1.385–3T.

(2) *One-corporation rule inapplicable to expanded group member determination.* The one-corporation rule in paragraph (b)(1) of this section does not apply in determining the members of an expanded group. Notwithstanding the previous sentence, an expanded group does not exist for purposes of this section and §§ 1.385–3 and 1.385–3T if it consists only of members of a single consolidated group.

(3) *Application of § 1.385–3 to debt instruments issued by members of a consolidated group*—(i) *Debt instrument treated as stock of the issuing member*

of a consolidated group. If a covered debt instrument treated as issued by a consolidated group under the one-corporation rule of paragraph (b)(1) of this section is treated as stock under § 1.385–3 or § 1.385–3T, the covered debt instrument is treated as stock in the member of the consolidated group that would be the issuer of such debt instrument without regard to this section. *But see* § 1.385–3(d)(7) (providing that a covered debt instrument that is treated as stock under § 1.385–3(b)(2), (3), or (4) and that is not described in section 1504(a)(4) is not treated as stock for purposes of determining whether the issuer is a member of an affiliated group (within the meaning of section 1504(a)).

(ii) *Application of the covered debt instrument exclusions.* For purposes of determining whether a debt instrument issued by a member of a consolidated group is a covered debt instrument, each test described in § 1.385–3(g)(3) is applied on a separate member basis without regard to the one-corporation rule in paragraph (b)(1) of this section.

(iii) *Qualified short-term debt instrument.* The determination of whether a member of a consolidated group has issued a qualified short-term debt instrument for purposes of § 1.385–3(b)(3)(vii) is made on a separate member basis without regard to the one-corporation rule in paragraph (b)(1) of this section.

(4) *Application of the reductions of § 1.385–3(c)(3) to members of a consolidated group*—(i) *Application of the reduction for expanded group earnings*—(A) *In general.* A consolidated group maintains one expanded group earnings account with respect to an expanded group period, and only the earnings and profits, determined in accordance with § 1.1502–33 (without regard to the application of § 1.1502–33(b)(2), (e), and (f)), of the common parent (within the meaning of section 1504) of the consolidated group are considered in calculating the expanded group earnings for the expanded group period of the consolidated group. Accordingly, a regarded distribution or acquisition made by a member of a consolidated group is reduced to the extent of the expanded group earnings account of the consolidated group.

(B) *Effect of certain corporate transactions on the calculation of expanded group earnings*—(*1*) *Consolidation.* A consolidated group succeeds to the expanded group earnings account of a joining member under the principles of § 1.385–3(c)(3)(i)(F)(*2*)(*ii*).

(*2*) *Deconsolidation*—(*i*) *In general.* Except as otherwise provided in paragraph (b)(4)(i)(B)(*2*)(*ii*) of this section, no amount of the expanded group earnings account of a consolidated group for an expanded group period, if any, is allocated to a departing member. Accordingly, immediately after leaving the consolidated group, the departing member has no expanded group earnings account with respect to its expanded group period.

(*ii*) *Allocation of expanded group earnings to a departing member in a distribution described in section 355.* If a departing member leaves the consolidated group by reason of an exchange or distribution to which section 355 (or so much of section 356 that relates to section 355) applies, the expanded group earnings account of the consolidated group is allocated between the consolidated group and the departing member in proportion to the earnings and profits of the consolidated group and the earnings and profits of the departing member immediately after the transaction.

(ii) *Application of the reduction for qualified contributions*—(A) *In general.* For purposes of applying § 1.385–3(c)(3)(ii)(A) to a consolidated group—

(*1*) A qualified contribution to any member of a consolidated group that remains a member of the consolidated group immediately after the qualified contribution from a person other than a member of the same consolidated group is treated as made to the one corporation provided in paragraph (b)(1) of this section;

(*2*) A qualified contribution that causes a member of a consolidated group to become a departing member of that consolidated group is treated as made to the departing member and not to the consolidated group of which the departing member was a member immediately prior to the qualified contribution; and

(*3*) No contribution of property by a member of a consolidated group to any other member of the consolidated group is a qualified contribution.

(B) *Effect of certain corporate transactions on the calculation of qualified contributions*—(*1*) *Consolidation.* A consolidated group succeeds to the qualified contributions of a joining member under the principles of § 1.385–3(c)(3)(ii)(F)(*2*)(*ii*).

(*2*) *Deconsolidation*—(*i*) *In general.* Except as otherwise provided in paragraph (b)(4)(ii)(B)(*2*)(*ii*) of this section, no amount of the qualified contributions of a consolidated group for an expanded group period, if any, is allocated to a departing member. Accordingly, immediately after leaving the consolidated group, the departing member has no qualified contributions with respect to its expanded group period.

(*ii*) *Allocation of qualified contributions to a departing member in a distribution described in section 355.* If a departing member leaves the consolidated group by reason of an exchange or distribution to which section 355 (or so much of section 356 that relates to section 355) applies, each qualified contribution of the consolidated group is allocated between the consolidated group and the departing member in proportion to the earnings and profits of the consolidated group and the earnings and profits of the departing member immediately after the transaction.

(5) *Order of operations.* For purposes of this section and §§ 1.385–3 and 1.385–3T, the consequences of a transaction involving one or more members of a consolidated group are determined as provided in paragraphs (b)(5)(i) and (ii) of this section.

(i) First, determine the characterization of the transaction under federal tax law without regard to the one-corporation rule of paragraph (b)(1) of this section.

(ii) Second, apply this section and §§ 1.385–3 and 1.385–3T to the transaction as characterized to determine whether to treat a debt instrument as stock, treating the consolidated group as one corporation under paragraph (b)(1) of this section, unless otherwise provided.

(6) *Partnership owned by a consolidated group.* For purposes of this section and §§ 1.385–3 and § 1.385–3T, and notwithstanding the one-corporation rule of paragraph (b)(1) of this section, a partnership that is wholly owned by members of a consolidated group is treated as a partnership. Thus, for example, if members of a consolidated group own all of the interests in a controlled partnership that issues a debt instrument to a member of the consolidated group, such debt instrument would be treated as a consolidated group debt instrument because, under § 1.385–3T(f)(3)(i), for purposes of this section and § 1.385–3, a consolidated group member that is an expanded group partner is treated as the issuer with respect to its share of the debt instrument issued by the partnership.

(7) *Predecessor and successor*—(i) *In general.* Pursuant to paragraph (b)(5) of this section, the determination as to whether a member of an expanded group is a predecessor or successor of another member of the consolidated

group is made without regard to paragraph (b)(1) of this section. For purposes of § 1.385–3(b)(3), if a consolidated group member is a predecessor or successor of a member of the same expanded group that is not a member of the same consolidated group, the consolidated group is treated as a predecessor or successor of the expanded group member (or the consolidated group of which that expanded group member is a member). Thus, for example, a departing member that departs a consolidated group in a distribution or exchange to which section 355 applies is a successor to the consolidated group and the consolidated group is a predecessor of the departing member.

(ii) *Joining members.* For purposes of § 1.385–3(b)(3), the term predecessor also means, with respect to a consolidated group, a joining member and the term successor also means, with respect to a joining member, a consolidated group.

(c) *Consolidated group debt instruments*—(1) *Debt instrument ceases to be a consolidated group debt instrument but continues to be issued and held by expanded group members*—(i) *Consolidated group member leaves the consolidated group.* For purposes of this section and §§ 1.385–3 and 1.385–3T, when a debt instrument ceases to be a consolidated group debt instrument as a result of a transaction in which the member of the consolidated group that issued the instrument (the *issuer*) or the member of the consolidated group holding the instrument (the *holder*) ceases to be a member of the same consolidated group but both the issuer and the holder continue to be a member of the same expanded group, the issuer is treated as issuing a new debt instrument to the holder in exchange for property immediately after the debt instrument ceases to be a consolidated group debt instrument. To the extent the newly-issued debt instrument is a covered debt instrument that is treated as stock under § 1.385–3(b)(3), the covered debt instrument is then immediately deemed to be exchanged for stock of the issuer. For rules regarding the treatment of the deemed exchange, see § 1.385–1(d). For examples illustrating this rule, see paragraph (f) of this section, *Examples 4* and *5.*

(ii) *Consolidated group debt instrument that is transferred outside of the consolidated group.* For purposes of this section and §§ 1.385–3 and 1.385–3T, when a member of a consolidated group that holds a consolidated group debt instrument transfers the debt instrument to an expanded group member that is not a member of the same consolidated group (*transferee expanded group member*), the debt instrument is treated as issued by the consolidated group to the transferee expanded group member immediately after the debt instrument ceases to be a consolidated group debt instrument. Thus, for example, for purposes of this section and §§ 1.385–3 and 1.385–3T, the sale of a consolidated group debt instrument to a transferee expanded group member is treated as an issuance of the debt instrument by the consolidated group to the transferee expanded group member in exchange for property. To the extent the newly-issued debt instrument is a covered debt instrument that is treated as stock upon being transferred, the covered debt instrument is deemed to be exchanged for stock of the member of the consolidated group treated as the issuer of the debt instrument (determined under paragraph (b)(3)(i) of this section) immediately after the covered debt instrument is transferred outside of the consolidated group. For rules regarding the treatment of the deemed exchange, see § 1.385–1(d). For examples illustrating this rule, see paragraph (f) of this section, *Examples 2* and *3.*

(iii) *Overlap transactions.* If a debt instrument ceases to be a consolidated group debt instrument in a transaction to which both paragraphs (c)(1)(i) and (ii) of this section apply, then only the rules of paragraph (c)(1)(ii) of this section apply with respect to such debt instrument.

(iv) *Subgroup exception.* A debt instrument is not treated as ceasing to be a consolidated group debt instrument for purposes of paragraphs (c)(1)(i) and (ii) of this section if both the issuer and the holder of the debt instrument are members of the same consolidated group immediately after the transaction described in paragraph (c)(1)(i) or (ii) of this section.

(2) *Covered debt instrument treated as stock becomes a consolidated group debt instrument.* When a covered debt instrument that is treated as stock under § 1.385–3 becomes a consolidated group debt instrument, then immediately after the covered debt instrument becomes a consolidated group debt instrument, the issuer is deemed to issue a new covered debt instrument to the holder in exchange for the covered debt instrument that was treated as stock. In addition, in a manner consistent with § 1.385–3(d)(2)(ii)(A), when the covered debt instrument that previously was treated as stock becomes a consolidated group debt instrument, other covered debt instruments issued by the issuer of that instrument (including a consolidated group that includes the issuer) that are not treated as stock when the instrument becomes a consolidated group debt instrument are re-tested to determine whether those other covered debt instruments are treated as funding the regarded distribution or acquisition that previously was treated as funded by the instrument (unless such distribution or acquisition is disregarded under paragraph (b)(1) of this section). Further, also in a manner consistent with § 1.385–3(d)(2)(ii)(A), a covered debt instrument that is issued by the issuer (including a consolidated group that includes the issuer) after the application of this paragraph and within the per se period may also be treated as funding that regarded distribution or acquisition.

(3) *No interaction with the intercompany obligation rules of § 1.1502–13(g).* The rules of this section do not affect the application of the rules of § 1.1502–13(g). Thus, any deemed satisfaction and reissuance of a debt instrument under § 1.1502–13(g) and any deemed issuance and deemed exchange of a debt instrument under this paragraph (c) that arise as part of the same transaction or series of transactions are not integrated. Rather, each deemed satisfaction and reissuance under the rules of § 1.1502–13(g), and each deemed issuance and exchange under the rules of this section, are respected as separate steps and treated as separate transactions.

(d) *Application of the funding rule of § 1.385–3(b)(3) to members departing a consolidated group.* This paragraph (d) provides rules for applying the funding rule of § 1.385–3(b)(3) when a departing member ceases to be a member of a consolidated group, but only if the departing member and the consolidated group are members of the same expanded group immediately after the deconsolidation.

(1) *Continued application of the one-corporation rule.* A disregarded distribution or acquisition by any member of the consolidated group continues to be disregarded when the departing member ceases to be a member of the consolidated group.

(2) *Continued recharacterization of a departing member's covered debt instrument as stock.* A covered debt instrument of a departing member that is treated as stock of the departing member under § 1.385–3(b) continues to be treated as stock when the departing member ceases to be a member of the consolidated group.

(3) *Effect of issuances of covered debt instruments that are not consolidated group debt instruments on the departing member and the consolidated group.* If

a departing member has issued a covered debt instrument (determined without regard to the one-corporation rule of paragraph (b)(1) of this section) that is not a consolidated group debt instrument and that is not treated as stock immediately before the departing member ceases to be a consolidated group member, then the departing member (and not the consolidated group) is treated as issuing the covered debt instrument on the date and in the manner the covered debt instrument was issued. If the departing member is not treated as the issuer of a covered debt instrument pursuant to the preceding sentence, then the consolidated group continues to be treated as issuing the covered debt instrument on the date and in the manner the covered debt instrument was issued.

(4) *Treatment of prior regarded distributions or acquisitions.* This paragraph (d)(4) applies when a departing member ceases to be a consolidated group member in a transaction other than a distribution to which section 355 applies (or so much of section 356 as relates to section 355), and the consolidated group has made a regarded distribution or acquisition. In this case, to the extent the distribution or acquisition has not caused a covered debt instrument of the consolidated group to be treated as stock under § 1.385–3(b) on or before the date the departing member leaves the consolidated group, then—

(i) If the departing member made the regarded distribution or acquisition (determined without regard to the one-corporation rule of paragraph (b)(1) of this section), the departing member (and not the consolidated group) is treated as having made the regarded distribution or acquisition.

(ii) If the departing member did not make the regarded distribution or acquisition (determined without regard to the one-corporation rule of paragraph (b)(1) of this section), then the consolidated group (and not the departing member) continues to be treated as having made the regarded distribution or acquisition.

(e) *Definitions.* The definitions in this paragraph (e) apply for purposes of this section.

(1) *Consolidated group debt instrument.* The term *consolidated group debt instrument* means a covered debt instrument issued by a member of a consolidated group and held by a member of the same consolidated group.

(2) *Departing member.* The term *departing member* means a member of an expanded group that ceases to be a member of a consolidated group but continues to be a member of the same expanded group. In the case of multiple members leaving a consolidated group as a result of a single transaction that continue to be members of the same expanded group, if such members are treated as one corporation under paragraph (b)(1) of this section immediately after the transaction, that one corporation is a departing member with respect to the consolidated group.

(3) *Disregarded distribution or acquisition.* The term *disregarded distribution or acquisition* means a distribution or acquisition described in § 1.385–3(b)(2) or (b)(3)(i) between members of a consolidated group that is disregarded under the one-corporation rule of paragraph (b)(1) of this section.

(4) *Joining member.* The term *joining member* means a member of an expanded group that becomes a member of a consolidated group and continues to be a member of the same expanded group. In the case of multiple members joining a consolidated group as a result of a single transaction that continue to be members of the same expanded group, if such members were treated as one corporation under paragraph (b)(1) of this section immediately before the transaction, that one corporation is a joining member with respect to the consolidated group.

(5) *Regarded distribution or acquisition.* The term *regarded distribution or acquisition* means a distribution or acquisition described in § 1.385–3(b)(2) or (b)(3)(i) that is not disregarded under the one-corporation rule of paragraph (b)(1) of this section.

(f) *Examples*—(1) *Assumed facts.* Except as otherwise stated, the following facts are assumed for purposes of the examples in paragraph (f)(3) of this section:

(i) FP is a foreign corporation that owns 100% of the stock of USS1, a covered member, and 100% of the stock of FS, a foreign corporation;

(ii) USS1 owns 100% of the stock of DS1 and DS3, both covered members;

(iii) DS1 owns 100% of the stock of DS2, a covered member;

(iv) FS owns 100% of the stock of UST, a covered member;

(v) At the beginning of Year 1, FP is the common parent of an expanded group comprised solely of FP, USS1, FS, DS1, DS2, DS3, and UST (the FP expanded group);

(vi) USS1, DS1, DS2, and DS3 are members of a consolidated group of which USS1 is the common parent (the USS1 consolidated group);

(vii) The FP expanded group has outstanding more than $50 million of debt instruments described in § 1.385–3(c)(4) at all times;

(viii) No issuer of a covered debt instrument has a positive expanded group earnings account, within the meaning of § 1.385–3(c)(3)(i)(B), or has received a qualified contribution, within the meaning of § 1.385–3(c)(3)(ii)(B);

(ix) All notes are covered debt instruments, within the meaning of § 1.385–3(g)(3), and are not qualified short-term debt instruments, within the meaning of § 1.385–3(b)(3)(vii);

(x) All notes between members of a consolidated group are intercompany obligations within the meaning of § 1.1502–13(g)(2)(ii);

(xi) Each entity has as its taxable year the calendar year;

(xii) No domestic corporation is a United States real property holding corporation within the meaning of section 897(c)(2);

(xiii) Each note is issued with adequate stated interest (as defined in section 1274(c)(2)); and

(xiv) Each transaction occurs after January 19, 2017.

(2) *No inference.* Except as otherwise provided in this section, it is assumed for purposes of the examples in paragraph (f)(3) of this section that the form of each transaction is respected for federal tax purposes. No inference is intended, however, as to whether any particular note would be respected as indebtedness or as to whether the form of any particular transaction described in an example in paragraph (f)(3) of this section would be respected for federal tax purposes.

(3) *Examples.* The following examples illustrate the rules of this section.

Example 1. Order of operations. (i) *Facts.* On Date A in Year 1, UST issues UST Note to USS1 in exchange for DS3 stock representing less than 20% of the value and voting power of DS3.

(ii) *Analysis.* UST is acquiring the stock of DS3, the non-common parent member of a consolidated group. Pursuant to paragraph (b)(5)(i) of this section, the transaction is first analyzed without regard to the one-corporation rule of paragraph (b)(1) of this section, and therefore UST is treated as issuing a covered debt instrument in exchange for expanded group stock. The exchange of UST Note for DS3 stock is not an exempt exchange within the meaning of § 1.385–3(g)(11) because UST and USS1 are not parties to an asset reorganization. Pursuant to paragraph (b)(5)(ii), § 1.385–3 (including § 1.385–3(b)(2)(ii)) is then applied to the transaction, thereby treating UST Note as stock for federal tax purposes when it is issued by UST to USS1. The UST Note is not treated as property for purposes of section 304(a) because it is not property within the meaning specified in section 317(a). Therefore, UST's acquisition of DS3 stock from USS1 in exchange for UST Note is not an acquisition described in section 304(a)(1).

Example 2. Distribution of consolidated group debt instrument. (i) *Facts.* On Date A

in Year 1, DS1 issues DS1 Note to USS1 in a distribution. On Date B in Year 2, USS1 distributes DS1 Note to FP.

(ii) *Analysis.* Under paragraph (b)(1) of this section, the USS1 consolidated group is treated as one corporation for purposes of § 1.385–3. Accordingly, when DS1 issues DS1 Note to USS1 in a distribution on Date A in Year 1, DS1 is not treated as issuing a debt instrument to another member of DS1's expanded group in a distribution for purposes of § 1.385–3(b)(2), and DS1 Note is not treated as stock under § 1.385–3. When USS1 distributes DS1 Note to FP, DS1 Note is deemed satisfied and reissued under § 1.1502–13(g)(3)(ii), immediately before DS1 Note ceases to be an intercompany obligation. Under paragraph (c)(1)(ii) of this section, when USS1 distributes DS1 Note to FP, the USS1 consolidated group is treated as issuing DS1 Note to FP in a distribution on Date B in Year 2. Accordingly, DS1 Note is treated as stock under § 1.385–3(b)(2)(i). Under paragraph (c)(1)(ii) of this section, DS1 Note is deemed to be exchanged for stock of the issuing member, DS1, immediately after DS1 Note is transferred outside of the USS1 consolidated group. Under paragraph (c)(3) of this section, the deemed satisfaction and reissuance under § 1.1502–13(g)(3)(ii) and the deemed issuance and exchange under paragraph (c)(1)(ii) of this section, are respected as separate steps and treated as separate transactions.

Example 3. Sale of consolidated group debt instrument. (i) *Facts.* On Date A in Year 1, DS1 lends $200x of cash to USS1 in exchange for USS1 Note. On Date B in Year 2, USS1 distributes $200x of cash to FP. Subsequently, on Date C in Year 2, DS1 sells USS1 Note to FS for $200x.

(ii) *Analysis.* Under paragraph (b)(1) of this section, the USS1 consolidated group is treated as one corporation for purposes of § 1.385–3. Accordingly, when USS1 issues USS1 Note to DS1 for property on Date A in Year 1, the USS1 consolidated group is not treated as a funded member, and when USS1 distributes $200x to FP on Date B in Year 2, that distribution is a transaction described in § 1.385–3(b)(3)(i)(A), but does not cause USS1 Note to be recharacterized under § 1.385–3(b)(3). When DS1 sells USS1 Note to FS, USS1 Note is deemed satisfied and reissued under § 1.1502–13(g)(3)(ii), immediately before USS1 Note ceases to be an intercompany obligation. Under paragraph (c)(1)(ii) of this section, when the USS1 Note is transferred to FS for $200x on Date C in Year 2, the USS1 consolidated group is treated as issuing USS1 Note to FS in exchange for $200x on that date. Because USS1 Note is issued by the USS1 consolidated group to FS within the per se period as defined in § 1.385–3(g)(19) with respect to the distribution by the USS1 consolidated group to FP, USS1 Note is treated as funding the distribution under § 1.385–3(b)(3)(iii)(A) and, accordingly, is treated as stock under § 1.385–3(b)(3). Under § 1.385–3(d)(1)(i) and paragraph (c)(1)(ii) of this section, USS1 Note is deemed to be exchanged for stock of the issuing member, USS1, immediately after USS1 Note is transferred outside of the USS1 consolidated group. Under paragraph (c)(3) of this section, the deemed satisfaction and reissuance under § 1.1502–13(g)(3)(ii) and the deemed issuance and exchange under paragraph (c)(1)(ii) of this section, are respected as separate steps and treated as separate transactions.

Example 4. Treatment of consolidated group debt instrument and departing member's regarded distribution or acquisition when the issuer of the instrument leaves the consolidated group. (i) *Facts.* The facts are the same as provided in paragraph (f)(1) of this section, except that USS1 and FS own 90% and 10% of the stock of DS1, respectively. On Date A in Year 1, DS1 distributes $80x of cash and newly-issued DS1 Note, which has a value of $10x, to USS1. Also on Date A in Year 1, DS1 distributes $10x of cash to FS. On Date B in Year 2, FS purchases all of USS1's stock in DS1 (90% of the stock of DS1), resulting in DS1 ceasing to be a member of the USS1 consolidated group.

(ii) *Analysis.* Under paragraph (b)(1) of this section, the USS1 consolidated group is treated as one corporation for purposes of § 1.385–3. Accordingly, DS1's distribution of $80x of cash to USS1 on Date A in Year 1 is a disregarded distribution or acquisition, and under paragraph (d)(1) of this section, continues to be a disregarded distribution or acquisition when DS1 ceases to be a member of the USS1 consolidated group. In addition, when DS1 issues DS1 Note to USS1 in a distribution on Date A in Year 1, DS1 is not treated as issuing a debt instrument to a member of DS1's expanded group in a distribution for purposes of § 1.385–3(b)(2)(i), and DS1 Note is not treated as stock under § 1.385–3(b)(2)(i). DS1's issuance of DS1 Note to USS1 is also a disregarded distribution or acquisition, and under paragraph (d)(1) of this section, continues to be a disregarded distribution or acquisition when DS1 ceases to be a member of the USS1 consolidated group. The distribution of $10x cash by DS1 to FS on Date A in Year 1 is a regarded distribution or acquisition. When FS purchases 90% of the stock of DS1's from USS1 on Date B in Year 2 and DS1 ceases to be a member of the USS1 consolidated group, DS1 Note is deemed satisfied and reissued under § 1.1502–13(g)(3)(ii), immediately before DS1 Note ceases to be an intercompany obligation. Under paragraph (c)(1)(i) of this section, for purposes of § 1.385–3, DS1 is treated as satisfying the DS1 Note with cash equal to the note's fair market value, followed by DS1's issuance of a new note for the same amount of cash immediately after DS1 Note ceases to be a consolidated group debt instrument. Under paragraph (d)(4)(i) of this section, the departing member, DS1 (and not the USS1 consolidated group) is treated as having distributed $10x to FS on Date A in Year 1 (a regarded distribution or acquisition) for purposes of applying § 1.385–3(b)(3) after DS1 ceases to be a member of the USS1 consolidated group. Because DS1 Note is reissued by DS1 to USS1 within the per se period (as defined in § 1.385–3(g)(19)) with respect to DS1's regarded distribution to FS, DS1 Note is treated as funding the distribution under § 1.385–3(b)(3)(iii)(A) and, accordingly, is treated as stock under § 1.385–3(b)(3). Under § 1.385–3(d)(1)(i) and paragraph (c)(1)(i) of this section, DS1 Note is immediately deemed to be exchanged for stock of DS1 on Date B in Year 2. Under paragraph (c)(3) of this section, the deemed satisfaction and reissuance under § 1.1502–13(g)(3)(ii) and the deemed issuance and exchange under paragraph (c)(1)(i) of this section are respected as separate steps and treated as separate transactions. Under § 1.385–3(d)(7)(i), after DS1 Note is treated as stock held by USS1, DS1 Note is not treated as stock for purposes of determining whether DS1 is a member of the USS1 consolidated group.

Example 5. Treatment of consolidated group debt instrument and consolidated group's regarded distribution or acquisition. (i) *Facts.* On Date A in Year 1, DS1 issues DS1 Note to USS1. On Date B in Year 2, USS1 distributes $100x of cash to FP. On Date C in Year 3, USS1 sells all of its interest in DS1 to FS, resulting in DS1 ceasing to be a member of the USS1 consolidated group.

(ii) *Analysis.* Under paragraph (b)(1) of this section, the USS1 consolidated group is treated as one corporation for purposes of § 1.385–3. Accordingly, when DS1 issues DS1 Note to USS1 in a distribution on Date A in Year 1, DS1 is not treated as issuing a debt instrument to a member of DS1's expanded group in a distribution for purposes of § 1.385–3(b)(2)(i), and DS1 Note is not treated as stock under § 1.385–3(b)(2)(i). DS1's issuance of DS1 Note to USS1 is also a disregarded distribution or acquisition, and under paragraph (d)(1) of this section, continues to be a disregarded distribution or acquisition when DS1 ceases to be a member of the USS1 consolidated group. The distribution of $100x cash by DS1 to USS1 on Date B in Year 2 is a regarded distribution or acquisition. When FS purchases all of the stock of DS1 from USS1 on Date C in Year 3 and DS1 ceases to be a member of the USS1 consolidated group, DS1 Note is deemed satisfied and reissued under § 1.1502–13(g)(3)(ii), immediately before DS1 Note ceases to be an intercompany obligation. Under paragraph (c)(1)(i) of this section, for purposes of § 1.385–3, DS1 is treated as satisfying DS1 Note with cash equal to the note's fair market value, followed by DS1's issuance of a new note for the same amount of cash immediately after DS1 Note ceases to be a consolidated group debt instrument. Under paragraph (d)(4)(ii) of this section, the USS1 consolidated group (and not DS1) is treated as having distributed $100x to FP on Date B in Year 2 (a regarded distribution or acquisition) for purposes of applying § 1.385–3(b)(3) after DS1 ceases to be a member of the USS1 consolidated group. Because DS1 has not engaged in a regarded distribution or acquisition that would have been treated as funded by the reissued DS1 Note, the reissued DS1 Note is not treated as stock.

Example 6. Treatment of departing member's issuance of a covered debt instrument. (i) *Facts.* On Date A in Year 1, FS lends $100x of cash to DS1 in exchange for DS1 Note. On Date B in Year 2, USS1 distributes $30x of cash to FP. On Date C in Year 2, USS1 sells all of its DS1 stock to FP, resulting in DS1 ceasing to be a member of the USS1 consolidated group.

(ii) *Analysis.* Under paragraph (b)(1) of this section, the USS1 consolidated group is treated as one corporation for purposes of § 1.385–3. Accordingly, on Date A in Year 1, the USS1 consolidated group is treated as issuing DS1 Note to FS, and on Date B in Year 2, the USS1 consolidated group is treated as distributing $30x of cash to FP. Because DS1 Note is issued by the USS1 consolidated group to FS within the per se period as defined in § 1.385–3(g)(19) with respect to the distribution by the USS1consoldiated group of $30x cash to FP, $30x of DS1 Note is treated as funding the distribution under § 1.385–3(b)(3)(iii)(A), and, accordingly, is treated as stock on Date B in Year 2 under § 1.385–3(b)(3) and § 1.385–3(d)(1)(ii). Under paragraph (d)(3) of this section, DS1 (and not the USS1 consolidated group) is treated as the issuer of the remaining portion of DS1 Note for purposes of applying § 1.385–3(b)(3) after DS1 ceases to be a member of the USS1 consolidated group.

(g) *Applicability date.* This section applies to taxable years ending on or after January 19, 2017.

(h) *Expiration date.* This section expires on October 11, 2019.

■ **Par. 7.** Section 1.752–2 is amended by adding paragraphs (c)(3) and (l)(4) to read as follows:

§ 1.752–2 Partner's share of recourse liabilities.

* * * * *

(c) * * *

(3) [Reserved]. For further guidance, see § 1.752–2T(c)(3).

* * * * *

(l) * * *

(4) [Reserved]. For further guidance, see § 1.752–2T(l)(4).

■ **Par. 8.** Section 1.752–2T is amended by revising paragraphs (c)(3) and (m) and adding (l)(4) to read as follows:

§ 1.752–2T Partner's share of recourse liabilities (temporary).

* * * * *

(c) * * *

(3) *Allocation of debt deemed transferred to a partner pursuant to regulations under section 385.* For a special rule regarding the allocation of a partnership liability that is a debt instrument with respect to which there is one or more deemed transferred receivables within the meaning of § 1.385–3T(g)(8), see § 1.385–3T(f)(4)(vi).

* * * * *

(l) * * *

(4) Paragraph (c)(3) of this section applies on or after January 19, 2017.

(m) *Expiration date*—(1) Paragraphs (a) through (c)(2) and (d) through (l)(3) of this section expire on October 4, 2019.

(2) Paragraphs (c)(3) and (l)(4) of this section expire on October 11, 2019.

■ **Par. 9.** Section 1.1275–1 is amended by adding a sentence after the last sentence of paragraph (d) to read as follows:

§ 1.1275–1 Definitions.

* * * * *

(d) * * * See § 1.385–2 for rules to determine whether certain instruments are treated as stock for federal tax purposes and § 1.385–3 for rules that treat certain instruments that otherwise would be treated as indebtedness as stock for federal tax purposes.

* * * * *

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: October 11, 2016

Mark J. Mazur

Assistant Secretary of the Treasury (Tax Policy).

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Part III

Department of Defense

Defense Acquisition Regulations System

48 CFR Parts 202, 203, 204, et al.

Defense Federal Acquisition Regulation Supplement: Network Penetration Reporting and Contracting for Cloud Services (DFARS Case 2013–D018); Final Rule

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 202, 204, 212, 239, and 252

[Docket DARS–2015–0039]

RIN 0750–AI61

Defense Federal Acquisition Regulation Supplement: Network Penetration Reporting and Contracting for Cloud Services (DFARS Case 2013–D018)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is adopting as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2013 and a section of the National Defense Authorization Act for Fiscal Year 2015, both of which require contractor reporting on network penetrations, as well as DoD policy on the purchase of cloud computing services.

DATES: Effective October 21, 2016.

FOR FURTHER INFORMATION CONTACT: Mr. Dustin Pitsch, telephone 571–372–6090.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published two interim rules in the **Federal Register** on August 26, 2015 (80 FR 51739), and December 30, 2015 (80 FR 81472), to implement section 941 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112–239) and section 1632 of the NDAA for FY 2015 (Pub. L. 113–291) regarding contractor reporting of network penetrations, as well as DoD policies and procedures with regard to purchases of cloud computing services. This final rule also implements, for DoD, section 325 of the Intelligence Authorization Act for FY 2014 (Pub. L. 113–126); however, implementing section 325 requires no new changes to the rule, because the reporting requirement is already included.

This rule is part of DoD's retrospective plan, completed in August 2011, under Executive Order 13563, ''Improving Regulation and Regulatory Review.'' DoD's full plan and updates can be accessed at: *http://www.regulations.gov/#!docketDetail;D=DOD-2011-OS-0036.* Twenty-five respondents submitted public comments in response to the interim rules.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments received and the changes made to the rule as a result of those comments follows:

A. Summary of Significant Changes From the Interim Rule

1. The definition of ''covered defense information'' is amended to clarify that, in order to be designated as covered defense information, the information must be controlled technical information or other information (as described in the Controlled Unclassified Information (CUI) Registry) that requires safeguarding or dissemination controls and is (1) marked or otherwise identified in the contract, task order, or delivery order, and provided to the contractor by or on behalf of DoD in connection with the performance of the contract; or (2) collected, developed, received, transmitted, used, or stored by or on behalf of the contractor in support of the performance of the contract. This definition is in line with the National Archives and Record Administration (NARA) ''Controlled Unclassified Information'' final rule published in the **Federal Register** on September 14, 2016 (81 FR 63324). Covered defense information includes all of the categories of information that are considered CUI. The rule also now specifies that all covered contractor information systems need to be protected in accordance with DFARS clause 252.204–7012, Safeguarding Covered Defense Information and Cyber Incident Reporting.

2. The definition of ''covered contractor information system'' is amended to clarify that it is an ''unclassified'' information system that is owned, or operated by or for, a contractor and that processes, stores, or transmits covered defense information.

3. DFARS 204.7304, Solicitation provision and contract clauses, is amended to specify that DFARS provision 252.204–7008, Compliance with Safeguarding Covered Defense Information Controls, and DFARS clause 252.204–7012 are not prescribed for use in solicitations or contracts that are solely for the acquisition of commercially available off-the-shelf (COTS) items.

4. DFARS 239.7602–1, General, is amended to provide for two exceptions in which a contracting officer may award a contract to acquire cloud services from a cloud service provider (CSP) that has not been granted a provisional authorization by the Defense Information System Agency.

5. DFARS clause 252.204–7000, Disclosure of Information, is amended to clarify that fundamental research, by definition, must not involve any covered defense information.

6. DFARS clause 252.204–7012 is amended to—

a. Specify that contractors are obligated to implement information protection requirements on all covered contractor information systems;

b. Provide additional guidance on requests to vary from National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171, ''Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations;''

c. Clarify that contractors are not required to implement any security requirement if an authorized representative of the DoD Chief Information Officer (CIO) has adjudicated the contractor's request to vary from NIST SP 800–171 and indicated the security requirement to be nonapplicable or to have an alternative, but equally effective, security measure;

d. Require contractors to ensure that external CSPs used in performance of the contract to store, process, or transmit any covered defense information meet security requirements equivalent to those established by the Government for the Federal Risk and Authorization Management Program (FedRAMP) Moderate baseline (available at *https://www.fedramp.gov/resources/documents/*) and comply with requirements in the clause for cyber incident reporting, malicious software, media preservation and protection, access to additional information and equipment necessary for forensic analysis, and cyber incident damage assessment;

e. Clarify that subcontractor flowdown is only necessary when covered defense information is necessary for performance of the subcontract, and that the contractor may consult with the contracting officer, if necessary, when uncertain if the clause should flow down; and

f. Clarify that the prime contract shall require its subcontractors to notify the prime contractor (or the next higher-tier subcontractor) when submitting requests to vary from a NIST SP 800–171 security requirement to the contracting officer.

B. Analysis of Public Comments

1. Applicability

a. Commercial/COTS Providers

Comment: Multiple respondents commented on the applicability of the rule to contracts and subcontracts for commercial and COTS items. One suggested that the full potential impact of the interim rule on commercial providers should be studied and quantified by DoD before implementation of the rule. Others suggested that the vast majority of commercial contracts do not require that DoD provide information in order for the contractor or subcontractor to perform the work, and that the clause should only apply when DoD provides controlled unclassified information to a contractor as a necessary predicate to performing the contract. One respondent recommended that DoD exempt contracts for commercial and COTS items from application of the final rule or, in the alternative, exempt subcontractors supplying commercial or COTS items from the final rule.

Response: The definition of covered defense information has been amended to clarify, as suggested by the respondents, that in order to be designated as covered defense information, the information must be marked or otherwise identified in the contract and provided to the contractor by or on behalf of DoD in connection with the performance of the contract; or collected, developed, received, transmitted, used, or stored by or on behalf of the contractor in support of the performance of the contract. In addition, to clarify that the rule does not apply to COTS items, the prescriptions at DFARS 204.7304 for use of the provision at 252.204–7008 and the clause at 252.204–7012 are amended to exclude solicitations and contracts solely for the acquisition of COTS items.

b. Fundamental Research

Comment: Several respondents requested clarification regarding the application of the security requirements embedded in DFARS clause 252.204–7012 to fundamental research.

Response: The security requirements in 252.204–7012 need to be in place when covered defense information is present. A contract or project that is appropriately scoped as fundamental research will not contain any covered defense information. The final rule is modified to only flow down the requirements of 252.204–7012 to subcontractors when subcontract performance is for operationally critical support or will involve covered defense information, which means the clause will not flow down to subcontractors that are exclusively performing fundamental research. DFARS clause 252.204–7000 is modified to ensure that it is clear that no covered defense information is involved when making a fundamental research determination.

c. Classified Information System

Comment: One respondent noted that it is unclear whether the clause applies to covered defense information resident on contractor classified information systems. While the covered defense information itself has been explicitly defined as unclassified, covered contractor systems are not specified as such.

Response: The definition for ''covered contractor information system'' has been amended to clarify that it is ''an unclassified information system that is owned, or operated by or for, a contractor and that processes, stores, or transmits covered defense information.''

d. When Other Security Requirements Apply

Comment: One respondent noted that the mandatory flowdowns of the data security and penetration reporting requirements to health care providers who are subcontractors to military health care plans should be amended to provide that such providers who comply with their data security obligations under Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health (HITECH) Act are deemed to be in compliance with DoD's data security rules.

Response: If the covered defense information provided is DoD HIPAA, then the requirement would be to meet both HIPAA and NIST SP 800–171. There are requirements of HIPAA that are not in 800–171, just as there are requirements in 800–171 that are not in HIPAA. DFARS 204.7300(b) states that the rule ''does not abrogate any other requirements regarding contractor physical, personnel, information, technical, or general administrative security operations governing the protection of unclassified information.''

e. Small Business

Comment: Several respondents commented on the cost impact to small businesses. One respondent suggested that this rule will impact subcontracting cycles and deliveries throughout the DoD supply chain, due to the inability for smaller suppliers to afford the investment and skilled labor force required to meet and manage these requirements. Multiple respondents requested that, due to the high cost of compliance, DoD provide for an alternative approach for small business. One respondent suggested that DoD consider collaborating with universities or other companies, to provide low-cost cybersecurity services to small businesses, or providing a one-time subsidy to small businesses to help cover the cost of initial consultations with third party vendors. Another suggested that DoD coordinate with the Small Business Administration, Department of Commerce, and other relevant executive agencies, to establish policy, training mechanisms, and learning centers that allow access to the necessary resources to assist small and commercial businesses in creating compliant information systems.

Response: While it is understood that implementing the minimum security controls outlined in the DFARS clause may increase costs, protection of unclassified DoD information is deemed necessary. The cost to the nation in lost intellectual property and lost technological advantage over potential adversaries is much greater than these initial/ongoing investments. The value of the information (and impact of its loss) does not diminish when it moves to contractors (prime or sub, large or small). NIST SP 800–171 was carefully crafted to use performance-based requirements and eliminate unnecessary specificity and include only those security requirements necessary to provide adequate protections for the impact level of CUI (*e.g.,* covered defense information). Implementation of the NIST SP 800–171 security requirements will provide significant benefit to the small business community in the form of increased protection of their intellectual property. In addition, defining one set of standards will help small businesses to avoid a situation in which small business must adopt multiple standards and rule sets as small businesses navigate amongst the many different organizations with which they do business. The addition of a new provision at 252.204–7008, Compliance with Safeguarding Covered Defense Information Controls, ensures that the offeror is aware of the requirements of clause 252.204–7012 and has time to bring their system into compliance and negotiate the terms of the contract accordingly. With regard to training, DoD will engage across both Government and industry to educate and raise awareness of the importance of protecting our controlled unclassified information and to address implementation of the rule.

2. Regulatory Flexibility Act

Comment: Various respondents addressed application of the rule to small entities.

Response: For analysis of applicability to small entities see the regulatory flexibility analysis at section V of this preamble.

3. Definitions

a. Covered Defense Information

Comment: Several respondents suggested that the definition of ''covered defense information'' is too expansive, requiring that data be safeguarded without clear marking instructions and identification of operational processes. Several respondents commented that contractors should not be required to make independent decisions regarding whether information is subject to safeguarding requirements, and that the rule limit its application only to covered defense information marked or expressly identified as protected by DoD. One respondent requested clarification that the rule only imposes restrictions on covered defense information that DoD provides to the contractor to perform the contract. Another respondent suggested that the relationship between ''controlled defense information'' and ''controlled unclassified information'' and the ''Controlled Unclassified Information Registry (CUI Registry)'' should be clearly articulated. Two respondents suggested that covered data be limited to the ''unclassified controlled technical information'' covered in the predecessor DFARS rule. One of the respondents further suggested that if the scope is not focused back to the ''unclassified controlled technical information'' definition, the rule should define covered defense information to specifically exclude the contractor's own information that is not delivered to the Government. One respondent commented that, because it is not possible to contemplate every type of information that may arise in the future, it would be prudent to set forth in the rule a centralized process that contractors could use when it is not clear whether a specific type of information falls within the definition of ''covered defense information'' to ensure that information is treated consistently across contracts and commands. This respondent further stated that the rule should provide a standard for evaluating whether a contractor has reasonably complied with the rule when faced with a judgment call as to whether information falls within the definition.

Response: The final rule clarifies the definition of ''covered defense information'' and the requirement to provide adequate security. The definition of ''covered defense information'' is amended to state that covered defense information is unclassified controlled technical information or other information (as described in the CUI Registry at *http://www.archives.gov/cui/registry/category-list.html*) that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Governmentwide policies and is either (1) marked or otherwise identified in the contract and provided to the contractor by or on behalf of DoD in connection with the performance of the contract; or (2) collected, developed, received, transmitted, used, or stored by or on behalf of the contractor in support of the performance of the contract. This revised definition adds an affirmative requirement for Government to mark or otherwise identify in the contract all covered defense information that is being provided to the contractor, while recognizing the shared obligation of the contractor to recognize and protect covered defense information that the contractor is developing during contract performance. In addition, paragraph (b) of DFARS clause 252.204–7012 is amended to clarify that adequate security is required on all covered contractor information systems. Paragraph (m)(1) of the clause is also modified to indicate that, if necessary, the contractor shall determine if the information required for subcontractor performance retains its identity as covered defense information and will require protection under this clause and, if necessary, consult with the contracting officer.

b. Export Control

Comment: Several respondents suggested that the definition of covered defense information should refer only to export controlled information, and not include a general description of the type of information that may be subject to export controls. One respondent suggested this section be reworded as follows: ''Unclassified information concerning items requiring licenses under the export administration regulations, or the international trafficking in arms regulations and munitions list.'' Another respondent suggested that DoD define ''export controlled information'' in the final rule, since particular categories of International Traffic in Arms Regulations (ITAR)—controlled technical data and designated control list categories of the Export Administration Regulations (EAR), such as national security, nonproliferation, and missile technology. Several respondents suggested the definition of ''export control'' be limited to technologies subject to the EAR, ITAR, or nuclear export regulations. One respondent suggested that DoD exclude items from its definition of ''covered defense information'' that are subject to minimal export controls.

Response: The definition of ''covered defense information'' is amended to clarify that the information includes unclassified controlled technical information or other information (as described in the CUI Registry) that is marked or otherwise identified in the contract and provided to the contractor by or on behalf of DoD in connection with the performance of the contract; or be collected, developed, received, transmitted, used, or stored by or on behalf of the contractor in support of the performance of the contract. Export control is a category in the CUI Registry, but it is only considered covered defense information when both DoD contractors hold unclassified information that is export controlled, and the information is ''provided to the contractor by or on behalf of DoD in connection with the performance of the contract, or collected, developed, received, transmitted, used, or stored by or on behalf of the contractor in support of the performance of the contract,'' as defined in the final rule. Protecting DoD-related export controlled information as covered defense information should not be interpreted to imply that the same information, not related to the DoD activity, requires protection as covered defense information.

c. Covered Defense Information—''Other'' Category

Comment: Several respondents commented that DoD should provide more clarity regarding the categories of information that comprise covered defense information, specifically the scope of ''any other information. . . .'' One respondent suggested that the rule specifically address DoD information routinely handled by Contractors, such as information marked ''For Official Use Only'' and personally identifiable information (PII) maintained to support DoD clearance processing, and clearly indicate whether this information is in or out of scope. Another respondent suggested that the definition of ''covered defense information'' should be amended to exclude information, such as protected health information (PHI) that is already subject to security control regulations.

Response: The definition of ''covered defense information'' is amended to clarify that ''other information'' is other information (as described in the CUI Registry) that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Governmentwide policies. The CUI Registry includes personal information, PII, and PHI. The security requirements in this clause set a baseline standard. Additional protections may be required for specific categories of information, such as PHI.

d. Operationally Critical Support and Critical Information (Operations Security)

Comment: Several respondents commented on how the rule addresses ''operationally critical support'' and ''critical information (operations security)'' and requested clarification of the terms ''critical information'' and ''operations security.'' One respondent commented that the rule indicates that the Government will designate which supplies or services are critical for airlift, etc., but the rule neither indicates where such information will be found, nor defines a process for designating contractors in this category or notifying such contractors that they are critical to operational support. Another respondent suggested that while the interim rule suggests that DoD will designate specific portions of its contracts that it considers to be ''operationally critical support,'' the scope of what constitutes a contractor's ''ability to provide operationally critical support'' is so vague that it may not accomplish its purpose. This respondent recommended that DoD clarify that a reportable incident occurs when a cyber incident affects the security or integrity of operationally critical information residing in a contractor information system. One respondent commented that ambiguities with regard to operationally critical support are particularly concerning to the transportation industry, suggesting that it is not clear whether ''package level detail'' which includes information about the identity of the shipping and receiving parties and the delivery address is considered ''covered defense information.'' This respondent also suggested that a cyber incident that affects the contractor's ability to perform ''operationally critical support'' could also include incidents on systems beyond ''covered information systems'' and the interim rule requires reporting of those incidents, as well. Another respondent requested DoD clarify how or whether the term ''operationally critical'' applies to contractors/subcontractors.

Response: The modified definition of covered defense information replaces the requirement that information ''falls in any of the following categories: Controlled technical information, critical information (operations security), export control, and any other information, marked or otherwise identified in the contract, that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Governmentwide policies'' with the statement ''as described in the CUI Registry at *http://www.archives.gov/cui/registry/category-list.html,* requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Governmentwide policies.'' Because ''critical information (operations security)'' is not currently listed on the CUI Registry, it can no longer, in and of itself, be designated as covered defense information. Section 1632 of the NDAA for FY 2015, which requires that a contractor designated as operationally critical report each time a cyber incident occurs on that contractor's network or information systems, is implemented via the DFARS clause 252.204–7012 requirement for contractors and subcontractors to report cyber incidents that result in an actual or potentially adverse effect on a their ability to provide operationally critical support. Operationally critical support is an ''activity''—not an information type—performed by the contractor or subcontract. DFARS does not require protections for contractor information systems that are used to provide operationally critical support, but does require the contractor to report a cyber incident that affects the contractor's ability to perform the requirements of the contract that are designated as operationally critical support. Operationally critical support requirements must be marked or otherwise identified in the contract, task order, or delivery order.

4. Compliance

a. Multiple Versions/Block Change

Comment: Several respondents commented that the new rule could leave contractors subject to different security standards depending on which version of clause 252.204–7012 appears in their contracts and subcontracts. One respondent suggested that this results in them incurring costs due to the changes involved. Other respondents recommended that, in lieu of each contractor negotiating the phase-in relief provided in the amended rules on every transaction, DoD issue a block change modification to all contracts where the relevant August interim rule clauses are present to adopt the December 30 changes and allow for equitable adjustment to the contract price. One respondent suggested that DoD consider issuing instructions to contracting officers to substitute the most recent version of this clause for older versions, at the request of the contractor.

Response: The security requirements in NIST SP 800–171 build upon the table of controls contained in the November 2013 version of DFARS clause 252.204–7012. While there is additional effort for the difference, none of the effort to implement the original controls is lost. Due to the differences in the multiple versions of 252.204–7012, however, amending the contract requires procuring contracting officer authority and is generally bilateral, requiring contractor signature. ''Block changes'' and ''mass modifications'' are generally reserved for administrative changes, such as a payment office address change. There is nothing that precludes a contracting officer from considering a modification of the contract upon request of the contractor.

b. Cost

Comment: One respondent commented that the cost recovery model for complying with the interim rule is not well understood, suggesting that the cost to them and their supply base will be significant as they expand their capabilities to meet the new controls and absorb the administrative costs to oversee the supply base's compliance. The respondent recommended that the Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics) work with industry to clarify cost recovery options.

Response: DoD does not develop ''cost recovery models'' for compliance with DFARS rules. The requirements levied by this rule should be treated the same as those levied by any other new DFARS rule and the cost related to compliance should be considered during proposal preparation. Contractors should continue to comply with their own internal accounting processes.

c. Certification and Oversight

Comment: A number of respondents commented on the lack of oversight and certification of compliance with the NIST controls in the rule. Several respondents requested clarification on the requirements for an organization to be considered compliant, as well as the intended means of verification, which organization will verify, how compliance will be assessed, and how

often. One respondent requested details on the process for obtaining official, consistent interpretations of the standards when DoD and the contractor have different interpretations of the NIST SP 800–171 standards. Another respondent recommended that large companies be allowed to certify at the company level, suggesting that the requirement to certify each program individually creates an insurmountable burden for both the company and DoD.

Response: No new oversight paradigm is created through this rule. If oversight related to these requirements is deemed necessary, then it can be accomplished through existing Federal Acquisition Regulation (FAR) and DFARS allowances, or an additional requirement can be added to the terms of the contract. The rule does not require ''certification'' of any kind. By signing the contract, the contractor agrees to comply with the contract's terms.

d. Implementation Deadline

Comment: One respondent asked for clarification with regard to what the term ''as soon as practical'' means.

Response: The phrase ''as soon as practical'' is added to encourage contractors to begin implementing the security requirements in NIST SP 800–171 prior to the December 31, 2017, deadline, but allows contractors to exercise their own judgement when planning an optimal implementation strategy.

e. Source Selection

Comment: One respondent inquired if DoD can require immediate compliance with all NIST controls as a condition of responsiveness to a solicitation, and urged DoD to prohibit source selection exclusions based on a desire or demand for 100% compliance at time of solicitation or contract prior to December 31, 2017. Another respondent suggested that the final rule clarify that DoD does not intend for DFARS clause 252.204–7012 to be used in the evaluation process.

Response: DFARS Clause 252.204–7012 is not structured to facilitate the use of the contractor's compliance with NIST SP 800–171 as a factor in the evaluation/source selection process. The requirements are set as the minimum acceptable level to protect covered defense information. The rule does not preclude a requiring activity from specifically stating in the solicitation that compliance with the NIST SP 800–171 will be used as an evaluation factor in the source section process, and the specifics on how such an evaluation factor would be utilized to evaluate proposals would need to be detailed within the solicitation. However, this is outside of the scope of this rule and would need to be appropriately addressed on an individual solicitation basis.

5. 30-Day Notification and Alternative Controls

a. Notification Versus Alternatives

Comment: Several respondents requested clarification as to why DFARS 252.204–7008 and 252.204–7012 are separate. Other respondents suggested that there is a contradiction between DFARS provision 252.204–7008 and clause 252.204–7012, and requested clarification regarding the intent of the 30-day notification requirement. Respondents also requested that DoD clarify how the NIST controls requirements variance process identified in the representation clause at 252.204–7008 (*i.e.,* a written explanation and adjudicative process by the DoD CIO pre-award) differs from the security clause at 252.204–7012, which allows for phased-in implementation with a process of proposing alternatives without pre-award approval.

Response: DFARS provision 252.204–7008 serves as a notice to offerors. The provision puts the offeror on notice that, when performance of the contract requires covered defense information on a covered contractor information system, the security requirements in NIST SP 800–171 apply and must be implemented no later than December 31, 2017. In addition, the provision notifies the offeror that they may submit a request to vary from any of the security requirements in NIST SP 800–171 to the contracting officer, for adjudication by DoD CIO, prior to award. DFARS clause 252.204–7012 is amended by adding a new paragraph (b)(2)(ii)(B) to clarify that the contractor may submit a request to vary from the security requirements in NIST SP 800–171 after contract award.

Separate and distinct from the process to request to vary from the security requirements in NIST SP 800–171, the 30-day notification requirement contained in DFARS clause 252.204–7012 requires the contractor to provide the DoD CIO with a list of the security requirements that the contractor is not implementing at the time of award. This notification will end for all contracts awarded after September 30, 2017, in preparation of the full security requirement implementation date of December 31, 2017.

b. Alternative Controls

Comment: Several respondents requested that DoD clarify 252.204–7008 with regard to the process to request variances from the SP 800–171 security controls, to include where a contractor/subcontractor request should be sent, if subcontractors may bypass their prime contractor when submitting in order to safeguard any proprietary information, a timeline for the authorized representative from the DoD CIO's office to respond to contractor/subcontractor requests, and whether and how CIO evaluations could impact award decisions. One respondent recommends that DoD clarify that contractors may also identify and seek CIO adjudication on variances from NIST SP 800–171 requirements after award as they progress through implementation, and that DoD clarify that such documents will be securely maintained and not be released publicly.

Response: DFARS provision 252.204–7008 ensures that offerors are aware of the safeguarding requirements of DFARS clause 252.204–7012, and provides a process for the offeror to identify situations in which a security requirement in NIST SP 800–171 is not necessary in performance of the contract, or to propose an alternative to a security requirement is NIST SP 800–171. In such cases, the offeror must provide a written explanation in their proposal describing the reasons why a security requirement is not applicable, or how alternative, but equally effective, security measures can compensate for the inability to satisfy a particular requirement. The contracting officer will refer the proposed variance to the DoD CIO for adjudication. The DoD CIO is responsible for ensuring consistent adjudication of proposed non-applicable or alternative security measures. If the DoD CIO needs additional information, a request is made to the contracting officer. Responses are then returned to the contracting officer who, in turn, advises the contractor of the decision. The timeframe for response by the DoD CIO is typically within five business days. The basis for determining if an alternative to a security requirement is acceptable is whether the alternative is equally effective; the basis for determining a security requirement is ''not applicable'' is whether the basis or condition for the requirement is absent. While the scope of this rule does not provide for the CIO evaluation to impact the award decision, there is nothing that precludes an activity from drafting the solicitation to provide for this.

DFARS clause 252.204–7012 is amended by adding a new paragraph

(b)(2)(ii)(B) to clarify that the contractor may request the contracting officer seek DoD CIO adjudication on variances from NIST SP 800–171 requirements after award. DFARS clause 252.204–7012 is flowed down to subcontractors without alteration when performance will involve operationally critical support or covered defense information. However, paragraph (m) of the clause is amended to clarify that the prime contractor shall require subcontractors to notify the prime contractor (or next higher-tier subcontractor) of any requests for variance submitted directly to the contracting officer.

c. 30-Day Notification

Comment: Several respondents requested that clarification be provided regarding the requirement that the contractor provide notification to the DoD CIO within 30 days of contract award listing the unmet NIST SP 800–171 security requirements. Respondents asked the following questions: Is the 30-day deadline for the prime contractor's response only, or also for the prime's entire supply base? Would post-award notifications also be required 30 days after award of subcontracts? Should subcontractors submit their notifications directly to the DoD CIO? Can subcontractors also be required to submit copies to the prime contractor? How will these sensitive documents be protected? One respondent asked what is required for the 30-day assessment, if the contract in question ends prior to the December 31, 2017, compliance date. One respondent also suggested that the requirement should be modified to allow at least 90 days after award, and that DoD should allow for a single corporate-wide compliance, and that such a compliance requirement could be accomplished at annual or semi-annual intervals, and not on every single transaction within 30 days.

Response: DFARS clause 252.204–7012 requires the contractor to notify the DoD CIO, within 30 days of contract award, of the security requirements that are not implemented at the time of award. The list need only identify the security requirement(s) (*e.g.,* NIST SP 800–171 security requirement 3.1.1) that is/are not implemented. No additional information is required.

DFARS clause 252.204–7012 is flowed down to subcontractors without alteration when performance will involve operationally critical support or covered defense information. As such, prior to October 1, 2017, the requirement is for the subcontractor to provide the DoD CIO, within 30 days of the prime contractor's award to the subcontractor, with a list of the security requirements that the subcontractor has not implemented at the time of award. Bypassing the prime is a matter to be addressed between the prime and the subcontractor.

Nothing precludes the contractor from providing a corporate-wide update to the status of requirements not implemented on a periodic basis, assuming it meets the requirements of the clause. If the contract in question ends prior to December 31, 2017, the Contractor must still provide the DoD CIO, within 30 days of contract award, with a list of the security requirements that are not implemented at the time of award.

Comment: One respondent asked that DoD confirm/clarify that after the 30-day notification, contractors are expected to manage compliance with DFARS clause 252.204–7012 through system security plans and plans of action and milestones. The respondent also asked for clarification that the only required reporting to DoD CIO subsequent to the initial list is to identify any NIST SP 800–171 controls that a contractor does not intend to meet either because the contractor has deemed the controls to be not applicable or because mitigating controls have been implemented.

Response: The notification to the DoD CIO of the NIST–SP security requirements not implemented at the time of contract award is a one-time action per contract and is a requirement for contracts awarded prior to October 1, 2017 (see 252.204–7012(b)(2)(ii)(A)). Separately, a contractor may submit requests to vary from a NIST SP 800–171 security requirement (because it is believed to be not applicable or the contractor has an alternative in place) to the contracting officer for adjudication by the DoD CIO (see 252.204–7012(b)(2)(ii)(B)).

During the course of performance under the contract, the contractor may manage compliance with the NIST SP 800–171 security requirements through a system security plan. One of the assumptions of NIST SP 800–171 (per table E–12 of the document) is that nonfederal organizations routinely have a system security plan in place to manage and maintain their information systems. When a corrective action is necessary to maintain NIST compliance, a plan of action may be necessary in accordance with NIST 800–171 requirement 3.12. DFARS clause 252.204–7012 is updated at paragraph (b)(3) to clarify that temporary deficiencies with compliance may be addressed within a system security plan.

6. Incident Reporting and Damage Assessment

a. Reporting (When, Where, What Versus 72 Hours)

Comment: Two respondents commented on the 72-hour reporting requirement. One suggested that the 72-hour reporting requirement is unrealistic unless the rule is revised to limit its applicability to specific information that DoD has provided to the contractor or subcontractor with appropriate markings. One respondent suggested that 72 hours is not enough time to investigate a potential cyber incident, confirm the incident, and obtain the requisite report information. Several respondents commented that the increased reporting requirement to include potentially adverse effects on an information system regardless of an actual compromise to covered defense information, is too burdensome to industry for little apparent benefit, and suggested that DoD eliminate the words ''or potentially'' from the definition of cyber incident. One respondent suggested that the rule address what factors contractors should consider when evaluating whether an incident has a ''potentially adverse effect.'' One respondent recommended that a threshold be established on when a contractor and subcontractor would be required to report a cyber incident, and that the agency point of contact be a centralized figure/office in which all cyber incident reports are submitted to or, in the alternative, a centralized figure/office that handles reporting for all contracts under which a given contractor performs.

Response: When a cyber incident is discovered, the contractor/subcontractor should report whatever information is available to the DIBNet portal within 72 hours of discovery. If the contractor/subcontractor does not have all the information required on the Incident Collection Form (ICF) at the time of the report, and if more information becomes available, the contractor should submit a follow-on report with the added information. The DoD Cyber Crime Center (DC3) serves as the DoD operational focal point for receiving cyber threat and incident reporting from those Defense contractors who have a contractual requirement to report under DFARS clause 252.204–7012. Upon receipt of the contractor/subcontractor-submitted ICF in the DIBNet portal, DC3 will provide the submitted ICF to the contracting officer identified on the ICF. The contracting officer is directed in DFARS Procedures, Guidance, and Information 204.7303–3 to notify the

requiring activities that have contracts identified in the ICF.

b. Incident Collection Form

Comment: One respondent recommended that the ICF, for example on the DIBnet site, should include a field where the contractor can indicate the vulnerability suspected, known, or created.

Response: The ICF fields are described at the ''Resources'' tab at *http://dibnet.dod.mil.* Field numbers 16 (Type of compromise), 17 (Description of technique or method used in cyber incident), 19 (Incident/Compromise narrative), and 20 (Any additional information) each provide the opportunity for the contractor to indicate the vulnerability suspected.

d. Access to Contractor Information

Comment: Multiple respondents commented that the rule does not appropriately limit the Government's access to contractor systems and fails to adequately protect sensitive contractor data, suggesting that the rule be revised to recognize the need for appropriate limits on the Government's rights to request, use, and disclose sensitive contractor information it may obtain as a result of a reported cyber incident or investigation. Many respondents offered alternatives of how to limit access. Several respondents suggested that the final rule use the same use and disclosure rights that were contained in the prior unclassified controlled technical information (UCTI) rule. Others suggested that the rule be modified to state that DoD limit access to equipment or information only in connection with a contractor report of a ''cyber incident'' and as necessary to conduct a forensic analysis or damage assessment, adding that the parties should discuss in good faith whether additional information or equipment is necessary. One suggested that the rule indicate that the Government may require access to equipment or information only ''to determine whether information created by or for the Department in connection with any Department program was successfully exfiltrated from a network or information system and, if so, what information was exfiltrated.''

Response: This rule adds on to the prior UCTI rule, by implementing 10 U.S.C. 391 and 393 (previously section 941 of the NDAA for FY 2013 and section 1632 of the NDAA for FY 2015), which state that contractors will provide access to equipment or information to determine if DoD information was successfully exfiltrated from a network or information system of such contractor and, if so, what information was exfiltrated. This requirement is implemented in DFARS clause 252.204–7012 by stating that, upon request by DoD, the Contractor shall provide DoD with access to additional information or equipment that is necessary to conduct a forensic analysis—thus limiting DoD access to equipment/information necessary to conduct the analysis resulting from a cyber incident, as suggested above. This analysis is critical to understand what information was exfiltrated from the information system.

e. Protection/Use of Contractor Information

Comment: Multiple respondents commented that the interim rule should address how DoD will safeguard any contractor data provided. One respondent added that the clause also does not allow contractors an opportunity to review their security information before it is disclosed. Several respondents recommend that the final rule use the same use and disclosure rights that were contained in the prior UCTI rule. One respondent recommended that DoD make clear that the information it receives from contractors under the cyber incident reporting rules may not be used for Government commercial or law enforcement purposes. One respondent suggested that the rule should address personal information in internal contractor systems, recommending that the DoD Privacy Officer review the rule and conduct a privacy impact assessment, and that DoD address special procedures and protections for personal information. One respondent suggested that the DFARS prohibit the release outside DoD of PHI or PII provided to DoD in connection with the reporting or investigation of a cyber incident.

Response: DoD protects against unauthorized use or release of cyber incident reporting information from the contractor, in accordance with applicable statutes and regulations. DoD complies with 10 U.S.C. 391 and 393 and provides reasonable protection of trade secrets and other information, such as commercial or financial information, and information that can be used to identify a specific person. DoD limits the dissemination of cyber incident information to the entities specified in the rule.

f. Attributional/Proprietary Information

Comment: One respondent suggested that the definition of contractor attributional/proprietary information exceeds the stated scope of the subpart 204.7300, namely, ''to safeguard covered defense information that resides in or transits through covered contractor information systems.'' One respondent commented that the rule places the burden on the contractor to mark information as ''contractor attributional/proprietary,'' adding that the rule should either address how contractors can protect previously unmarked information while still complying with the requirement to preserve images of their information system, or enumerate what steps the Government will take to ensure that the absence of a marking on a document provided to the Government as part of that image will not be treated as determinative of the Government's ultimate obligations to protect that information as contractor attributional/proprietary.

One respondent commented that restrictions and requirements imposed by the rule with regard to attributional/proprietary information would impact international suppliers of U.S. allies who provide critical components that are integrated into major systems and subsystems, suggesting that international suppliers may be unable to comply with the requirements of the DFARS due to the applicable laws in their country or a lack of resources.

Response: The Government may request access to media to assess what covered defense information was affected by the cyber incident. DoD will protect against the unauthorized use or release of contractor attributional/proprietary information. The contractor should identify and mark attributional/proprietary information and personal information to assist DoD in protecting this information. To the extent that media may include attributional/proprietary information, the Government will protect against unauthorized access. DoD will need to work with the prime contractor to resolve challenges with international suppliers on a case by case basis.

g. Third Party Information

Comment: Several respondents commented on third-party support contractors' access to other contractors' internal systems and/or information. One respondent suggested that third party support contractor access to other contractors' internal systems raises serious concerns and encouraged DoD to incorporate an effective mechanism to notify the originating party about third parties with access to such data, as well as any disclosure of such data by those third parties. One respondent recommended that DoD add a requirement for third parties to sign a non-disclosure agreement with each

company they may conduct a forensic analysis on or an investigation against.

Response: The rule subjects support service contractors directly supporting Government activities related to safeguarding covered defense information and cyber incident reporting (*e.g.,* providing forensic analysis services, damages assessment services, or other services that require access to data from another contractor) to restrictions on use and disclosure obligations.

h. Liability Protections

Comment: One respondent recommended that the final rule integrate the liability protections provided by section 1641 of the NDAA for FY 2016, further suggesting that DoD work to extend the liability protections so that all contractors and subcontractors that are required to report cyber incidents under its regulations are provided the same levels of protection.

Response: DFARS Case 2016–D025, Liability Protections when Reporting Cyber Incidents, was opened on April 20, 2016 to implement section 1641 of the FY 2016 NDAA.

7. Subcontractors

a. Reporting

Comment: Multiple respondents addressed the requirement for subcontractors to simultaneously report incidents directly to the Government and the prime contractor. One respondent suggested that having subcontractors report directly to DoD creates a control challenge for prime contractors. Another suggested that subcontractor reporting directly to DoD removes the prime contractors ability to educate themselves about the incident and to be a resource to DoD. Others suggested that the obligation for subcontractors to report violates the subcontractor's confidentiality rights. Other respondents requested clarification regarding the types of information that must be disclosed by subcontractors to prime contractors. One respondent suggest the rule should limit the information that a subcontractor is required to report to its prime contractor or, otherwise, limit the prime contractors' ability to disclose any information that is received as a result of the disclosures. One respondent commented that it is not clear how the Government intends to protect proprietary information reported by the subcontractor to the prime contractor from unauthorized use.

Response: The rule has been amended to clarify that subcontractors are required to rapidly report cyber incidents directly to DoD at *http://dibnet.dod.mil,* and to provide the incident report number, automatically assigned by DoD, to the prime Contractor (or next higher-tier subcontractor) as soon as practicable. Any requirement for the subcontractor to provide anything more than the incident report number to the prime Contractor (or next higher-tier subcontractor) is a matter to be addressed between the prime and the subcontractor.

DoD will protect against the unauthorized use or release of cyber incident information reported by the contractor or subcontractor in accordance with applicable statutes and regulations.

b. Flowdown

Comment: Multiple respondents commented on aspects of the flowdown and subcontractor requirements of the rule. One respondent asked which party determines whether a subcontractor's efforts involve covered defense information or require providing operationally critical support, suggesting that, without additional detail or guidance, the determination of what constitutes covered defense information or operationally critical support would vary. Several respondents requested clarification regarding how DoD intends to enforce the flowdown of DFARS clause 252.204–7012 beyond the first tier of the supply chain, and how subcontractors can comply with the final rule's requirements. One respondent asked DoD to clarify whether it will prohibit a prime contractor from entering into a subcontract if the subcontractor refuses to accept DFARS 252.207–7012. Several respondents commented on the change made to the second interim rule that, when applicable, the clause shall be included without alteration, except to identify the parties, suggesting that this requirement restrains prime contractors' and subcontractors' ability to negotiate flowdown provisions that address the specific needs of their contractual arrangements. Another asked if ''where DoD requires flow-down without alteration, can industry assume that wherever the language in 252.204–7012 refers to a ''contractor,'' the term ''subcontractor'' should or can be used in the flowdown version of the clause, except where ''subcontractor'' is already used in the clause''?

Response: Paragraph (m) of DFARS clause 252.204–7012, states that the clause will be included without alteration, ''except to identify the parties.'' This allows the Contractor to identify the appropriate party as required. Paragraph (m) is amended in the final rule to clarify that flowdown of the clause is required for subcontracts for operationally critical support, or for which subcontract performance will involve ''covered defense information,'' instead of ''a covered contractor information system.'' Paragraph (m) is further amended to instruct the contractor to, if necessary, consult with the contracting officer to determine if the information required for subcontractor performance retains its identity as covered defense information and will require protection under this clause, thus driving when the substance of DFARS clause 252.204–7012 must be included in a subcontract. Flowdown is a requirement of the terms of the contract with the Government, which should be enforced by the prime contractor as a result of compliance with these terms. If a subcontractor does not agree to comply with the terms of 252.204–7012, then covered defense information shall not be on that subcontractor's information system.

8. Cloud Computing

a. Access

Comment: One respondent commented that they did not agree with DFARS 252.239–7010(i)(3), ''which provides that a Government contracting officer may require physical access to data centers for purposes of audits, inspections, or other similar and undefined activities,'' suggesting that the DFARS be revised to reflect the practice of infrastructure as-a-service providers to limit third party access to data centers to accredited FedRAMP third party assessment organizations and to law enforcement activities.

Response: DFARS 252.239–7010(i)(3) states that the contractor shall provide the Government or its authorized representatives (vice contracting officers) access to all Government data and Government-related data, access to contractor personnel involved in performance of the contract, and physical access to any Contractor facility with Government data, for the purpose of audits, investigations, inspections, or other similar activities, as authorized by law or regulation (vice undefined activities).

b. 252.204–7012 Versus 252.239–7010

Comment: One respondent commented that it is unlikely that a majority of CSPs have completed their review/audit of their systems in order to notify contracting officers within 30 days of award whether or not they comply with NIST SP 800–171 security

requirements. This respondent also commented that companies that have demonstrated compliance with DoD Impact Level L4/5 (as described in the Cloud Computing Security Requirements Guide (SRG)) should not be required to do all the paperwork or be subject to the requirement for an additional assessment.

Response: When using cloud computing to provide information technology services in the performance of the contract (*i.e.,* an information technology service or system operated on behalf of the Government), CSPs shall comply with the requirements of DFARS Clause 252.239–7010, Cloud Computing Services, which points to the Cloud Computing SRG. The requirement to provide DoD CIO with a list of security requirements that are not implemented at the time of contract award applies only to implementation of security requirements as required in DFARS clause 252.204–7012. The rule has been amended to clarify that when the contractor is not providing cloud computing services in the performance of the contract, but intends to use an external CSP to store, process, or transmit any covered defense information for the contract, DFARS clause 252.204–7012 (b)(2)(ii)(D) applies. DFARS clause 252.204–7012(b)(2)(ii)(D) requires the CSP to meet security requirements equivalent to those established by the Government for the FedRAMP ''Moderate'' baseline at the time award. The text in DFARS clause 252.204–7012 has also been amended to clarify that the contractor shall, within 30 days of contract award, provide the DoD CIO with a list of the security requirements at (b)(2)(i) that are not implemented at the time of contract award, to include any security requirements not implemented by an external cloud service provider.

Comment: One respondent suggested that the rule does not provide any guidance as to how to reconcile the implementation of DFARS clauses 252.204–7012 and 252.239–7010, and that the appropriate security controls that should be applied to cloud systems is unclear. The respondent suggested that because the cloud computing exemption in DFARS 252.204–7012 is located within the ''adequate security'' requirements of the clause, the clause can be read as to impose the Cloud Computing SRG security requirements (included in 252.239–7010) on all cloud information systems, and that different reporting and preservation requirements would apply if the information stored on the CSP's cloud is covered defense information. This respondent further suggested that the scope of DFARS 252.204–7012(b)(1)(A) is defined by the type of service provided, rather than the environment in which information is stored.

Response: DFARS clause 252.204–7012 has been amended to clarify the appropriate security controls that should be applied on all covered contractor information systems. Cyber incident reporting, media preservation, and system access are not part of the contractor's adequate security obligations, but rather distinct requirements of the clause when a cyber incident occurs on a covered contractor information system.

Comment: One respondent commented that it is unclear whether the exemption for security controls contained within DFARS 252.204–7012 covers ancillary cloud services, such as cloud migration and eDiscovery, that a CSP may provide as an add-on service to a cloud computing contract. This respondent suggested that a clarification of the scope of the exemption would be helpful for defining reporting and safeguarding obligations for these providers. One respondent suggested that DoD revise DFARS clause 252.204–7012 to clarify that data stored on a cloud is exempt from the requirements of this clause and subject only to the requirements of DFARS clause 252.239–7010. Such an approach will provide contractors with clear guidelines as to when they are subject to the requirements DFARS 252.204–7012 or DFARS 252.239–7010. Furthermore, through the application of the Cloud Computing SRG requirements to data stored on a cloud, this approach will ensure that DoD information receives the appropriate degree of protection for the environment in which it is stored.

Response: DFARS clause 252.204–7012 requires that (for an information technology service or system operated on behalf of the Government) CSP shall comply with the requirements of DFARS clause 252.239–7010, Cloud Computing Services, which points to the Cloud Computing SRG (see paragraph (b)(1)(i) of the clause). This clause has been amended to clarify that (for an information technology services or system not operated on behalf of the Government) when using an external CSP to store, process, or transmit any covered defense information, the CSP shall meet requirements equivalent to those established by the Government in the FedRAMP Moderate baseline (see paragraph (b)(2)(ii)(D) of the clause).

Comment: One respondent commented that they understand that the subcontractor flowdown clause is not required in contracts between the contractor and the CSPs, and that the contractor is not responsible for ensuring that CSPs comply with DFARS clause 252.204–7012, and requested that this be confirmed or clarified.

Response: When a contractor uses an external CSP to store, process, or transmit any covered defense information for the contract, DFARS Clause 252.204–7012(b)(2)(ii)(D) applies. While the flowdown provision in 252.204–7012 does not apply to the CSP in this case, the prime contractor is responsible to ensure that the CSP meets the requirements at 252.204–7012(b)(2)(ii)(D).

c. Reporting

Comment: One respondent commented that the rule fails to define the information that must be reported and creates a reporting system separate from the FedRAMP and Cloud Computing SRG Requirements, suggesting that an established system with clear reporting requirements for cloud computing security incidents would be more efficient than utilizing a new, separate, possibly conflicting portal at *http://dibnet.dod.mil.*

Response: The public facing DIBNet Web site includes a ''Resources'' tab that describes the information required when reporting a cyber incident that is related to the cloud computing service provided under his contract. Consistent with reporting requirements in DFARS clause 252.205–7012 and the Cloud Computing SRG, reports shall be submitted to DoD via *http://dibnet.dod.mil/.* This is DoD's single reporting mechanism for DoD contractor reporting of cyber incidents on unclassified information systems. The rule streamlines the reporting processes for DoD contractors and minimizes duplicative reporting processes.

Comment: One respondent commented that it is their understanding that if a contractor, when not providing information technology services in the performance of the contract, but is using an external CSP that is FedRAMP compliant to store, process, or transmit any covered defense information for the contract, the contractor only needs to ensure that the CSP reports cyber incidents to the contractor so the contractor can comply with its reporting requirements to the Government.

Response: DFARS clause 252.204–7012 was amended to require that the CSP should be FedRAMP ''Moderate'' compliant, not simply FedRAMP compliant (as there are CSPs that are only FedRAMP ''Low'' compliant, which is not sufficient for covered defense information protection). The clause also requires that the external

CSP meets the cyber incident reporting, malicious software, media preservation and protection, access to additional information and equipment necessary for forensic analysis, and cyber incident damage assessment requirements at paragraphs (c) through (g) of the clause.

Comment: One respondent suggested that CSPs should only be responsible for reporting incidents that result in an actual, or reasonably suspected, unauthorized disclosure of customer data, adding that if reporting requirements are scoped to customer data only, then the 72-hour reporting window is reasonable.

Response: Cyber incidents that impact the environment could have an impact on the CSP's security accreditation and DoD data, which is the reason that all incidents that are on shared services and infrastructure should be reported.

Comment: One respondent commented that the reporting requirements in DFARS clause 252.239–7010 fail to recognize the unique role of CSPs, stating that commercial CSPs and their customers typically agree to abide by strict privacy and access-to information controls which normally include limiting provisions that prevent CSPs from accessing customer information without prior consent and from providing customer data to third parties or providing third parties access to customer data. The respondent suggested that these limitations, in which only the customer would know whether an incident impacts a particular customer's data and whether there are additional reporting requirements, drive the need for a two-step reporting requirement that allows the customer who has full knowledge of the data that is stored in the cloud and the applicable classifications of such data to make the ultimate determination of any reporting obligations to the Government.

Response: As any cyber incident to the shared infrastructure can have an adverse impact on DoD data, the CSP must report any cyber incident to the shared infrastructure to DoD. That may require modifications to their commercial terms of service to allow for that. In addition, communication between the Government and the contractor (whether CSP or not) is vital; any specific requirements, or interpretations of requirements, should be negotiated as part of the service level agreement.

Comment: Several comments suggested that DFARS 252.239–7010, Cloud Computing Services, sets forth a number of requirements that commercial cloud infrastructure (*i.e.,* infrastructure as a service (IaaS)) providers will not be able to sign up to (as prime contractors or subcontractors), because compliance with those requirements are outside of their control; compliance with those requirements falls within the control of the managed services providers, account owners, lead systems engineers, or prime contractors (the ''primes'') running DoD workloads and storing ''Government data'' and ''Government-related data'' in the cloud infrastructure. One comment suggested that the DIBNet cyber reporting requirements should not apply to IaaS providers, but to the prime using the cloud, stating that although IaaS providers will notify the primes of security breaches, they will not have insight into the nature of the data the primes are storing and processing in the infrastructure, or know whether a breach results in a ''cyber incident,'' as that term is defined in the clause.

Response: The reporting requirement in DFARS 252.239–7010 requires the prime to report all cyber incidents that are related to the cloud computing service provided under the contract. In cases where the CSP is the prime contractor, the provider is required to report the incident to DoD. If the provider (acting as a prime) does not have insight into the nature of the data being stored or processed, any breach would be considered a cyber incident given the potential impact it could have on the information or the information system.

Because the IaaS providers deliver shared services, any cyber incident on the shared infrastructure and services would be the responsibility of the IaaS provider and they are obligated to report those incidents.

9. Workforce Training

Comment: One respondent asked about DoD plans to train the workforce to consistently apply the requirements for handling covered defense information.

Response: DoD will engage across both Government and industry to educate and raise awareness of the importance of protecting covered defense information. The Better Buying Power 3.0 initiative includes efforts to educate our workforce on the value and best practices for system security and efforts to communicate the importance of cybersecurity across DoD and to the Defense Industrial Base. Efforts to improve technological superiority will be in vain if effective cybersecurity is not practiced throughout the product lifecycle. Defense Acquisition University, in coordination with education counterparts in the Intelligence Community and Defense Security Service, is working to develop education and training to increase workforce understanding of the value and best practices for covered defense information protection.

C. Other Changes

The following additional changes are made in the final rule:

1. Definitions. Several definitions already included in the rule are added to or removed from certain subparts based on their usage in the text, to include ''compromise,'' ''information system,'' ''media,'' ''operationally critical support,'' ''spillage,'' and ''technical information.''

2. Incident Report Number. DFARS 204.7302(b) and 252.204–7012(m)(2)(ii) are amended to clarify that the incident report number is automatically assigned by DoD.

3. NIST SP 800–171. DFARS 252.204–7008(c) is amended to clarify in the notice to offerors, the requirement to implement the NIST SP 800–171 that is in effect at the time the solicitation is issued or as authorized by the contracting officer.

4. Malicious Software. DFARS 252.204–7012(d) is amended to specifically direct the contractor to not send malicious software to the contracting officer.

5. Access. DFARS 239.7602–1 is amended to provide the same list provided at DFARS 252.239–7010(i)(3) of activities in which the contractor is required to provide records and facility access.

D. Additional Information

Defense Procurement and Acquisition Policy (DPAP) Program Development and Implementation (PDI) provides answers to frequently asked questions at *http://www.acq.osd.mil/dpap/pdi/network_penetration_reporting_and_contracting.html.* The answers to these general questions are intended to assist with understanding and implementing the requirements of this rule.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

The rule created two new provisions and two new clauses as follows: (1) DFARS 252.204–7008, Compliance with Safeguarding Covered Defense Information Controls; (2) DFARS 252.204–7009, Limitations on the Use or Disclosure of Third-Party Contractor Information; (3) DFARS 252.239–7009, Representation of Use of Cloud Computing; and (4) DFARS 252.239–7010, Cloud Computing Services.

Additionally, the rule amended the existing DFARS clause 252.204–7012, Safeguarding Covered Defense Information and Cyber Incident Reporting.

The objectives of the rule are to improve information security for DoD information stored on or transiting contractor information systems as well as in a cloud environment. The rule implements section 941 of the NDAA for FY 2013 (Pub. L. 112–239), section 1632 of the NDAA for FY 2015, and section 325 of the Intelligence Authorization Act of FY 2014 (Pub. L. 113–126). Additionally the rule implements DoD CIO policy for the acquisition of cloud computing services. The only clause within this rule that is implementing the statutory requirements is clause 252.204–7012, which already applied to acquisitions below the simplified acquisition threshold (SAT) and to commercial items, including commercially available off-the-shelf items (COTS). The following addresses the applicability of the new statutory requirements in DFARS clause 252.204–7012.

A. Applicability to Contracts at or Below the SAT

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold (SAT). It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Director, DPAP, is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. 41 U.S.C. 1906 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Likewise, 41 U.S.C. 1907 governs the applicability of laws to commercially available off-the-shelf (COTS) items, with the Administrator for Federal Procurement Policy the decision authority to determine that it is in the best interest of the Government to apply a provision of law to acquisitions of COTS items in the FAR. The Director, DPAP, is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

C. Applicability Determination

The Director, DPAP, has determined that it is in the best interest of the Government to apply the requirements of section 941 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013, section 1632 of the NDAA for FY 2015, and section 325 of the Intelligence Authorization Act of FY 2014 (Pub. L. 113–126) to contracts at or below the SAT and to contracts for the acquisition of commercial items, for clause 252.204–7012, Safeguarding Covered Defense Information and Cyber Incident Reporting. However, the clause prescription is amended in the final rule to exempt use in solicitations and contracts that are solely for the acquisition of COTS items.

The necessity to protect covered defense information is the same across all contract types for all dollar values. The harm that could result from the loss or compromise of covered defense information is the same under a FAR part 12 contract that is under the SAT as it would be under any other contract. Recent high-profile breaches of Federal information show the need to ensure that information security protections are clearly, effectively, and consistently addressed in contracts. Failure to apply this rule to contracts with covered defense information may cause harm to the Government which could directly impact national security. Therefore, exempting contracts below the SAT or for the acquisition of commercial items (excluding COTS items) from application of the statutes would severely decrease the intended effect of the statutes and increase the risk of mission failure.

For the same reasons expressed in the preceding paragraph, DoD applied the following provisions and clauses to acquisitions below the SAT and to the acquisition of commercial items, excluding COTS items: (1) DFARS 252.204–7008, Compliance with Safeguarding Covered Defense Information Controls; (2) DFARS 252.204–7009, Limitations on the Use or Disclosure of Third-Party Contractor Information; (3) DFARS 252.239–7009, Representation of Use of Cloud Computing; and (4) DFARS 252.239–7010, Cloud Computing Services.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This final rule expands on the existing information safeguarding policies in the Defense Federal Acquisition Regulation System (DFARS), which were put in place in November 2013 (78 FR 69273), by requiring contractors to report cyber incidents to the Government in a broader scope of circumstances.

The objective of this rule is to implement section 941 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112–239), section 1632 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015, and DoD CIO policy for the acquisition of cloud computing services, in order to improve information security for DoD information stored on or transiting contractor information systems, as well as in a cloud environment.

The significant issues raised by the public in response to the initial regulatory flexibility analysis are as follows:

Comment: Respondents expressed concern that the estimated of the total number of small businesses impacted by the rule is too low and that the rule does not allow for alternative standards or exemption for small business due to potentially burdensome costs of compliance.

Response: As there is no database collecting the number of contractors receiving covered defense information it is difficult to determine how many contractors are required to implement the security requirements of clause 252.204–7012, Safeguarding Covered Defense Information and Cyber Incident Reporting. Further, without adding a new information collection requirement to prime contractors it is not possible to determine how many subcontractors are in possession of covered defense information. Based on the respondent's analysis of the number of small entities, as prime contractors and as subcontractors, that may be affected by the rule the DoD estimate of small entities affected by this rule has been revised, to increase the number.

The cost of compliance with the requirements of this rule is unknown as the cost is determined based on the make-up of the information system and the current state of security already in place. If a contractor is already in compliance with the 2013 version of the clause 252.204–7012, then the changes necessary to comply with the new rule are not as significant. For a new contractor that has not been subject to the previous iteration of the 252.204–7012 clause and is now handling covered defense information the cost could be significant to comply. The cost of compliance is allowable and should be accounted for in proposal pricing (in accordance with the entity's accounting practices). Though it is not a change specific to small entities the security requirements as amended in this rule are found in National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171, ''Protecting Controlled Unclassified information in Nonfederal Information Systems and organizations,'' to replace a table based on NIST SP 800–53. The security requirements in NIST SP 800–171 are specifically tailored for use in protecting sensitive information residing in contractor information systems and generally reduce the burden placed on contractors by eliminating Federal-centric processes and requirements and enabling contractors to use systems they already have in place with some modification instead of building a new system.

Recommendations made by public comment to allow for alternative application of the rule for small entities include: An exemption for small entities, delaying application to small entities until costs are further analyzed, and creating a different set of security requirements for small entities. While all of these paths were considered, they were rejected as conflicting with the overarching purpose of this rule which is to increase the security of unclassified information that DoD has determined could result in harm if released. Regardless of the size of the contractor or subcontractor handling the information, the protection level of that information needs to be the same across the board to achieve the goal of increased information assurance.

The Chief Counsel for Advocacy of the Small Business Administration submitted a response to the second interim rule. The response reiterated the concerns brought by one of the public comments and provided suggestions for alternative application of the rule for small businesses:

Comment: The SBA Office of Advocacy suggested that DoD has underestimated the number of small businesses affected by this rulemaking, and recommended that DoD include small businesses serving as prime contractors and as subcontractors in their estimation of the number of impacted small entities. This respondent also commented that the cost of compliance with the rule will be a significant barrier to small businesses engaging in the Federal acquisition process, adding that many small businesses will be forced to purchase services and additional software from outside or third-party vendors in order to provide ''adequate safeguards'' for covered defense information and to adequately assess and evaluate their information systems and security controls.

Response: The final rule clarifies that the protections are not required when contracting solely for COTS items, thereby reducing the impact on some small business. The need to protect covered defense information does not change when such information is shared with nonfederal partners including small businesses. The cost of not protecting covered defense information is an enormous detriment to DoD resulting in a potential loss or compromise of such information, adverse impacts to the DoD warfighting mission, and to the lives of service men and women.

Comment: The SBA Office of Advocacy suggested that DoD has underestimated the number of small businesses affected by this rulemaking, and recommended that DoD include small businesses serving as prime contractors and as subcontractors in their estimation of the number of impacted small entities.

Response: As noted in response to the same public comment, DoD revises the estimate to be 12,000 small business prime contractors and any small business subcontractors that will be required to handle covered defense information during performance of the subcontracted work. There is currently no system to track when covered defense information is present on contract or passed to subcontractors so this estimate is not made with a high level of certainty.

Comment: The SBA Office of Advocacy commented that the cost of compliance with the rule will be a significant barrier to small businesses engaging in the Federal acquisition process, adding that many small businesses will be forced to purchase services and additional software from outside and third-party in order to provide ''adequate safeguards'' for covered defense information and to adequately assess and evaluate their information systems and security controls.

Response: While it is understood that implementing the minimum security controls outlined in the DFARs clause may increase costs, protection of unclassified DoD information is deemed necessary. The cost to the nation in lost intellectual property and lost technological advantage over potential adversaries is much greater than these initial/ongoing investments. The value of the information (and impact of its loss) does not diminish when it moves to contractors (prime or sub, large or small). NIST SP 800–171 was carefully crafted to use performance-based requirements and eliminate unnecessary specificity and include only those security requirements necessary to provide adequate protections for the impact level of CUI (*e.g.,* covered defense information).

Implementation of the NIST SP 800–171 security requirements will provide significant benefit to the small business community in the form of increased protection of their intellectual property. In addition, defining one set of standards will help small businesses to avoid a situation in which small business must adopt multiple standards and rule sets as they navigate amongst the many different organizations with which they do business. The addition of a new provision at DFARS 252.204–7008, Compliance with Safeguarding Covered Defense Information Controls, ensures that the offeror is aware of the requirements of clause 252.204–7012 and has time to bring their system into compliance and negotiate the terms of the contract accordingly.

Comment: The SBA Office of Advocacy suggested that DoD consider collaborating with universities or other companies, to provide low-cost cybersecurity services to small

businesses, or providing a one-time subsidy to small businesses to help cover the cost of initial consultations with third party vendors.

Response: There is no funding appropriation attached to compliance with the rule so it is not feasible to create a program for compliance or a one-time subsidy related to the new security requirements associated with the rule. However, the costs associated with compliance are allowable and should be considered in proposals on solicitations including the 252.204–7008 provision and 252.204–7012 clause, when covered defense information is present. The final rule is amended to require the security requirements to be in place only when the covered defense information is marked or identified in the contract, which should cut down significantly on the number of contractors that mistakenly assumed they were required to comply.

DoD has revised the estimate to be 12,000 small business prime contractors; however, the number of small business subcontractors that will be required to handle covered defense information during performance of the subcontracted work cannot be accurately estimated. Which small businesses will be required to comply, is entirely dependent on the work that they perform and the unclassified information involved. If they work solely in COTS items, then they will be exempt from the security requirements.

This rule requires that contractors report cyber incidents to the Government in accordance with DFARS clause 252.204–7012. An information technology expert will likely be required to provide information describing the cyber incident in the report, or at least to determine what information was affected.

For the final rule the prescriptions for provision 252.204–7008 and 252.204–7012 are amended to exempt COTS items, to clarify that they do not apply to contracts that are solely for COTS items. The final rule will keep the subcontractor flowdown requirement as amended in the second interim rule to only require the clause to flowdown when the covered defense information has been provided to the subcontractor, and this will significantly decrease the amount of small subcontractors that are unnecessarily working toward compliance with the security requirements of clause 252.204–7012.

VI. Paperwork Reduction Act

This rule contains information collection requirements that have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35) under OMB Control Number 0704–0478 entitled ''Enhanced Safeguarding and Cyber Incident Reporting of Unclassified DoD Information Within Industry.''

List of Subjects in 48 CFR Parts 202, 204, 212, 239, and 252

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Accordingly, the interim rule amending 48 CFR parts 202, 204, 212, 239, and 252, which was published at 80 FR 51739 on August 26, 2015, and the interim rule amending 48 CFR part 252, which was published at 80 FR 81472 on December 30, 2015, are adopted as final rules with the following changes:

■ 1. The authority citation for 48 CFR parts 202, 204, 239, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 202—DEFINITIONS OF WORDS AND TERMS

202.101 [Amended]

■ 2. Amend section 202.101 by removing the definition of ''media''.

PART 204—ADMINISTRATIVE MATTERS

204.7300 [Amended]

■ 3. Amend section 204.7300(a) by removing ''security controls'' and adding ''security requirements'' in its place.

■ 4. Amend section 204.7301 by—

■ a. In the definition of ''covered contractor information system'', removing ''an information system'' and adding ''an unclassified information system'' in its place;

■ b. Revising the definition of ''covered defense information'';

■ c. Adding, in alphabetical order, the definition for ''media'';

■ d. Removing the definition of ''operationally critical support''; and

■ e. Amending the definition of ''rapid(ly) report(ing)'' by removing ''Rapid(ly) report(ing)'' and adding ''Rapidly report'' in its place.

The revisions and addition read as follows:

204.7301 Definitions.

* * * * *

Covered defense information means unclassified controlled technical information or other information (as described in the Controlled Unclassified Information (CUI) Registry at *http://www.archives.gov/cui/registry/category-list.html*) that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Governmentwide policies, and is—

(1) Marked or otherwise identified in the contract, task order, or delivery order and provided to the contractor by or on behalf of DoD in support of the performance of the contract; or

(2) Collected, developed, received, transmitted, used, or stored by or on behalf of the contractor in support of the performance of the contract.

* * * * *

Media means physical devices or writing surfaces including, but not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts onto which covered defense information is recorded, stored, or printed within a covered contractor information system.

* * * * *

■ 5. Amend section 204.7302 by—

■ a. Revising paragraphs (a) and (b);

■ b. In paragraph (c), removing ''The Government acknowledges that information shared by the contractor under these procedures may'' and adding ''Information shared by the contractor may'' in its place;

■ c. Revising paragraph (d); and

■ d. In paragraph (e), removing ''providing forensic analysis services, damages assessment services,'' and adding ''forensic analysis, damage assessment,'' in its place; and removing ''use and disclosure'' and adding ''use and disclosure of reported information'' in its place.

The revisions read as follows:

204.7302 Policy.

(a) Contractors and subcontractors are required to provide adequate security on all covered contractor information systems.

(b) Contractors and subcontractors are required to rapidly report cyber incidents directly to DoD at *http://dibnet.dod.mil.* Subcontractors provide the incident report number automatically assigned by DoD to the prime contractor. Lower-tier subcontractors likewise report the incident report number automatically assigned by DoD to their higher-tier subcontractor, until the prime contractor is reached.

(1) If a cyber incident occurs, contractors and subcontractors submit to DoD—

(i) A cyber incident report;

(ii) Malicious software, if detected and isolated; and

(iii) Media (or access to covered contractor information systems and equipment) upon request.

(2) Contracting officers shall refer to PGI 204.7303–4(c) for instructions on contractor submissions of media and malicious software.

* * * * *

(d) A cyber incident that is reported by a contractor or subcontractor shall not, by itself, be interpreted as evidence that the contractor or subcontractor has failed to provide adequate security on their covered contractor information systems, or has otherwise failed to meet the requirements of the clause at 252.204–7012, Safeguarding Covered Defense Information and Cyber Incident Reporting. When a cyber incident is reported, the contracting officer shall consult with the DoD component Chief Information Officer/cyber security office prior to assessing contractor compliance (see PGI 204.7303–3(a)(3)). The contracting officer shall consider such cyber incidents in the context of an overall assessment of a contractor's compliance with the requirements of the clause at 252.204–7012.

* * * * *

■ 6. Amend section 204.7304 by—
■ a. In paragraph (a), adding the phrase '', except for solicitations solely for the acquisition of commercially available off-the-shelf (COTS) items'' to the end of the sentence;
■ b. In paragraph (b), removing ''contracts for services'' and adding ''contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, for services'' in its place; and
■ c. In paragraph (c), adding the phrase '', except for solicitations and contracts solely for the acquisition of COTS items'' to the end of the sentence.

PART 239—ACQUISITION OF INFORMATION TECHNOLOGY

■ 7. Amend section 239.7601 by adding, in alphabetical order, definitions for ''information system'' and ''media''; and removing the definition of ''spillage''.

The additions read as follows:

239.7601 Definitions.

* * * * *

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information.

Media means physical devices or writing surfaces including, but not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts onto which information is recorded, stored, or printed within an information system.

■ 8. Amend section 239.7602–1 by—
■ a. In paragraph (a), removing ''the DoD'' and adding ''DoD'' in its place;
■ b. Revising paragraph (b);
■ c. In paragraph (c) introductory text, removing ''provided in the purchase request—'' and adding ''provided by the requiring activity:'' in its place;
■ d. In paragraph (c)(1), removing the semicolon and adding a period in its place;
■ e. In paragraph (c)(2), removing ''CDRL, SOW task'' and adding ''DD Form 1423, Contract Data Requirements List; work statement task;'' in its place; and removing the semicolon at the end of the second sentence and adding a period in its place;
■ f. Removing paragraphs (c)(3) and (6);
■ g. Redesignating paragraphs (c)(4) and (5) as paragraphs (c)(3) and (4);
■ h. In the newly redesignated paragraph (c)(3), removing the semicolon and adding a period in its place; and
■ i. In the newly redesignated paragraph (c)(4), removing ''litigation, eDiscovery, records management associated with the agency's retention schedules,''; and removing ''activities; and'' and adding ''activities.'' in its place.

The revision reads as follows:

239.7602–1 General.

* * * * *

(b)(1) Except as provided in paragraph (b)(2) of this section, the contracting officer shall only award a contract to acquire cloud computing services from a cloud service provider (*e.g.,* contractor or subcontractor, regardless of tier) that has been granted provisional authorization by Defense Information Systems Agency, at the level appropriate to the requirement, to provide the relevant cloud computing services in accordance with the Cloud Computing Security Requirements Guide (SRG) (version in effect at the time the solicitation is issued or as authorized by the contracting officer) found at *http://iase.disa.mil/cloud_security/Pages/index.aspx.*

(2) The contracting officer may award a contract to acquire cloud computing services from a cloud service provider that has not been granted provisional authorization when—

(i) The requirement for a provisional authorization is waived by the DoD Chief Information Officer; or

(ii) The cloud computing service requirement is for a private, on-premises version that will be provided from U.S. Government facilities. Under this circumstance, the cloud service provider must obtain a provisional authorization prior to operational use.

* * * * *

239.7602–2 [Amended]

■ 9. Amend section 239.7602–2(a) by removing ''DoD Instruction 8510.01, Risk Management Framework (RMF) for DoD Information Technology (IT)'' and adding ''DoD Instruction 8510.01'' in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 10. Amend section 252.204–7000 by—
■ a. Removing the clause date of ''(AUG 2013)'' and adding ''(OCT 2016)'' in its place; and
■ b. Revising paragraph (a)(3) to read as follows:

252.204–7000 Disclosure of information.

* * * * *

(a) * * *

(3) The information results from or arises during the performance of a project that involves no covered defense information (as defined in the clause at DFARS 252.204–7012, Safeguarding Covered Defense Information and Cyber Incident Reporting) and has been scoped and negotiated by the contracting activity with the contractor and research performer and determined in writing by the contracting officer to be fundamental research (which by definition cannot involve any covered defense information), in accordance with National Security Decision Directive 189, National Policy on the Transfer of Scientific, Technical and Engineering Information, in effect on the date of contract award and the Under Secretary of Defense (Acquisition, Technology, and Logistics) memoranda on Fundamental Research, dated May 24, 2010, and on Contracted Fundamental Research, dated June 26, 2008 (available at DFARS PGI 204.4).

* * * * *

252.204–7008 [Amended]

■ 11. Amend section 252.204–7008 by—
■ a. Removing the clause date of ''(DEC 2015)'' and adding ''(OCT 2016)'' in its place;
■ b. In paragraph (a), removing ''and *covered defense information,* are'' and adding ''*covered defense information, cyber incident, information system,* and *technical information* are'' in its place.
■ c. In paragraph (b), removing ''252.204–7012, Covered Defense Information and Cyber Incident Reporting,'' and adding ''252.204–7012'' in its place;

■ d. In paragraph (c) introductory text, removing ''(IT)''; and removing ''252.204–7012(b)(1)(ii)'' and adding ''252.204–7012(b)(2)'' in its place;
■ e. In paragraph (c)(1), removing ''(see *http://dx.doi.org/10.6028/NIST.SP.800-171*),'' and adding ''(see *http://dx.doi.org/10.6028/NIST.SP.800-171*) that are in effect at the time the solicitation is issued or as authorized by the contracting officer'' in its place; and
■ f. In paragraph (c)(2)(i) introductory text, removing ''that is in effect'' and adding ''that are in effect'' in its place.

■ 12. Amend section 252.204–7009 by—
■ a. Removing the clause date of ''(DEC 2015)'' and adding ''(OCT 2016)'' in its place; and
■ b. In paragraph (a)—
■ i. Revising the definition of ''covered defense information''; and
■ ii. Adding, in alphabetical order, the definitions for ''information system'', ''media'', and ''technical information''.

The revision and additions read as follows:

252.204–7009 Limitations on the use or disclosure of third-party contractor reported cyber incident information.

* * * * *

(a) * * *

Covered defense information means unclassified controlled technical information or other information (as described in the Controlled Unclassified Information (CUI) Registry at *http://www.archives.gov/cui/registry/category-list.html*) that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Governmentwide policies, and is—

(1) Marked or otherwise identified in the contract, task order, or delivery order and provided to the contractor by or on behalf of DoD in support of the performance of the contract; or

(2) Collected, developed, received, transmitted, used, or stored by or on behalf of the contractor in support of the performance of the contract.

* * * * *

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information.

Media means physical devices or writing surfaces including, but is not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts onto which covered defense information is recorded, stored, or printed within a covered contractor information system.

Technical information means technical data or computer software, as those terms are defined in the clause at DFARS 252.227–7013, Rights in Technical Data—Noncommercial Items, regardless of whether or not the clause is incorporated in this solicitation or contract. Examples of technical information include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog-item identifications, data sets, studies and analyses and related information, and computer software executable code and source code.

* * * * *

■ 13. Amend section 252.204–7012 by—
■ a. Removing the clause date of ''(DEC 2015)'' and adding ''(OCT 2016)'' in its place;
■ b. In paragraph (a)—
■ i. Removing the definition of ''contractor information system'';
■ ii. In the definition of ''covered contractor information system'' removing ''an information system'' and adding ''an unclassified information system'' in its place;
■ iii. Revising the definition of ''covered defense information'';
■ iv. Adding, in alphabetical order, the definition for ''information system'';
■ v. In the definition of ''media'', removing ''which information is recorded'' and adding ''which covered defense information is recorded'' in its place; and removing ''within an information system'' and adding ''within a covered contractor information system'' in its place;
■ vi. In the definition of ''rapid(ly) report(ing)'', removing ''Rapid(ly) report(ing)'' and adding ''Rapidly report'' in its place; and
■ vii. In the definition of ''technical information'', removing ''Rights in Technical Data-Non Commercial Items'' and adding ''Rights in Technical Data—Noncommercial Items'' in its place;
■ c. Revising paragraph (b);
■ d. In paragraph (c)(1) introductory text, removing ''critical support'' and adding ''critical support and identified in the contract'' in its place;
■ e. Revising paragraph (d); and
■ f. Revising paragraph (m).

The revisions and addition read as follows:

252.204–7012 Safeguarding covered defense information and cyber incident reporting.

* * * * *

(a) * * *

Covered defense information means unclassified controlled technical information or other information, as described in the Controlled Unclassified Information (CUI) Registry at *http://www.archives.gov/cui/registry/category-list.html,* that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Governmentwide policies, and is—

(1) Marked or otherwise identified in the contract, task order, or delivery order and provided to the contractor by or on behalf of DoD in support of the performance of the contract; or

(2) Collected, developed, received, transmitted, used, or stored by or on behalf of the contractor in support of the performance of the contract.

* * * * *

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information.

* * * * *

(b) *Adequate security.* The Contractor shall provide adequate security on all covered contractor information systems. To provide adequate security, the Contractor shall implement, at a minimum, the following information security protections:

(1) For covered contractor information systems that are part of an information technology (IT) service or system operated on behalf of the Government, the following security requirements apply:

(i) Cloud computing services shall be subject to the security requirements specified in the clause 252.239–7010, Cloud Computing Services, of this contract.

(ii) Any other such IT service or system (*i.e.,* other than cloud computing) shall be subject to the security requirements specified elsewhere in this contract.

(2) For covered contractor information systems that are not part of an IT service or system operated on behalf of the Government and therefore are not subject to the security requirement specified at paragraph (b)(1) of this clause, the following security requirements apply:

(i) Except as provided in paragraph (b)(2)(ii) of this clause, the covered contractor information system shall be subject to the security requirements in National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171, ''Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations'' (available via the internet at *http://dx.doi.org/10.6028/NIST.SP.800-171*) in effect at the time the solicitation is issued or as authorized by the Contracting Officer.

(ii)(A) The Contractor shall implement NIST SP 800–171, as soon as

practical, but not later than December 31, 2017. For all contracts awarded prior to October 1, 2017, the Contractor shall notify the DoD Chief Information Officer (CIO), via email at *osd.dibcsia@mail.mil,* within 30 days of contract award, of any security requirements specified by NIST SP 800–171 not implemented at the time of contract award.

(B) The Contractor shall submit requests to vary from NIST SP 800–171 in writing to the Contracting Officer, for consideration by the DoD CIO. The Contractor need not implement any security requirement adjudicated by an authorized representative of the DoD CIO to be nonapplicable or to have an alternative, but equally effective, security measure that may be implemented in its place.

(C) If the DoD CIO has previously adjudicated the contractor's requests indicating that a requirement is not applicable or that an alternative security measure is equally effective, a copy of that approval shall be provided to the Contracting Officer when requesting its recognition under this contract.

(D) If the Contractor intends to use an external cloud service provider to store, process, or transmit any covered defense information in performance of this contract, the Contractor shall require and ensure that the cloud service provider meets security requirements equivalent to those established by the Government for the Federal Risk and Authorization Management Program (FedRAMP) Moderate baseline (*https://www.fedramp.gov/resources/documents/*) and that the cloud service provider complies with requirements in paragraphs (c) through (g) of this clause for cyber incident reporting, malicious software, media preservation and protection, access to additional information and equipment necessary for forensic analysis, and cyber incident damage assessment.

(3) Apply other information systems security measures when the Contractor reasonably determines that information systems security measures, in addition to those identified in paragraphs (b)(1) and (2) of this clause, may be required to provide adequate security in a dynamic environment or to accommodate special circumstances (*e.g.,* medical devices) and any individual, isolated, or temporary deficiencies based on an assessed risk or vulnerability. These measures may be addressed in a system security plan.

* * * * *

(d) *Malicious software.* When the Contractor or subcontractors discover and isolate malicious software in connection with a reported cyber incident, submit the malicious software to DoD Cyber Crime Center (DC3) in accordance with instructions provided by DC3 or the Contracting Officer. Do not send the malicious software to the Contracting Officer.

* * * * *

(m) *Subcontracts.* The Contractor shall—

(1) Include this clause, including this paragraph (m), in subcontracts, or similar contractual instruments, for operationally critical support, or for which subcontract performance will involve covered defense information, including subcontracts for commercial items, without alteration, except to identify the parties. The Contractor shall determine if the information required for subcontractor performance retains its identity as covered defense information and will require protection under this clause, and, if necessary, consult with the Contracting Officer; and

(2) Require subcontractors to—

(i) Notify the prime Contractor (or next higher-tier subcontractor) when submitting a request to vary from a NIST SP 800–171 security requirement to the Contracting Officer, in accordance with paragraph (b)(2)(ii)(B) of this clause; and

(ii) Provide the incident report number, automatically assigned by DoD, to the prime Contractor (or next higher-tier subcontractor) as soon as practicable, when reporting a cyber incident to DoD as required in paragraph (c) of this clause.

* * * * *

■ 14. Amend section 252.239–7010 by—

■ a. Removing the clause date of ''(AUG 2015)'' and adding ''(OCT 2016)'' in its place;

■ b. In paragraph (a)—

■ i. Adding in alphabetical order, definitions for ''compromise'' and ''information system''; and

■ ii. In the definition of ''media'', removing ''which covered defense information'' and adding ''which information'' in its place; and removing ''a covered contractor information system'' and adding ''an information system'' in its place;

■ c. In paragraph (b)(2), adding the phrase '', unless notified by the Contracting Officer that this requirement has been waived by the DoD Chief Information Officer'' to the end of the sentence; and removing the semicolon and adding a period in its place;

■ d. In paragraph (d), removing ''submitted to the Department of Defense'' and adding ''submitted to DoD'' in its place;

■ e. In paragraph (f), removing ''identified in paragraph (d) of this clause'' and adding ''identified in the cyber incident report (see paragraph (d) of this clause)'' in its place;

■ f. In paragraph (j), removing ''Local'' and adding ''local'' in its place; and

■ g. In paragraph (l), removing the phrase ''the substance of''.

The additions read as follows:

252.239–7010 Cloud computing services.

* * * * *

(a) * * *

Compromise means disclosure of information to unauthorized persons, or a violation of the security policy of a system, in which unauthorized intentional or unintentional disclosure, modification, destruction, or loss of an object, or the copying of information to unauthorized media may have occurred.

* * * * *

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information.

* * * * *

[FR Doc. 2016–25315 Filed 10–20–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 245

[Docket DARS–2016–0035]

RIN 0750–AJ11

Defense Federal Acquisition Regulation Supplement: Use of the Government Property Clause (DFARS Case 2015–D035)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to expand the prescription for use of the Federal Acquisition Regulation (FAR) Government property clause.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before December 20, 2016, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2015–D035, using any of the following methods:

○ *Federal eRulemaking Portal: http://www.regulations.gov.* Search for ''DFARS Case 2015–D035.'' Select ''Comment Now'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2015–D035'' on any attached documents.

○ *Email: osd.dfars@mail.mil.* Include DFARS Case 2015–D035 in the subject line of the message.

○ *Fax:* 571–372–6094.

○ *Mail:* Defense Acquisition Regulations System, Attn: Mr. Thomas Ruckdaschel, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Ruckdaschel, telephone 571–372–6088.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend DFARS 245.107 to strengthen the management and accountability of Government-furnished property (GFP). DoD has identified a gap in the current process that hinders full implementation of achieving accountability for GFP due to an exception to the use of the clause at FAR 52.245–1, Government Property.

DoD has implemented a transactional information technology solution to track, report, and manage GFP using the Wide Area WorkFlow suite of tools. This has been implemented through requirements in FAR clause 52.245–1, Government Property, and use of associated DFARS clauses relating to Government property. The basic property receipt and record keeping requirements of FAR clause 52.245–1, and as proposed in this rule, mirror customary commercial record keeping practices. Customary commercial practice is to create receiving reports and keep records for incoming assets regardless of the source of such assets. A recent industry association survey revealed that all its member firms create receiving reports and establish records in some form to track GFP.

II. Discussion and Analysis

The current language at FAR 45.107 provides an exception whereby contracting officers can choose not to include the clause in purchase orders for property repairs, when the unit acquisition cost of Government property to be repaired does not exceed the simplified acquisition threshold (SAT). Acquisition value alone, however, is not an indicator of the criticality or sensitivity of the property. For example, the acquisition cost of individual items of firearms, body armor, night-vision equipment, computers, or cryptologic devices may be below the SAT, but the accountability requirements for these items are fairly stringent. Omission of the Government property clause in purchase orders for repairs of these types of items increases risk of misuse or loss of the property and could call into dispute their ownership. To address this accountability gap, DoD is proposing to amend DFARS 245.107(1)(i) to require the use of FAR clause 52.245–1, Government Property, in all purchase orders for repair, maintenance, overhaul, or modification of Government property regardless of the unit acquisition cost of the items to be repaired. The rule also facilitates compliance with DoD Instruction 4161.02 entitled ''Accountability and Management of Government Contract Property,'' which requires DoD components to use electronic transactions when transferring Government property to a contractor and upon return of property to DoD. Use of FAR clause 52.245–1, in conjunction with the following associated DFARS clauses, creates an electronic end-to-end process for GFP management—

- 252.245–7001, Tagging, Labeling, and Marking of Government-Furnished Property;
- 252.245–7002, Reporting Loss of Government Property;
- 252.245–7003, Contractor Property Management System Administration; and
- 252.211–7007, Reporting of Government-Furnished Property.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not add any new provisions or clauses; however, the rule does change the prescription for DoD use of FAR clause 52.245–1, Government Property. DoD is proposing to amend DFARS 245.107(1)(i) to require the use of FAR clause 52.245–1, Government Property, in all purchase orders for repair, maintenance, overhaul, or modification of Government property regardless of the unit acquisition cost of the items to be repaired. FAR 45.107(a)(1)(iii) requires the clause to be used for contracts or modifications awarded under FAR part 12 procedures where Government property that exceeds the simplified acquisition threshold, as defined in FAR 2.101, is furnished or where the contractor is directed to acquire property for use under the contract that is titled in the Government. FAR 45.107(d) provides that purchase orders for property repair need not include a Government property clause when the acquisition cost of Government property to be repaired does not exceed the simplified acquisition threshold. This DFARS rule, however, will require all DoD purchase orders for repair, maintenance, overhaul, or modification of Government property to include FAR clause 52.245–1, Government Property, regardless of the unit acquisition cost of the items to be repaired.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of

harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* However, an initial regulatory flexibility analysis has been prepared and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to expand the prescription for use of the Federal Acquisition Regulation (FAR) clause 52.245–1, Government Property. The current language at FAR 45.107 provides an exception whereby contracting officers can choose not to include FAR clause 52.245–1 in purchase orders for repairs of Government-furnished property (GFP), when the unit acquisition cost of Government property to be repaired does not exceed the simplified acquisition threshold (SAT). Acquisition value alone, however, is not an indicator of the criticality or sensitivity of the property. As an example, the acquisition cost of individual items of firearms, body armor, night-vision equipment, computers, or cryptologic devices may be below the SAT, but the accountability requirements for these items are fairly stringent. Omission of the Government property clause in purchase orders for repairs of these types of items increases the risk of misuse or loss of the property and could call into dispute their ownership.

The objective of this rule is to strengthen the management and accountability of GFP. This rule proposes to amend DFARS 245.107 by requiring that FAR clause 52.245–1, Government Property, be incorporated in all DoD purchase orders involving repair, maintenance, overhaul, or modification of Government property, regardless of the unit acquisition cost of the Government property to be repaired.

Based on data available in the Federal Procurement Data System for fiscal year 2015, DoD awarded 735 purchase orders involving the repair of Government property at or below the simplified acquisition threshold to 530 unique vendors, of which 328 (approximately 56 percent) were small businesses.

This rule contains reporting and recordkeeping requirements for those entities that repair Government property under purchase orders that contain the FAR 52.245–1 clause. Entities affected by this rule would be required to prepare a property record and receiving report for the Government property provided. Additionally, entities would be required to acknowledge receipt of assets in the Wide Area WorkFlow system. The professional skill sets required are those of mid-level administrative personnel.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternatives to the rule to achieve accountability of Government-furnished property and resolve potential risks of loss or disputes for the ownership of property acquired with Government funds.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2015–D035), in correspondence.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies. The proposed rule contains information collection requirements. Accordingly, DoD has submitted a request for approval of a new information collection requirement concerning DFARS Case 2015–D035 to the Office of Management and Budget.

A. Public reporting burden for this collection of information is estimated to average one-half hour or 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated as follows:

Number of respondents: 530.
Responses per respondent: 3.8 approximately.
Total annual responses: 2,000.
Preparation hours per response: 0.5 hours.
Total response burden hours: 735.
Recordkeeping burden hours: 265.
Total annual burden hours: 1,000.
Frequency: On occasion.
Affected Public: Businesses or other for-profit institutions.

B. Request for Comments Regarding Paperwork Burden. Written comments and recommendations on the proposed information collection, including suggestions for reducing this burden, should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, or email *Jasmeet_K._Seehra@omb.eop.gov,* with a copy to the Defense Acquisition Regulations System, Attn: Mr. Thomas Ruckdaschel, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the DFARS, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Acquisition Regulations System, Attn: Mr. Thomas Ruckdaschel, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060, or email *osd.dfars@mail.mil.* Include DFARS Case 2015–D035 in the subject line of the message.

List of Subjects in 48 CFR Part 245

Government procurement.

Jennifer L. Hawes,
Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR 245 is proposed to be amended as follows:

PART 245—GOVERNMENT PROPERTY

■ 1. The authority citation for part 245 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Amend section 245.107 by—
■ a. Removing paragraph (6);
■ b. Redesignating paragraphs (1) through (5) as paragraphs (2) through (6), respectively; and

■ c. Adding a new paragraph (1).

The addition reads as follows:

245.107 Contract clauses.

(1)(i) In lieu of the prescription at FAR 45.107(d), use the clause at 52.245–1, Government Property, in all purchase orders for repair, maintenance, overhaul, or modification of Government property regardless of the unit acquisition cost of the items to be repaired.

(ii) For negotiated fixed-price contracts awarded on a basis other than submission of certified cost or pricing data for which Government property is provided, use the clause at FAR 52.245–1, Government Property, without its Alternate I.

* * * * *

[FR Doc. 2016–25316 Filed 10–20–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 252

[Docket DARS–2016–0016]

RIN 0750–AI94

Defense Federal Acquisition Regulation Supplement: Display of Hotline Posters (DFARS Case 2016–D018)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: This rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) to consolidate the multiple hotline posters into one poster that delineates multiple reportable offenses.

DATES: Effective October 21, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, telephone 571–372–6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 81 FR 28816 on May 10, 2016, to revise DFARS clause 252.203–7004, Display of Hotline Posters, to reduce the number of fraud, waste, and abuse hotline posters required to be displayed and to remove the United States only restriction for use of the poster. One respondent submitted a public comment in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of the comment is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

The following two changes from the proposed rule are based on internal Government comments:

- At DFARS 203.1003, paragraph (c) is added to permit alternative means of notifying contractor personnel of the DoD Hotline program in lieu of displaying the posters, when performance is outside the United States and security concerns can be appropriately demonstrated to the contracting officer. In the DFARS 252.203–7004 clause, a similar statement is also added at paragraph (b)(1)(ii).
- The final rule also removes from the DFARS 252.203–7004 clause the statement regarding assistance with translation. The contractor bears the individual and financial responsibility for translation and accuracy of translated hotline posters.

B. Analysis of Public Comment

Comment: The respondent supports the proposed rule to display a consolidated poster, and recommends the DoD Office of the Inspector General consider publishing several poster variations that combine these three initiatives and that any one of these posters may be displayed at the option of the contractor. This will permit contractors to periodically rotate posters in order to refresh interest and attention by contractor employees, and also permit contractors to select posters that more closely match their respective corporate culture. In addition, the respondent recommended that at least some posters emphasize the benefits of a culture that does not tolerate fraud or human trafficking and encourages reporting, rather than just the negative, punitive aspects of compliance failure.

Response: This comment is outside the scope of this rule and no change is made to the rule.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* and is summarized as follows:

The Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.203–7004, Display of Hotline Posters, required three separate hotline posters which have now been combined into one poster. The objective of the rule is to reduce the number of fraud, waste, and abuse hotline posters required to be displayed and to remove the United States only restriction for use of the poster.

There were no public comments in response to the initial regulatory flexibility analysis.

DFARS clause 252.203–7004 is required for use in contracts with an estimated value greater than $5.5 million, except contracts awarded using Federal Acquisition Regulations part 12 commercial item procedures for the acquisition of commercial item. According to data available in the Federal Procurement Data System, in fiscal year (FY) 2015, DoD awarded 4,180 contracts meeting this criteria to 2,656 unique vendors, of which 1,598 (approximately 60% percent) were small businesses. DoD estimates the total number of small businesses affected by this rule to be approximately 1,920 small businesses (the total for FY 2015 plus 20 percent to accommodate subcontractor applicability).

There are no reporting or recordkeeping burdens associated with this rule.

The rule has no significant economic impact on small entities. DoD did not identify any significant alternatives that would reduce the impact on small entities and still meet the objectives of the statute.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203 and 252

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 203 and 252 are amended as follows:

■ 1. The authority citation for parts 203 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 2. Amend section 203.1003 by adding paragraph (c) to read as follows:

203.1003 Requirements.

* * * * *

(c) *Fraud hotline poster.* For contracts performed outside the United States, when security concerns can be

appropriately demonstrated, the contracting officer may provide the contractor the option to publicize the program to contractor personnel in a manner other than public display of the poster required by 203.1004(b)(2)(ii), such as private employee written instructions and briefings.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 252.203–7004 by—

■ a. Removing the clause date ''(OCT 2015)'' and adding ''(OCT 2016)'' in its place;

■ b. Revising paragraph (b);

■ c. Removing paragraph (c);

■ d. Redesignating paragraphs (d) and (e) as paragraphs (c) and (d), respectively;

■ e. In newly redesignated paragraph (c)(1), removing ''These DoD hotline posters'' and adding ''The DoD hotline poster'' in its place and removing ''or are also'' and adding ''or is also'' in its place;

■ f. In newly redesignated paragraph (c)(2), removing ''posters are'' and adding ''poster is'' in its place and removing the last sentence;

■ g. In the newly redesignated paragraph (c)(3), removing ''these required posters'' and adding ''the required poster'' in its place; and

■ h. In newly designated paragraph (d), removing the phrase ''the substance of'' and removing ''paragraph (e)'' and adding ''paragraph (d)'' in its place.

The revision reads as follows:

252.203–7004 Display of Hotline Posters.

* * * * *

(b) *Display of hotline poster(s).* (1)(i) The Contractor shall display prominently the DoD fraud, waste, and abuse hotline poster prepared by the DoD Office of the Inspector General, in effect at time of contract award, in common work areas within business segments performing work under Department of Defense (DoD) contracts.

(ii) For contracts performed outside the United States, when security concerns can be appropriately demonstrated, the contracting officer may provide the contractor the option to publicize the program to contractor personnel in a manner other than public display of the poster, such as private employee written instructions and briefings.

(2) If the contract is funded, in whole or in part, by Department of Homeland Security (DHS) disaster relief funds and the work is to be performed in the United States, the DHS fraud hotline poster shall be displayed in addition to the DoD hotline poster. If a display of a DHS fraud hotline poster is required, the Contractor may obtain such poster from—

(i) DHS Office of Inspector General/ MAIL STOP 0305, Attn: Office of Investigations—Hotline, 245 Murray Lane SW., Washington, DC 20528–0305; or

(ii) Via the Internet at *https://www.oig.dhs.gov/assets/Hotline/DHS_OIG_Hotline-optimized.jpg.*

* * * * *

[FR Doc. 2016–25317 Filed 10–20–16; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215, 217, and 243

[Docket DARS–2016–0026]

RIN 0750–AI99

Defense Federal Acquisition Regulation Supplement: Undefinitized Contract Action Definitization (DFARS Case 2015–D024)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to provide a more transparent means of documenting the impact of costs incurred during the undefinitized period of an undefinitized contract action on allowable profit.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before December 20, 2016, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2015–D024, using any of the following methods:

◦ *Federal eRulemaking Portal: http://www.regulations.gov.* Search for ''DFARS Case 2015–D024.'' Select ''Comment Now'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2015–D024'' on any attached documents.

◦ *Email: osd.dfars@mail.mil.* Include DFARS Case 2015–D024 in the subject line of the message.

◦ *Fax:* 571–372–6094.

◦ *Mail:* Defense Acquisition Regulations System, Attn: Mr. Mark Gomersall, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, telephone 571–372–6099.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to provide a more transparent means of documenting the impact of costs incurred during the undefinitized period of an undefinitized contract action (UCA), and to recognize when contractors demonstrate efficient management and internal cost control systems through the submittal of a timely, auditable proposal in furtherance of definitization of a UCA. In some cases, DoD contracting personnel have not documented their consideration of the reduced risk to the contractor for costs incurred as of the date the contractor submits a qualifying proposal to definitize a UCA. While such costs generally present very little risk to the contractor, the contracting officer should consider the reasons for any delays in definitization in making their determination of the appropriate assigned value for contract type risk.

II. Discussion and Analysis

This rule proposes to make the following amendments to DFARS parts 215, 217, and 243:

- DFARS 215.404–71–2, Performance Risk. This section is amended to specify that if the contractor demonstrates efficient management and cost control through the submittal of a timely, auditable proposal in furtherance of definitization of an undefinitized contract action (UCA), and the proposal demonstrates effective cost control from the time of award to the present, the contracting officer may add 1 percentage point to the value determined for management/cost control up to the maximum of 7 percent.
- DFARS 215.404–71–3, Contract Type Risk and Working Capital Adjustment. This section is amended to reflect the separation of Item 24 on the DD Form 1547, Record of Weighted Guidelines, into Item 24a, Contract Type Risk (based on costs incurred as of the date the contractor submits a qualifying proposal); Item 24b, Contract Type Risk (based on Government estimated cost to complete); and Item 24c, Totals. Also, paragraph (d)(2)(ii) is added to require contracting officers to document the reason for assigning a specific contract type risk value in determining the negotiation objective.
- DFARS 217.7404–6, Allowable Profit. This section is amended to require contracting officers to document in the price negotiation memorandum the reason for assigning a specific contract type risk value.
- DFARS 243.204–70–6, Allowable Profit. This section is amended to require contracting officers to document in the price negotiation memorandum the reason for assigning a specific contract type risk value.

In addition, the DD Form 1547, Record of Weighted Guidelines Application, is proposed to be amended to separate Item 24, Contract Type Risk, into Item 24a, Contract Type Risk (based on contractor incurred costs under a UCA), Item 24b, Contract Type Risk (based on Government projected costs), and Item 24c, Totals.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601, *et seq.* However, an initial regulatory flexibility analysis has been prepared and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to provide a more transparent means of documenting the impact of costs incurred during the undefinitized period of an undefinitized contract action (UCA) on allowable profit, and to recognize when contractors demonstrate efficient management and internal cost control systems through the submittal of a timely, auditable proposal in furtherance of definitization of a UCA. In some cases, DoD contracting personnel have not documented their consideration of the reduced risk to the contractor of costs incurred during the undefinitized period of a UCA.

The objective of this proposed rule is to gain visibility into the contracting officer's rationale for the contract type risk values entered on the DD Form 1547, Record of Weighted Guidelines Application. Therefore, the proposed rule requires contracting officers to

enter separate contract type risk values on the DD Form 1547, one value based on incurred costs under an UCA and the other value based on Government estimated costs to complete.

This rule only changes processes that are internal to the Government by providing a more transparent means of documenting the impact of costs incurred during the undefinitized period of a UCA when calculating negotiation profit objectives. This rule does not revise the current regulatory requirements at DFARS 215.404–71–3(d)(2), which direct contracting officers to assess the extent to which costs have been incurred prior to definitization of the UCA. However, to recognize when contractors demonstrate efficient management and cost control through the submittal of a timely, auditable proposal in furtherance of definitization of a UCA, and the proposal demonstrates effective cost control from the time of award to the present, the contracting officer may add 1 percentage point to the value determined for management/cost control up to the maximum of 7 percent. Since this rule merely provides a more transparent means of documenting the impact of such incurred costs and contractors' efficient management and cost control, there is no impact to small entities who are awarded UCAs.

The rule does not impact reporting, recordkeeping, or other compliance requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternative approaches to the rule that would meet the requirements.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2015–D024), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 215, 217, and 243

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 215, 217, and 243 are proposed to be amended as follows:

■ 1. The authority citation for parts 215, 217, and 243 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 215—CONTRACTING BY NEGOTIATION

■ 2. Amend section 215.404–71–2 by adding paragraph (e)(2)(iii) to read as follows:

215.404–71–2 Performance risk.

* * * * *

(e) * * *

(2) * * *

(iii) If the contractor demonstrates efficient management and cost control through the submittal of a timely, auditable proposal in furtherance of definitization of an undefinitized contract action, and the proposal demonstrates effective cost control from the time of award to the present, the contracting officer may add 1 percentage point to the value determined for management/cost control up to the maximum of 7 percent.

* * * * *

■ 3. Amend section 215.404–71–3 by—

■ a. Revising paragraph (b) introductory text and paragraphs (b)(1) through (3); and

■ b. Revising paragraph (d)(2).

The revisions and addition read as follows:

215.404–71–3 Contract type risk and working capital adjustment.

* * * * *

(b) *Determination.* The following extract from the DD 1547 is annotated to explain the process.

Item	Contractor risk factors	Assigned value	Base	Profit objective
24a	Contract Type Risk (based on incurred costs at the time of qualifying proposal submission).	(1)	(2)	(3)
24b	Contract Type Risk (based on Government estimated cost to complete)	(1)	(2)	(3)
24c	Totals		(3)	(3)

Item	Contractor risk factors	Costs financed	Length factor	Interest rate	Profit objective
25	Working Capital (4)	(5)	(6)	(7)	(8)

(1) Select a value from the list of contract types in paragraph (c) of this subsection using the evaluation criteria in paragraph (d) of this subsection. See paragraph (d)(2) of this section.

(2) Insert the amount of costs incurred as of the date the contractor submits a qualifying proposal, such as under an undefinitized contract action, (excluding facilities capital cost of money) into Block 24a, and the amount of Government estimated cost to complete (excluding facilities capital cost of money) into Block 24b.

(3) Multiply (1) by (2) for Blocks 24a and 24b. Add Blocks 24a and 24b and insert the total in Block 24c.

* * * * *

(d) * * *

(2) *Mandatory.* (i) The contracting officer shall assess the extent to which costs have been incurred prior to definitization of the contract action (also see 217.7404–6(a) and 243.204–70–6). When costs have been incurred prior to definitization, generally regard the contract type risk to be in the low end of the designated range. If a substantial portion of the costs have been incurred prior to definitization, the contracting officer may assign a value as low as 0 percent, regardless of contract type.

(ii) Contracting officers shall document the reason for assigning a specific contract type risk value, to include the extent to which any reduced

cost risk during the undefinitized period of performance was considered, in determining the negotiation objective. This justification shall be documented in the price negotiation memorandum.

* * * * *

PART 217—SPECIAL CONTRACTING METHODS

217.7404–6 [Amended]

■ 4. Amend section 217.7404–6 by—

■ a. In paragraph (b), removing ''The contractor's reduced cost risk for costs incurred'' and adding ''Any reduced cost risk to the contractor for costs expected to be incurred'' in its place; and

■ b. In paragraph (c), removing ''contract file'' and adding ''price negotiation memorandum'' in its place.

PART 243—CONTRACT MODIFICATIONS

243.204–70–6 [Amended]

■ 5. Amend section 243.204–70–6 by—

■ a. In paragraph (b), removing ''The contractor's reduced cost risk for costs incurred'' and adding ''Any reduced cost risk to the contractor for costs expected to be incurred'' in its place; and

■ b. In paragraph (c), removing ''contract action'' and adding ''unpriced change order'' in its place and removing ''contract file'' and adding ''price negotiation memorandum'' in its place.

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FEDERAL REGISTER

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No. 204 October 21, 2016

Part IV

The President

Proclamation 9526—Minority Enterprise Development Week, 2016

Federal Register
Vol. 81, No. 204
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Presidential Documents

Title 3—

The President

Proclamation 9526 of October 18, 2016

Minority Enterprise Development Week, 2016

By the President of the United States of America

A Proclamation

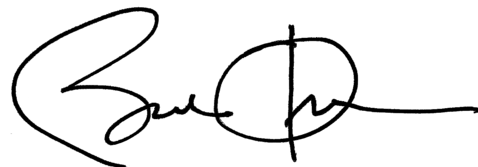
Since our earliest days, entrepreneurship has embodied the very promise of our Nation, reaffirming the notion that in a place of such limitless potential, Americans can forge a prosperous future and build a better life for themselves and their families. Women and men of every faith, background, and race have channeled their talents and ingenuity into harnessing the spirit of innovation that has long been the hallmark of our people. And as an essential part of our country's story, minority-owned enterprises have helped spur this progress. During Minority Enterprise Development Week, we reflect on the significant ways they have helped put our economy on the path to success, and we recommit to empowering every hardworking American to write our next great chapters.

Minority-owned firms employ millions of workers and generate more than $1 trillion in economic output, revitalizing our communities and driving our growth. That is why my Administration is helping entrepreneurs of all backgrounds and small businesses across our country get the resources they need to get off the ground. Through the Minority Business Development Agency, we have led efforts to promote growth and competitiveness. We are helping streamline the process of starting a company and investing in entrepreneurship training and skill building for more Americans. Through www.Business.USA.gov, we are helping more enterprises get information about Federal contracts, and we are connecting them to critical resources to help develop and grow a business. In today's global economy, minority-owned businesses are essential to our country's success. They are twice as likely as other businesses to export their goods and services, and I am working to encourage entrepreneurship and innovation through a smart trade agenda that will allow us to sell more goods, boost economic competitiveness, and help more of our entrepreneurs thrive.

Our Nation has always drawn strength from the diversity of our people, and no matter who you are, what you look like, or where you come from, America is a place where everyone deserves a chance to get ahead. This week, we must continue working to support minority enterprises and all entrepreneurs—and ensure that by expanding access to the networks, capital, and opportunities required to build a business, everybody can have a fair shot at reaching their piece of the American dream.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim October 23 through October 29, 2016, as Minority Enterprise Development Week. I call upon all Americans to celebrate this week with appropriate programs, ceremonies, and activities to recognize the many contributions of our Nation's minority enterprises.

IN WITNESS WHEREOF, I have hereunto set my hand this eighteenth day of October, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and forty-first.



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